To: OGIS@nara.gov
Subject: OGIS 22-3350

Attached please find 'inter-alia' clarity in relation to discussions I have had with the Department of Justice and been affirmed that these records sought are releasable and in the states interest.

I am unable to 'proffer' negotiate further on the request besides OGIS mediation as the ethics presented from the Privacy Office do not match the ethics of the Office of Information Policy. Which might be a 'managerial failure' ..the internal bodies are not lockstep in ethical conduct..

Respectfully,

William Fernandes

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

EFOIA Request for communications and please produce productions in .pdf format via email.

Vaughn index requested for any exempted materials.

Please redact all materials appropriately to protect the identities as needed pursuant to the Privacy Act.

FOIA request

Information Sought:
For Criminal Justice Participation Assistance Fund (CJPAF): please produce the last 200 pages of documents including but not limited to applications, affidavits, written and or oral interrogatories, and crime reports or evidence supplements utilized to find basis for payments being made under the program to any applicants.

For the offices handling Victim Impact Statements :
Please produce the last 5 Victims Impact Statements, not subject to active litigation which have been vetted and or presented/processed and or distributed by your offices.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

William Fernandes

William Fernandes
MuckRock News
DEPT MR 106227
411A Highland Ave
Somerville, MA 02144-2516
requests@muckrock.com

Re: FOIA/PA #21-073

Dear Mr. Fernandes:

This is to acknowledge your email dated December 22, 2020 for information pertaining to the Criminal Justice Participation Assistance Fund (CJPAF). Our FOIA office received your Freedom of Information Act request on December 22, 2020.

In response to the COVID-19 public health emergency, the NSD FOIA staff is teleworking full time. Our FOIA operations have been diminished while we are teleworking and our FOIA intake and FOIA processing will be slower than normal.

Our policy is to process FOIA requests on a first-in, first-out basis. Consistent with this policy, every effort will be made to respond to your request as quickly as possible. The actual processing time will depend upon the complexity of the request, whether it involves sensitive or voluminous records, and whether consultations with other agencies or agency components are appropriate. Also, the National Security Division does not handle Delegation of Authority.

You may contact our Government Information Specialist, Arnetta Mallory, for any further assistance and to discuss any aspect of your request at:

U.S. Department of Justice
Records and FOIA Unit
3 Constitution Square
175 N Street N.E. 12th Floor
Washington, DC 20530
(202) 233-2639

Sincerely,

Arnetta Mallory
Government Information Specialist

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

On the basis of public records and internal procedures of your offices, as highlighted below from DOJ OPR: 'Henthorn Reviews: As a result of a ruling by the U.S. Court of Appeals for the Ninth Circuit in United States v. Henthorn, since April 18, 1991, when requested by a defendant, DEA is required to search its personnel files for impeachment material. The DEA Office of Chief Counsel is responsible for responding to requests for impeachment material from the U.S. Attorneys' Offices. In order to comply with these requests, DEA/OPR searches its database to identify DEA personnel who have been the subjects of DEA/OPR investigations or reviews. During fiscal year 1995, DEA/OPR responded to requests for 815 Henthorn reviews. As a result of those reviews, DEA/OPR was required to produce 144 files for review by the Office of Chief Counsel, and 12 DEA Special Agents were removed from witness lists by federal prosecutors.'

I was seeking the release of any and all 'Henthorn Reviews' produced to the USAO California Central district for the years 2012-2021.

EFOIA Request for communications and please produce productions in .pdf format via email.

Vaughn index requested for any exempted materials.

Please redact all materials appropriately to protect the identities as needed pursuant to the Privacy Act.

Fee Waiver Request: Media

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

William Fernandes

U.S. Department of Justice

Executive Office for United States Attorneys

Freedom of Information and Privacy Staff

Suite 5.400, 3CON Building
175N Street, NE
Washington, DC 20530

(202) 252-6020

September 28, 2021

VIA E-mail

William Fernandes
MuckRock News
DEPT MR 108614 411A Highland Ave.
Somerville, MA 02144-2516
108614-16660110@requests.muckrock.cpm

Re: Request Number EOUSA-2021-002255
Date of Receipt: May 25, 2021
Subject of Request: Henthorn Reports

Dear William Fernandes:

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Office.

To provide you with the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes. The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act. 28 CFR § 16.81. We have also processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you.

After carefully reviewing the records responsive to your request, I have determined that all potentially responsive records are protected from disclosure by court seal or protective orders issued by the US District Court for the Central District of California. For this reason, this Office lacks authority to consider the releasability of this information under the FOIA.

This is the final action on this above-numbered request. If you are not satisfied with my response to your request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530 or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

You may contact our FOIA Public Liaison at the Executive Office for United States Attorneys (EOUSA) for any further assistance and to discuss any aspect of your request. The contact information for EOUSA is 175 N Street, NE, Suite 5.400, Washington, DC 20530; telephone at 202-252-6020. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

Kevin Krebs
Assistant Director

Enclosure(s)

EXPLANATION OF EXEMPTIONS

FOIA: TITLE 5, UNITED STATES CODE, SECTION 552

(b) (1) (A) specifically authorized under criteria established by and Executive order to be kept secret in the in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

PRIVACY ACT: TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information complied in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to Executive Order 12356 in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material complied for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability eligibility, or qualification for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his identity would be held in confidence.

U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

April 11, 2022

William Fernandes
108614-16660110@requests.muckrock.com

Re: Appeal No. A-2022-00514
Request No. EOUSA-2021-002255
DRC:HMV

VIA: Email

Dear William Fernandes:

You appealed from the action of the Executive Office for United States Attorneys (EOUSA) on your Freedom of Information Act request for access to records concerning Henthorn Reviews produced to the United States Attorneys Office for the Central District of California from 2012-2021. I note that your appeal concerns EOUSAs denial of your request.

After carefully considering your appeal, I am affirming, on modified grounds, EOUSAs action on your request.* A proper FOIA request for records must reasonably describe the records sought. See 5 U.S.C. § 552(a)(3)(A); see also 28 C.F.R. § 16.3(b)(2021). I have determined that your request for records related to Henthorn Reviews from 2012-2021 would require EOUSA to conduct an unreasonably burdensome search. Your request is not reasonably described because you did not characterize the records sought in such a way that they could be located without individually searching every criminal case for the nine-year period requested. Courts have consistently held that the FOIA does not require agencies to conduct unreasonably burdensome searches for records. See, e.g., Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995).

Please be advised that this Offices decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of EOUSA in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

Sincerely,

X /s/ Daniel Castellano

Daniel Castellano,
Associate Chief, for
Matthew Hurd
Chief, Administrative Appeals Staff

* This response does not reach the merits of EOUSAs citation of court seals or protective orders to deny your request.

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

I was seeking any and all documents related to 'Bluestone' . Years to search 2019-2022
'Bluestone is an enterprise-level initiative to transform DEA's IT infrastructure and operating environment by establishing enterprise capabilities utilizing DevSecOps practices and incorporating a certified, agile-at-scale methodology.'

A related press release in relation to the contract award can be found online here:
https://govcio.com/news/govcio-wins-875m-task-order-for-dea-it-infrastructure-modernization/

Vaughn Index is requested for any documents cited for claimed exemptions.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

William Fernandes

U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

William Fernandes

Re: Appeal No. A-2022-01709
Request No. 22-00873-F
CDT:JKD

127057-06635952@requests.muckrock.com

VIA: Online Portal - 8/4/2022

Dear William Fernandes:

You appealed from the action of the Drug Enforcement Administration (DEA) on your Freedom of Information Act (FOIA) request for access to records concerning "Bluestone" from 2019 to 2022. I note that your appeal concerns DEA's denial of your request.

After carefully considering your appeal, and as a result of discussions between DEA personnel and this Office, I am remanding your request to DEA for a search for responsive records. If DEA locates releasable records, it will send them to you directly, subject to any applicable fees. You may appeal any future adverse determination made by DEA. If you would like to inquire about the status of this remanded request or to receive an estimated date of completion, please contact DEA directly at 571-776-2300.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

X _____
Christina D. Troiani
Associate Chief, for Matthew W. Hurd,
Chief, Administrative Appeals Staff

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

I was seeking copies any and all DEA OPR investigation reports referred to the Board of Professional Conduct for disciplinary recommendations for the years 2015 -2019. This information and procedures and data is highly publicized as cited in the related hyperlinked news. Produce the reports in a properly redacted format on par with other agencies who regularly make these types of disclosures.

US Government sponsors bill to cease false narratives / Fake News
https://news.un.org/en/story/2022/04/1115412

DEA RFP Case Management Systems and Failures
Notice ID IST-1234

"Current technical capabilities for information tracking, sharing, and analysis are limited by the design of the current toolset utilized as the primary work enablers for ISTA. These applications were not designed to provide high levels of confidentiality, integrity, or accessibility for those with a need to know; nor where they intended to be the backbone of significant analytical and business processing activities in a high operational tempo (OPTEMPO) office. As workloads increase, the technology becomes a limiting factor for maturing ISTA in a way that would ensure increased capabilities in the mission to detect, deter, and mitigate insider threats.
https://etc.g2xchange.com/statics/doj-rfi-dea-case-management-system/

Review of the Drug
Enforcement
Administration's
Disciplinary System
Report Number
I-2004-002
https://oig.justice.gov/reports/DEA/e0402/final.pdf

DEA agents kept jobs despite serious misconduct
Brad Heath, and Meghan HoyerUSA TODAY

https://www.usatoday.com/story/news/2015/09/27/few-dea-agents-fired-misconduct/72805622/

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

William Fernandes

From: William Fernandes
04/12/2022

You are welcomed to narrow the request to 200 pages. You can spice up 50 pages per year or even send 200 pages from the 4 years that were selected to 'not have disciplinary action taken'.

Best,
William

U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

William Fernandes

Re: Appeal No. A-2022-01240
Request No. 22-00549-F
CDT:KHK

127052-94319956@requests.muckrock.com

VIA: Online Portal - 7/11/2022

Dear William Fernandes:

You appealed from the action of the Drug Enforcement Administration (DEA) on your Freedom of Information Act (FOIA) request for access to records concerning OPR investigation reports referred to the Board of Professional Conduct for disciplinary recommendations for the years 2015-2019. I note that your appeal concerns DEA's cateogrical withholding of responsive records pursuant to Exemption (7)(C).

After carefully considering your appeal, and as a result of discussions between DEA personnel and this Office, I am remanding your request to DEA for a search for responsive records. If DEA locates releasable records, it will send them to you directly, subject to any applicable fees. You may appeal any future adverse determination made by DEA. If you would like to inquire about the status of this remanded request or to receive an estimated date of completion, please contact DEA directly at (571) 776-2300.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

X
Christina D. Troiani

Associate Chief, for Matthew W. Hurd, Chief,
Administrative Appeals Staff

U.S. Department of Justice
Drug Enforcement Administration
FOIA and Privacy Act Unit
8701 Morrissette Drive
Springfield, Virginia 22152

December 15, 2021

Case Number: 21-00500-F

Subject: A copy of the DEA OPR investigation related to the death of Special Agent Jeffrey Bockelkamp

William Fernandes
MuckRock News
DEPT MR 112672
411A Highland Avenue
Somerville, Massachusetts 02144-2516
Sent via e-mail: 112672-42015373@requests.muckrock.com

Dear William Fernandes:

This letter responds to your Freedom of Information Act/Privacy Act (FOIA/PA) request dated May 19, 2021, received by the Drug Enforcement Administration (DEA), FOIA/PA Unit, seeking access to DEA records. Your request has been opened and assigned the above case number. Please include this case number when communicating with this office.

The records you seek require searches in another office or offices, and so your request falls within "unusual circumstances." *See* 5 U.S.C. § 552(a)(6)(B)(i)-(iii). Because of these unusual circumstances, we are extending the time limit to respond to your request beyond the ten additional days provided by the statute. We have not yet completed a search to determine whether there are records within the scope of your request. The time needed to process your request will necessarily depend on the complexity of our records search and on the volume and complexity of any records located. For your information, this office assigns incoming requests to one of three tracks: simple, complex, or expedited. Each request is then handled on a first-in, first-out basis in relation to other requests in the same track. Simple requests usually receive a response in approximately one month, whereas complex requests necessarily take longer. At this time, your request has been assigned to the complex track. You may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options. Please be advised that due to necessary operational changes as a result of the national emergency concerning the novel coronavirus disease (COVID-19) outbreak, there may be some delay in the processing of your request.

We have determined that you are a non-media, non-commercial requester pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(III). As a non-media, non-commercial requester, you are entitled to two free hours of search time and up to one hundred pages of duplication without charge. *See* 28 C.F.R. § 16.10(d)(4).

We regret the necessity of this delay, but please be assured that your request will be processed as soon as possible. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact our FOIA Requester Service Center at (571) 776-2300, or e-mail your correspondence to DEA.FOIA@dea.gov.

In addition, you may wish to visit our website at www.dea.gov to determine if the information you are requesting is already available to the public. You may contact our FOIA Public Liaison at (571) 776-2300 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at 1-877-684-6448; or facsimile at (202) 741-5769.

Sincerely,

Yvette D. Davis, Chief
Intake Sub-Unit
Freedom of Information and Privacy Act Unit

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

I was seeking a copy of the related DEA OPR investigation related to the death of this agent.

Related online blog:
http://jeffbockelkamp.blogspot.com/

Related Obituary:
'Jeffrey Bockelkamp, 30, of Manhattan Beach, Calif., formerly of Clarks Summit, died Friday. Born March 20, 1976, in Scranton, he was the son of Frank and Terry Burkett Bockelkamp, Clarks Summit. He was a special agent for the U.S. Drug Enforcement Administration, assigned to the Los Angeles...'
https://www.legacy.com/obituaries/name/jeffrey-bockelkamp-obituary?pid=85911269

EFOIA request
VAUGH index requested for any materials cited in exemption

Respectfully,

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

William Fernandes

U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

William Fernandes

Re: Appeal No. A-2022-01709
Request No. 22-00873-F
CDT:JKD

127057-06635952@requests.muckrock.com

VIA: Online Portal - 8/4/2022

Dear William Fernandes:

You appealed from the action of the Drug Enforcement Administration (DEA) on your Freedom of Information Act (FOIA) request for access to records concerning "Bluestone" from 2019 to 2022. I note that your appeal concerns DEA's denial of your request.

After carefully considering your appeal, and as a result of discussions between DEA personnel and this Office, I am remanding your request to DEA for a search for responsive records. If DEA locates releasable records, it will send them to you directly, subject to any applicable fees. You may appeal any future adverse determination made by DEA. If you would like to inquire about the status of this remanded request or to receive an estimated date of completion, please contact DEA directly at 571-776-2300.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

X _____
Christina D. Troiani
Associate Chief, for Matthew W. Hurd,
Chief, Administrative Appeals Staff

To Whom It May Concern:

Pursuant to the Freedom of Information Act, I hereby request the following records:

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US Government sponsors bill to cease false narratives / Fake News
https://news.un.org/en/story/2022/04/1115412

DEA RFP Case Management Systems and Failures
Notice ID IST-1234

"Current technical capabilities for information tracking, sharing, and analysis are limited by the design of the current toolset utilized as the primary work enablers for ISTA. These applications were not designed to provide high levels of confidentiality, integrity, or accessibility for those with a need to know; nor where they intended to be the backbone of significant analytical and business processing activities in a high operational tempo (OPTEMPO) office. As workloads increase, the technology becomes a limiting factor for maturing ISTA in a way that would ensure increased capabilities in the mission to detect, deter, and mitigate insider threats.
https://etc.g2xchange.com/statics/doj-rfi-dea-case-management-system/

Review of the Drug
Enforcement
Administration's
Disciplinary System
Report Number
I-2004-002
https://oig.justice.gov/reports/DEA/e0402/final.pdf

DEA agents kept jobs despite serious misconduct
Brad Heath, and Meghan HoyerUSA TODAY

https://www.usatoday.com/story/news/2015/09/27/few-dea-agents-fired-misconduct/72805622/

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Sincerely,

William Fernandes

From: William Fernandes
04/12/2022

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Best,
William

U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

William Fernandes

Re: Appeal No. A-2022-01240
Request No. 22-00549-F
CDT:KHK

127052-94319956@requests.muckrock.com

VIA: Online Portal - 7/11/2022

Dear William Fernandes:

You appealed from the action of the Drug Enforcement Administration (DEA) on your Freedom of Information Act (FOIA) request for access to records concerning OPR investigation reports referred to the Board of Professional Conduct for disciplinary recommendations for the years 2015-2019. I note that your appeal concerns DEA's cateogrical withholding of responsive records pursuant to Exemption (7)(C).

After carefully considering your appeal, and as a result of discussions between DEA personnel and this Office, I am remanding your request to DEA for a search for responsive records. If DEA locates releasable records, it will send them to you directly, subject to any applicable fees. You may appeal any future adverse determination made by DEA. If you would like to inquire about the status of this remanded request or to receive an estimated date of completion, please contact DEA directly at (571) 776-2300.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

X
Christina D. Troiani

Associate Chief, for Matthew W. Hurd, Chief,
Administrative Appeals Staff

Harlow v. Fitzgerald
457 U.S. 800 (1982)

Syllabus | Case

U.S. Supreme Court

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

Harlow v. Fitzgerald

No. 80-945

Argued November 30, 1981

Decided June 24, 1982

457 U.S. 800

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

In respondent's civil damages action in Federal District Court based on his alleged unlawful discharge from employment in the Department of the Air Force, petitioners, White House aides to former President Nixon, were codefendants with him and were claimed to have participated in the same alleged conspiracy to violate respondent's constitutional and statutory rights as was involved in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731. After extensive pretrial discovery, the District Court denied the motions of petitioners and the former President for summary judgment, holding, *inter alia,* that petitioners were not entitled to absolute immunity from suit. Independently of the

former President, petitioners appealed the denial of their immunity defense, but the Court of Appeals dismissed the appeal.

Held:

1. Government officials whose special functions or constitutional status requires complete protection from suits for damages -- including certain officials of the Executive Branch, such as prosecutors and similar officials, *see Butz v. Economou,* 438 U. S. 478, and the President, *Nixon v. Fitzgerald, ante* p. 457 U. S. 731 -- are entitled to the defense of absolute immunity. However, executive officials in general are usually entitled to only qualified or good faith immunity. The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority. *Scheuer v. Rhodes,* 416 U. S. 232. Federal officials seeking absolute immunity from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. Pp. 457 U. S. 806-808.

2. Public policy does not require a blanket recognition of absolute immunity for Presidential aides. *Cf. Butz, supra*. Pp. 457 U. S. 808-813.

(a) The rationale of *Gravel v. United States,* 408 U. S. 606 -- which held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself -- does not mandate "derivative" absolute

immunity for the President's chief aides. Under the "functional" approach to immunity law, immunity protection extends no further than its justification warrants. Pp. 457 U. S. 809-811.

(b) While absolute immunity might be justified for aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. To establish entitlement to absolute immunity, a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then

must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. Under the record in this case, neither petitioner has made the requisite showing for absolute immunity. However, the possibility that petitioners, on remand, can satisfy the proper standards is not foreclosed. Pp. 457 U. S. 811-813.

3. Petitioners are entitled to application of the qualified immunity standard that permits the defeat of insubstantial claims without resort to trial. Pp. 457 U. S. 813-820.

(a) The previously recognized "subjective" aspect of qualified or "good faith" immunity -- whereby such immunity is not available if the official asserting the defense "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," *Wood v. Strickland,* 420 U. S. 308, 420 U. S. 322 -- frequently has proved incompatible with the principle that insubstantial claims should not proceed to trial. Henceforth, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. Pp. 457 U. S. 815-819.

(b) The case is remanded for the District Court's reconsideration of the question whether respondent's pretrial showings were insufficient to withstand petitioners' motion for summary judgment. Pp. 457 U. S. 819-820.

Vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 457 U. S. 820. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed a separate concurring statement, *post,* p. 457 U. S. 821. REHNQUIST, J., filed a concurring opinion, *post,* p. 457 U. S. 822. BURGER, C.J., filed a dissenting opinion, *post,* p. 457 U. S. 822.

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JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their

official acts.

I

In this suit for civil damages, petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations. [Footnote 1] At the conclusion of discovery, the

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supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity, respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans. [Footnote 2] The other evidence most supportive of Fitzgerald's claims consists of a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald. [Footnote 3]

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his involvement

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in any wrongful activity. [Footnote 4] He avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith. [Footnote 5]

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May, 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman, [Footnote 6] Butterfield circulated a White House memorandum in that

month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view. [Footnote 7] Fitzgerald characterizes this memorandum as evidence

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that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald cites communications between Butterfield and Haldeman in December, 1969, and January, 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counseled against offering Fitzgerald another job in the administration at that time. [Footnote 8]

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December, 1969 -- more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald. [Footnote 9]

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion, the District Court upheld the legal sufficiency of Fitzgerald's *Bivens (Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971)) claim under the First Amendment and his "inferred" statutory causes of action under 5 U.S.C. § 7211 (1976 ed., Supp. IV) and 18 U.S.C. § 1505. [Footnote 10] The court

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found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. App. to Pet. for Cert. 1a-3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. *Id.* at 11a-12a. Never having determined the immunity available to the senior

aides and advisers of the President of the United States, we granted certiorari. 452 U.S. 959 (1981). [Footnote 11]

II

As we reiterated today in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731, our decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.

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Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, *see, e.g., Eastland v. United States Servicemen's Fund,* 421 U. S. 491 (1975), and of judges, in their judicial functions, *see, e.g., Stump v. Sparkman,* 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, *see Butz v. Economou,* 438 U. S. 478, 438 U. S. 508-512 (1978), executive officers engaged in adjudicative functions, *id.* at 438 U. S. 513-517, and the President of the United States, *see Nixon v. Fitzgerald, ante* p. 457 U. S. 731.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer v. Rhodes,* 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good faith immunity. *Id.* at 416 U. S. 247-248. In *Butz v. Economou, supra,* we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer,* we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U.S. at 438 U. S. 504-505, but also

"the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

Id. at 438 U. S. 506. Without discounting the adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations -- consequences found sufficient in *Spalding v. Vilas,* 161 U. S. 483 (1896), and *Barr v. Matteo,* 360 U. S. 564

(1959), to warrant extension to such officials of absolute immunity from suits at common law -- we emphasized our expectation that insubstantial suits need not proceed to trial:

"Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

438 U.S. at 438 U. S. 507-608 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that

"federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."

Id. at 438 U. S. 506. This we reaffirmed today in *Nixon v. Fitzgerald, ante* at 457 U. S. 747.

III

A

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim, we do not write on an empty page. In *Butz v. Economou, supra,* the Secretary of Agriculture -- a Cabinet official directly accountable to the President -- asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing, we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the

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President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U.S. at 438 U. S. 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be

"untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] § 1983 and suits brought directly under the Constitution against federal officials."

Id. at 438 U. S. 504.

Having decided in *Butz* that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

B

In disputing the controlling authority of *Butz,* petitioners rely on the principles developed in *Gravel v. United States,* 408 U. S. 606 (1972). [Footnote 12] In *Gravel,* we endorsed the view that

"it is literally impossible . . . for Members of Congress to perform

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their legislative tasks without the help of aides and assistants,"

and that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. . . ." *Id.* at 408 U. S. 616-617. Having done so, we held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself. *Id.* at 408 U. S. 621-622.

Petitioners contend that the rationale of *Gravel* mandates a similar "derivative" immunity for the chief aides of the President of the United States. Emphasizing that the President must delegate a large measure of authority to execute the duties of his office, they argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself.

Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet -- Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself [Footnote 13] -- be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz.* [Footnote 14] Moreover, in general, our cases have followed a "functional" approach to immunity law. We have recognized

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that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel,* for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U.S. at 408 U. S. 625 . *See Hutchinson v. Proxmire,* 443 U. S. 111, 443 U. S. 125-133 (1979). Our cases involving judges [Footnote 15] and prosecutors [Footnote 16] have followed a similar line. The undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the "functional" approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself. [Footnote 17]

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form

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of argument accords with the analytical approach of our cases. For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. [Footnote 18] But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz,* which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station. [Footnote 19]

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U.S. at 438 U. S. 506. We have not, of course, had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. In order to establish entitlement to absolute immunity

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a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. [Footnote 20] He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. [Footnote 21]

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that "public policy requires [for any of the functions of his office] an exemption of [absolute] scope." *Butz,* 438 U.S. at 438 U. S. 506. Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could we now conclude that the acts charged in this lawsuit -- if taken at all -- would lie within the protected area. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.

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In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz v. Economou, supra,* at 438 U. S. 506; *see Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. at 403 U. S. 410 ("For people in Bivens' shoes, it is damages or nothing"). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent, as well as the guilty -- at a cost not only to the defendant officials, but to society as a whole. [Footnote 22] These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949), *cert. denied,* 339 U.S. 949 (1950).

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz, supra,* at 438 U. S. 507-508, as in *Scheuer,* 416 U.S. at 416 U. S. 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U.S. at 438 U. S. 507-508; *see Hanrahan v. Hampton,* 446 U. S. 754, 446 U. S. 765 (1980) (POWELL, J., concurring in part and dissenting in part). [Footnote 23] Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial -- a factor presupposed in the balance of competing interests struck by

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our prior cases -- requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo,* 446 U. S. 635 (1980). [Footnote 24] Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland,* 420 U. S. 308, 420 U. S. 322 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically, the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official

"*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. . . ."

Ibid. (emphasis added). [Footnote 25]

The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz*

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that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. [Footnote 26] And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury. [Footnote 27]

In the context of *Butz'* attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective"

inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background

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in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. [Footnote 28] Inquiries of this kind can be peculiarly disruptive of effective government. [Footnote 29]

Consistently with the balance at which we aimed in *Butz,* we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of

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trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Procunier v. Navarette,* 434 U. S. 555, 434 U. S. 565 (1978); *Wood v. Strickland,* 420 U.S. at 322. [Footnote 30]

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, [Footnote 31] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred. [Footnote 32] If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily

should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. [Footnote 33] But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray,* 386 U. S. 547, 386 U. S. 554 (1967). [Footnote 34]

C

In this case, petitioners have asked us to hold that the respondent's pretrial showings were insufficient to survive their motion for summary judgment. [Footnote 35] We think it appropriate,

however, to remand the case to the District Court for its reconsideration of this issue in light of this opinion. [Footnote 36] The trial court is more familiar with the record so far developed, and also is better situated to make any such further findings as may be necessary.

V

The judgment of the Court of Appeals is vacated, and the case is remanded for further action consistent with this opinion.

So ordered.

[Footnote 1]

Harlow held this position from the beginning of the Nixon administration on January 20, 1969, through November 4, 1969. On the latter date, he was designated as Counselor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counselor for the period from July 1, 1973, through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

[Footnote 2]

The record reveals that Secretary Seamans called Harlow in May, 1969, to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony,

"[w]e [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress."

App. 153a, 164a-165a (deposition of Robert Seamans). Through an aide, Harlow responded that "this was a very sensitive item on the Hill, and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.* at 152a. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December, 1969. *See id.* at 186a.

[Footnote 3]

See id. at 284a (transcript of a recorded conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. *See id.* at 218a-221a (transcript of recorded conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation, the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, *see id.* at 218a, but the parties continue to dispute whether Mr. Nixon -- at the most relevant moments in the discussion -- was confusing Fitzgerald's case with that of

another dismissed employee. The President explicitly stated at one point that he previously had been confused. *See id.* at 220a.

[Footnote 4]

See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment in Civ. No. 74-178 (DC), p. 7 (Feb. 12, 1980).

[Footnote 5]

In support of his version of events, Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force, and that he never received any White House instruction regarding the Fitzgerald case. App. 159a-160a. Harlow also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." *Id.* at 284a. The President did not respond to Ziegler's comment.

[Footnote 6]

The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March, 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

[Footnote 7]

Id. at 274a. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum, Butterfield reported that he had received the information

"by word of several mouths, but allegedly from a senior AFL-CIO official originally. . . . Evidently, Fitzgerald attended a recent meeting of the National Democratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic."

Ibid.

[Footnote 8]

Id. at 99a-100a, 180a-181a. This memorandum, quoted in *Nixon v. Fitzgerald, ante* at 457 U. S. 735-736, was not sent to the Defense Department.

[Footnote 9]

See Memorandum in Support of Summary Judgment, *supra,* at 26. The history of Fitzgerad's litigation is recounted in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's second amended complaint of July 5 1978.

[Footnote 10]

The first of these statutes, 5 U.S.C. § 7211 (1976 ed., Supp. IV), provides generally that

"[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

The second, 18 U.S.C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. *See* n 36, *infra*.

[Footnote 11]

As in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U.S.C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

[Footnote 12]

Petitioners also claim support from other cases that have followed *Gravel* in holding that congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. *See Eastland v. United States Servicemen's Fund,* 421 U. S. 491 (1975); *Doe v. McMillan,* 412 U. S. 306 (1973).

[Footnote 13]

See U.S.Const., Art. II, § 2 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .").

[Footnote 14]

THE CHIEF JUSTICE, *post* at 457 U. S. 828, argues that senior Presidential aides work "more intimately with the President on a daily basis than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. In our view, it is impossible to generalize about the role of "offices" in an individual President's administration without reference to the functions that particular officeholders are assigned by the President. *Butz v. Economou* cannot be distinguished on this basis.

[Footnote 15]

See, e.g., Supreme Court of Virginia v. Consumers Union of United States, 446 U. S. 719, 446 U. S. 731-737 (1980); *Stump v. Sparkman,* 435 U. S. 349, 435 U. S. 362 (1978).

[Footnote 16]

In *Imbler v. Pachtman,* 424 U. S. 409, 424 U. S. 430-431 (1976), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time, the Courts of Appeals generally have ruled that prosecutors do not enjoy absolute immunity for acts taken in those capacities. *See, e.g., Mancini v. Lester,* 630 F.2d 990, 992 (CA3 1980); *Forsyth v. Kleindienst,* 599 F.2d 1203, 1213-1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending

absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. *See Butz v. Economou,* 438 U.S. at 438 U. S. 615-517.

[Footnote 17]

Our decision today in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials -- including Presidential aides -- generally do not invoke separation of powers considerations to the same extent as suits against the President himself.

[Footnote 18]

Cf. United States v. Nixon, 418 U. S. 683, 418 U. S. 710-711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality"); *Katz v. United States,* 389 U. S. 347, 389 U. S. 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States *or his chief legal officer, the Attorney General,* has considered the requirements of national security and authorized electronic surveillance as reasonable") (emphasis added).

[Footnote 19]

Gravel v. United States, 408 U. S. 606 (1972), points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *id.* at 408 U. S. 616-617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz, supra,* at 438 U. S. 507. *Cf. Gravel, supra,* at 408 U. S. 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel,* a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

[Footnote 20]

Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. *See Nixon v. Fitzgerald, ante* at 457 U. S. 747-748.

[Footnote 21]

The need for such an inquiry is implicit in *Butz v. Economou, supra,* at 438 U. S. 508-517; *see Imbler v. Pachtman, supra,* at 424 U. S. 430-431. Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. *See, e.g., Hutchinson v. Proxmire,* 443 U. S. 111 (1979); *Doe v. McMillan,* 412 U. S. 306 (1973); *Gravel v. United States, supra.*

[Footnote 22]

*See gene*rally Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 S.Ct.Rev. 281, 324-327.

[Footnote 23]

The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U. S. 391, 440 U. S. 405 (1979); *Tenney v. Brandhove,* 341 U. S. 367, 341 U. S. 377-378 (1951). As the Court observed in *Tenney:* "In times of political passion, dishonest or vindictive motives are readily attributed . . . , and as readily believed." *Id.* at 341 U. S. 378.

[Footnote 24]

Although *Gomez* presented the question in the context of an action under 42 U.S.C. § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. *See* 446 U.S. at 446 U. S. 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.* at 446 U. S. 642 (REHNQUIST, J., concurring).

[Footnote 25]

In *Wood,* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U.S. at 420 U. S. 322,

would be stripped of claimed immunity in an action under 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. *See, e.g., Procunier v. Navarette,* 434 U. S. 555, 434 U. S. 562-563, 566 (1978), quoted in *Baker v. McCollan,* 443 U. S. 137, 443 U. S. 139 (1979).

[Footnote 26]

Rule 56(c) states that summary judgment

"shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E.g., Poller v. Columbia Broadcasting System, Inc.,* 368 U. S. 464, 368 U. S. 473 (1962).

[Footnote 27]

E.g., Landrum v. Moats, 576 F.2d 1320, 1329 (CA8 1978); *Duchesne v. Sugarman,* 566 F.2d 817, 832-833 (CA2 1977); *cf. Hutchinson v. Proxmire,* 443 U.S. at 443 U. S. 120, n. 9 (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

[Footnote 28]

In suits against a President's closest aides, discovery of this kind frequently could implicate separation of powers concerns. As the Court recognized in *United States v. Nixon,* 418 U.S. at 418 U. S. 708:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions, and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

[Footnote 29]

As Judge Gesell observed in his concurring opinion in *Halperin v. Kissinger,* 196 U.S.App.D.C. 285, 307, 606 F.2d 1192, 1214 (1979), *aff'd in pertinent part by an equally divided Court,* 452 U. S. 713 (1981):

"We should not close our eyes to the fact that. with increasing frequency in this jurisdiction and throughout the country. plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials' and their colleagues' being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover [*sic*] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial]. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

[Footnote 30]

This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be

"untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

Butz v. Economou, 438 U.S. at 438 U. S. 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

[Footnote 31]

This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the

Constitution.

[Footnote 32]

As in *Procunier v. Navarette,* 434 U.S. at 434 U. S. 565, we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

[Footnote 33]

Cf. Procunier v. Navarette, supra, at 434 U. S. 565, quoting *Wood v. Strickland,* 420 U.S. at 420 U. S. 322 ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct *cannot reasonably be characterized as being in good faith'").*

[Footnote 34]

We emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

[Footnote 35]

In *Butz,* we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U.S. at 438 U. S. 507. *See* Schuck, *supra,* n 22, at 324-327. We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. 438 U.S. at 438 U. S. 508.

[Footnote 36]

Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U.S.C. § 7211 (1976 ed., Supp. IV) and 18 U.S.C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U. S. 353, 456 U. S. 377-378 (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth.*

v. National Sea Clammers Assn., 453 U. S. 1 (1981) (same); *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U. S. 630, 451 U. S. 638-639 (1981) (same). Nor is the *Bivens* question. *Cf. Bush v. Lucas,* 647 F.2d 573, 576 (CA5 1981) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

I agree with the substantive standard announced by the Court today, imposing liability when a public official defendant

"knew or should have known" of the constitutionally violative effect of his actions. *Ante* at 457 U. S. 815, 457 U. S. 819. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. *Ante* at 457 U. S. 819, n. 33. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Ante* at 457 U. S. 818. I write separately only to note that, given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public official defendant did "know" at the time of his actions. In this respect, the issue before us is very similar to that addressed in *Herbert v. Lando,* 441 U. S. 153 (1979), in which the Court observed that

"[t]o erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their goo[d f]aith. . . ."

Id. at 441 U. S. 170. Of course, as the Court has already noted, *ante* at 457 U. S. 818-819, summary judgment will be readily available to public official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not

have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred. I see no reason why discovery of defendants' "knowledge" should not be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds such as these. *Cf. Herbert v. Lando, supra,* at 441 U. S. 180, n. 4 (POWELL, J., concurring).

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concurring.

We join the Court's opinion but, having dissented in *Nixon*

v. Fitzgerald, ante p. 457 U. S. 731, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon v. Fitzgerald* was correctly decided.

JUSTICE REHNQUIST, concurring.

At such time as a majority of the Court is willing to reexamine our holding in *Butz v. Economou,* 438 U. S. 478 (1978), I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

CHIEF JUSTICE BURGER, dissenting.

The Court today decides in *Nixon v. Fitzgerald, ante* p. 457 U. S. 731, what has been taken for granted for 190 years, that it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts as Chief Executive. I agree fully that absolute immunity for official acts of the President is, like executive privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon,* 418 U. S. 683, 418 U. S. 708 (1974). [Footnote 2/1]

In this case, the Court decides that senior aides of the President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel v. United States,* 408 U. S. 606 (1972). The Court reads *Butz v.*

Economou, 438 U. S. 478 (1978), as resolving that question; I do not. Butz is clearly distinguishable. [Footnote 2/2]

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In *Gravel,* we held that it is implicit in the Constitution that aides of Members of Congress have absolute immunity for acts performed for Members in relation to their legislative function. We viewed the aides' immunity as deriving from the Speech or Debate Clause, which provides that "for any Speech or Debate *in either House,* [Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6, cl. 1 (emphasis added). Read literally, the Clause would, of course, limit absolute immunity only to the Member and only to speech and debate within the Chamber. But we have read much more into this plain language. The Clause says nothing about "legislative acts" outside the Chambers, but we concluded that the Constitution grants absolute immunity for legislative acts not only "in either House" but in committees and conferences and in reports on legislative activities.

Nor does the Clause mention immunity for congressional aides. Yet, going far beyond any words found in the Constitution itself, we held that a Member's aides who implement policies and decisions of the Member are entitled to the same absolute immunity as a Member. It is hardly an overstatement to say that we thus avoided a "literalistic approach," *Gravel, supra,* at 408 U. S. 617, and instead looked to the structure of the Constitution and the evolution of the function of the Legislative Branch. In short, we drew this immunity for legislative aides from a functional analysis of the legislative process in the context of the Constitution taken as a whole and in light of 20th-century realities. Neither Presidents nor Members of Congress can, as they once did, perform all their constitutional duties personally. [Footnote 2/3]

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We very properly recognized in *Gravel* that the central purpose of a Member's absolute immunity would be "diminished and frustrated" if the legislative aides were not also protected by the same broad immunity. Speaking for the Court in *Gravel,* JUSTICE WHITE agreed with the Court of Appeals that

"it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks *without the*

help of aides and assistants; that the day-to-day work of such aides *is so critical to the Members' performance* that they must be treated as the latter's *alter egos;* and that, if they are not so recognized, the central role of the Speech or Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . -- will inevitably be diminished and frustrated."

408 U.S. at 408 U. S. 616-617 (emphasis added). I joined in that analysis and continue to agree with it, for without absolute immunity for these "elbow aides," who are indeed "alter egos," a Member could not effectively discharge all of the assigned constitutional functions of a modern legislator.

The Court has made this reality a matter of our constitutional jurisprudence. How can we conceivably hold that a President of the United States, who represents a vastly larger constituency than does any Member of Congress, should not have "alter egos" with comparable immunity? To perform the constitutional duties assigned to the Executive would be "literally impossible, in view of the complexities of the modern [Executive] process, . . . without the help of

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aides and assistants." [Footnote 2/4] *Id.* at 408 U. S. 616. These words reflect the precise analysis of *Gravel,* and this analysis applies with at least as much force to a President. The primary layer of senior aides of a President -- like a Senator's "alter egos" -- are literally at a President's elbow, with offices a few feet or at most a few hundred feet from his own desk. The President, like a Member of Congress, may see those personal aides many times in one day. They are indeed the President's "arms" and "fingers" to aid in performing his constitutional duty to see "that the laws [are] faithfully executed." Like a Member of Congress, but on a vastly greater scale, the President cannot personally implement a fraction of his own policies and day-to-day decisions. [Footnote 2/5]

For some inexplicable reason, the Court declines to recognize the realities in the workings of the Office of a President, despite the Court's cogent recognition in *Gravel* concerning the realities of the workings of 20th-century Members of Congress. Absent equal protection for a President's aides, how will Presidents be free from the risks of "intimidation . . . by [Congress] and accountability before a possibly hostile

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judiciary?" *Gravel,* 408 U.S. at 408 U. S. 617. Under today's holding in this case, the functioning of the Presidency will inevitably be "diminished and frustrated." *Ibid.*

Precisely the same public policy considerations on which the Court now relies in *Nixon v. Fitzgerald,* and that we relied on only recently in *Gravel,* are fully applicable to senior Presidential aides. The Court's opinion in *Nixon v. Fitzgerald* correctly points out that, if a President were subject to suit, awareness of personal vulnerability to suit

"frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."

Ante at 457 U. S. 753. This same negative incentive will permeate the inner workings of the Office of the President if the Chief Executive's "alter egos" are not protected derivatively from the immunity of the President. In addition, exposure to civil liability for official acts will result in constant judicial questioning, through judicial proceedings and pretrial discovery, into the inner workings of the Presidential Office beyond that necessary to maintain the traditional checks and balances of our constitutional structure. [Footnote 2/6]

I challenge the Court and the dissenters in *Nixon v. Fitzgerald* who join in the instant holding to say that the effectiveness of Presidential aides will not "inevitably be diminished and frustrated," *Gravel, supra,* at 408 U. S. 617, if they must weigh every act and decision in relation to the risks of future

lawsuits. The *Gravel* Court took note of the burdens on congressional aides: the stress of long hours, heavy responsibilities, constant exposure to harassment of the political arena. Is the Court suggesting the stresses are less for Presidential aides? By construing the Constitution to give only qualified immunity to senior Presidential aides, we give those key "alter egos" only lawsuits, winnable lawsuits perhaps, but lawsuits nonetheless, with stress and effort that will disperse and drain their energies and their purses. [Footnote 2/7]

In this Court, we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the

myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service.

We judges -- collectively -- have held that the common law provides us with absolute immunity for ourselves with respect to judicial acts, however erroneous or ill-advised. *See, e.g., Stump v. Sparkman,* 435 U. S. 349 (1978). Are the lowest ranking of 27,000 or more judges, thousands of prosecutors, and thousands of congressional aides -- an aggregate

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of not less than 75,000 in all -- entitled to greater protection than two senior aides of a President?

Butz v. Economou, 438 U. S. 478 (1978), does not dictate that senior Presidential aides be given only qualified immunity. *Butz* held only that a Cabinet officer exercising discretion was not entitled to absolute immunity; we need not abandon that holding. A senior Presidential aide works more intimately with the President on a daily basis than does a Cabinet officer, directly implementing Presidential decisions literally from hour to hour.

In his dissent today in *Nixon v. Fitzgerald,* JUSTICE WHITE states that the "Court now applies the dissenting view in *Butz* to the Office of the President." *Ante* at 457 U. S. 764. However, this suggests that a President and his Cabinet officers, who serve only "during the pleasure of the President," are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his "elbow aides" from the role of Cabinet officers, who are department heads, rather than "alter egos." It would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers.

The Court's analysis in *Gravel* demonstrates that the question of derivative immunity does not and should not depend on a person's rank or position in the hierarchy, but on the *function* performed by the person and the relationship of that person to the superior. Cabinet officers clearly outrank United States Attorneys, yet qualified immunity is accorded the former and absolute immunity the latter; rank is important only to the extent that the rank determines the function to be performed. The function

of senior Presidential aides, as the "alter egos" of the President, is an integral, inseparable part of the function of the President. [Footnote 2/8] JUSTICE WHITE

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was clearly correct in *Gravel,* stating that Members of Congress could not

"perform their legislative tasks without the help of aides and assistants; [and] that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. . . ."

408 U.S. at 408 U. S. 616-617.

By ignoring *Gravel* and engaging in a wooden application of *Butz,* the Court significantly undermines the functioning of the Office of the President. Under the Court's opinion in *Nixon* today, it is clear that Presidential immunity derives from the Constitution as much as congressional immunity comes from that source. Can there rationally be one rule for congressional aides and another for Presidential aides simply because the initial absolute immunity of each derives from different aspects of the Constitution? I find it inexplicable why the Court makes no effort to demonstrate why the Chief Executive of the Nation should not be assured that senior staff aides will have the same protection as the aides of Members of the House and Senate.

[Footnote 2/1]

As I noted in *Nixon v. Fitzgerald,* Presidential immunity for official acts while in office has never been seriously questioned until very recently. *See ante* at 457 U. S. 758, n. 1 (BURGER, C.J., concurring).

[Footnote 2/2]

If indeed there is an irreconcilable conflict between *Gravel* and *Butz,* the Court has an obligation to try to harmonize its holdings -- or at least tender a reasonable explanation. The Court has done neither.

[Footnote 2/3]

A Senator's allotment for staff varies significantly, but can range from as few as 17 to over 70 persons, in addition to committee staff aides who perform important legislative functions for Members. S. DOC. No. 97-19, Pp. 27-106 (1981). House Members have

roughly 18 to 26 assistants at any one time, in addition to committee staff aides. H.R. Doc. No. 97-113, pp. 28-174 (1981).

[Footnote 2/4]

In the early years of the Republic, Members of Congress and Presidents performed their duties without staffs of aides and assistants. Washington and Jefferson spent much of their time on their plantations. Congress did not even appropriate funds for a Presidential clerk until 1857. Lincoln opened his own mail, Cleveland answered the phone at the White House, and Wilson regularly typed his own speeches. S. Wayne, The Legislative Presidency 30 (1978). Whatever may have been the situation beginning under Washington, Adams, and Jefferson, we know today that the Presidency functions with a staff that exercises a wide spectrum of authority and discretion and directly assists the President in carrying out constitutional duties.

[Footnote 2/5]

JUSTICE WHITE's dissent in *Nixon v. Fitzgerald* today expresses great concern that a President may "cause serious injury to any number of citizens even though he knows his conduct violates a statute. . . ." *Ante* at 457 U. S. 764. What the dissent wholly overlooks, however, is the plain fact that the absolute immunity does not protect a President for acts *outside* the constitutional function of a President.

[Footnote 2/6]

The same remedies for checks on Presidential abuse also will check abuses by the comparatively small group of senior aides who act as "alter egos" of the President. The aides serve at the pleasure of the President, and thus may be removed by the President. Congressional and public scrutiny maintain a constant and pervasive check on abuses, and such aides may be prosecuted criminally. *See Nixon, ante* at 457 U. S. 757. However, a criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability.

[Footnote 2/7]

The Executive Branch may, as a matter of grace, supply some legal assistance. The Department of Justice has a longstanding policy of representing federal officers in civil

suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. *See* Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (Comm. Print 1978). The Congress frequently pays the expenses of defending its Members even as to acts wholly outside the legislative function.

[Footnote 2/8]

This Court had no trouble reconciling *Gravel* with *Kilbourn v. Thompson,* 103 U. S. 168 (1881). In *Kilbourn,* the Sergeant-at-Arms of the House of Representatives was held not to share the absolute immunity enjoyed by the Members of Congress who ordered that officer to act.

U.S. Department of Justice
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Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

November 30, 2021

Re: Appeal No. A-2021-01475
Request No. 1493405-000
DRC:JNW

VIA: Online Portal

Dear William Fernandes:

You appealed from the action of the Federal Bureau of Investigation on your Freedom of Information Act request for access to records concerning employee misconduct complaints generated to the Insider Threat Office from October 2018 to October 2019 that resulted in Office of Professional Responsibility investigations. I note that your appeal concerns the FBI's full denial of your request.

After carefully considering your appeal, and as a result of discussions between FBI personnel and this Office, I am remanding your request to the FBI for a search for responsive records. If the FBI locates releasable records, it will send them to you directly, subject to any applicable fees. You may appeal any future adverse determination made by the FBI. If you would like to inquire about the status of this remanded request or to receive an estimated date of completion, please contact the FBI directly at (202) 868-4593.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. §552(a)(4)(B).

Sincerely,

/s/ Daniel Castellano
X_____

Daniel Castellano,
Associate Chief, for Matthew Hurd, Chief,
Administrative Appeals Staff

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

April 6, 2021

FOIPA Request No.: 1493405-000
Subject: Employee Misconduct Complaints to Insider Threat Office resulting in OPR Investigations
(October 2018 – October 2019)

Dear Mr. Fernandes:

This letter is in response to your Freedom of Information/Privacy Acts (FOIPA) request. Please see the paragraphs below for relevant information specific to your request as well as the enclosed FBI FOIPA Addendum for standard responses applicable to all requests.

Material responsive to your request is being withheld in its entirety by the FBI pursuant to subsections (b)(6) and (b)(7)(C). See attached Explanations of Exemptions.

Please refer to the enclosed FBI FOIPA Addendum for additional standard responses applicable to your request. **"Part 1"** of the Addendum includes standard responses that apply to all requests. **"Part 2"** includes additional standard responses that apply to all requests for records about yourself or any third party individuals. **"Part 3"** includes general information about FBI records that you may find useful. Also enclosed is our Explanation of Exemptions.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request.

If you are not satisfied with the Federal Bureau of Investigation's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so it may be easily identified.

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

June 22, 2022

OIP Appeal Number: A-2022-01072
Request No.: 1493405-000
Subject: Employee Misconduct Complaints to Insider Threat Office resulting in OPR Investigations
(October 2018 – October 2019)

Dear Mr. Fernandes:

This acknowledges your Freedom of Information/Privacy Acts (FOIPA) remanded appeal has been received by the FBI from the Office of Information and Policy for processing. Below you will find check boxes and informational paragraphs about your request. Please read each one carefully.

☑ We have opened your remanded appeal and will inform you of the results in future correspondence.

☐ We have converted your NFP into a FOIPA appeal; therefore, the NFP number originally assigned to your request will now appear as the FOIPA appeal number listed above.

☑ Your request for a fee waiver is being considered and you will be advised of the decision if fees are applicable.

Please check the status of your FOIPA request at www.fbi.gov/foia by clicking on **FOIPA Status**. **Enter the OIP Appeal Number (ex. 201500123) listed above, without hyphens.** Status updates are adjusted weekly. The status of newly assigned requests may not be available until the next weekly update. If the FOIPA has been closed the notice will indicate that appropriate correspondence has been mailed to the address on file.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request.

The FOIPA Appeal Number listed above has been assigned to your request. Please reference the FOIPA Appeal Number and OIP Appeal Number in all future correspondence concerning your request.

Sincerely,

Michael G. Seidel
Section Chief
Record/Information
Dissemination Section
Information Management Division