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NOTE

QUALIFIED IMMUNITY FOR GOVERNMENT OFFICIALS—OBJECTIVE INQUIRY APPLIED TO A NATIONAL SECURITY MOTIVATED WIRETAP

HALPERIN v. KISSINGER

Private citizens are entitled to bring suits for civil damages to protect their constitutional and statutory rights from violation by government officials. Government officials, however, are generally afforded some type of immunity from such suits. The concept of immunity was derived from English common law and was developed by the American courts to encourage uninhibited governmental decision-making and to protect officials from threats of liability. The courts believe that immunity promotes lawful and appropriate governmental action and that support of such action outweighs any injuries that citizens may sustain.

Application of the immunity doctrine requires an initial inquiry into the type of immunity to which a government official is entitled.


4. See Barr v. Matteo, 360 U.S. 564, 576, reh’g denied, 361 U.S. 855 (1959); Kattan, Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damages Actions, 30 Vand. L. Rev. 941, 957 (1977). See also Scheuer v. Rhodes, 416 U.S. 232, 242 (1974) (chance of injury from good faith error is preferable to official inaction); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (honest officials should not be subjected to continuous fear of liability, even though some wrongs may be uncompensated), cert. denied, 339 U.S. 949 (1950). But see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (essence of civil liberty consists of the right of every individual to claim protection of the laws whenever he receives an injury); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1204 (1977) ("[R]espect for the legal system in the long run may be hampered rather than enhanced by a scheme which seems to place at least some individuals beyond the reach of the Constitution.").

DEPAUL LAW REVIEW

Court has granted absolute immunity to an official when either his official status or the special functions inherent in his role require protection from suit. The majority of officials, however, are granted only qualified immunity. An official is entitled to qualified immunity from suit if he satisfies an objective inquiry which relies on the reasonableness of his conduct as measured by clearly established law. The threshold issue in a qualified immunity defense is whether or not the applicable law was clearly established at the time of the official's conduct. Subjective inquiries into an official's motives are prohibited because such inquiries frequently result in frivolous suits against officials proceeding to trial and unduly hamper governmental decision-making.

In Halperin v. Kissinger, the District of Columbia Court of Appeals held that federal officials were entitled to qualified immunity if it was objectively reasonable that they instituted a warrantless wiretap for national security purposes. The Halperin holding, however, reintroduces a subjective inquiry into the qualified immunity doctrine. The effect of Halperin is to afford government officials decreased protection from liability for alleged constitutional and statutory violations. This effect is in conflict with the Supreme Court's objective approach which favors the vigorous exercise of governmental authority and raises concerns about the correctness of the Halperin holding.

This Note will discuss the Supreme Court's approach to determining the type of immunity available to various levels of government officials and the Court's revision of the qualified immunity doctrine to favor a totally objective inquiry. In addition, this Note will discuss the Halperin decision and the court's dilemma in applying an objective inquiry to a case in which a violation of the law in question depends upon the purpose of the federal official's conduct. Finally, this Note will argue that the Halperin court negates the Supreme Court's goal of eliminating subjective inquiries from the qualified immunity doctrine and, as a result, unduly obstructs governmental decision-making in a controversial and sensitive area of official responsibility, namely, that of protecting the nation's security.

I. THE BACKGROUND OF IMMUNITY FOR GOVERNMENT OFFICIALS

A. Types of Governmental Immunity

Federal decisions addressing governmental official immunity have frequently focused on the type of immunity available to various levels of governmental officials.
of government officials. The decisions have recognized two types of immunity defenses, absolute and qualified. Absolute immunity has been extended to officials whose special functions or constitutional status require a complete protection from suit and has been granted to legislators, judges, quasi-judicial officials, and the President of the


15. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) (judges are extended absolute immunity for acts within and in excess of authority but not for acts in absence of authority). See also Forrester v. White, 108 S. Ct. 538 (1988) (judge is not absolutely immune for acts which are administrative and not judicial in nature and judge's act of demoting and firing probation officer was an administrative act); Stump v. Sparkman, 435 U.S. 349 (1978) (judge immune from suit for approving a petition without a hearing to have a "somewhat" retarded girl sterilized because this activity constituted a judicial act); Pierson v. Ray, 386 U.S. 547, 564 n.4 (1967) (Douglas, J., dissenting) (judicial absolute immunity promotes judicial independence and preserves the separation of powers because the threat of suit does not influence judicial decisions). See generally Block, Stump v. Sparkman and the History of Judicial Immunity, 5 Duke L.J. 879 (1980) (discusses the history of judicial immunity).

16. Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity extended to state prosecutor when initiating and prosecuting a criminal case because of the functional comparability of
United States. Other government officials have been granted only qualified immunity from suits for damages predicated on their official acts. Qualified immunity has been extended generally to presidential cabinet members, executive officials, and public prosecutors performing administrative or


19. See Scheuer v. Rhodes, 416 U.S. 232 (1974). The Scheuer Court concluded that the governor and his aides were entitled to qualified immunity in a section 1983 suit alleging the violation of constitutional rights and acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Id. at 246-47. The degree of protection was found to be dependent upon the scope of discretion, responsibilities of the office, and the circumstances as they reasonably appeared at the time the action occurred on which liability was sought to be based. Id. at 247. As interpreted in later cases, Scheuer established a two-tiered division of immunity defenses in section 1983 suits. See Nixon v. Fitzgerald, 457 U.S. 731, 746 (1982). To the majority of officials, Scheuer accorded qualified immunity. The scope of the defense for these officials varied in proportion to the nature of their official functions and the range of decisions that might be made in “good faith.” This functional approach also defined a second tier at which the especially sensitive duties of certain officials required the continued recognition of absolute immunity. Id. at 243.

Recent federal court decisions have reaffirmed the principle that executive officials are entitled to the protection of only qualified immunity as enunciated in Scheuer v. Rhodes. See, e.g., Davis v. Scherer, 468 U.S. 183, 190, reh'g denied, 468 U.S. 1226 (1984) (officials of the Florida Department of Highway Safety and Motor Vehicles entitled to claim a qualified immunity defense in a suit for damages for terminating a department employee without a formal pretermination or post-termination hearing); Davis v. Passman, 442 U.S. 228, 235 n.11 (1979) (absolute immunity for members of Congress does not extend beyond the scope of the speech or debate clause); Butz v. Economou, 438 U.S. 478, 504-08 (1978) (in a suit for damages arising from unconstitutional conduct, federal executive officials exercising discretion are entitled to only qualified immunity); Procunier v. Navarette, 434 U.S. 555, 562 (1978) (prison officials are entitled to only qualified immunity); Wood v. Strickland, 420 U.S. 308, 318 (1975) (school officials are entitled to qualified immunity from liability for damages under section 1983 suit); Zweibon v. Mitchell, 720 F.2d 162, 173 (D.C. Cir. 1983) (former Attorney General could claim qualified immunity from liability for damages for violating plaintiff's constitutional and statutory rights by authorizing warrantless wiretaps); Chagnon v. Bell, 642 F.2d 1248, 1255 (D.C. Cir. 1980) (FBI officers engaged in electronic surveillance at the direction of the Attorney General are entitled to claim qualified immunity in a suit for damages); Halperin v. Kissinger,
investigatory duties. The Supreme Court has recognized that the special functions of some of these officials might require absolute immunity, but it has held that federal officials who seek this absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. The qualified immunity doctrine is designed to balance two important societal objectives: to protect the rights of citizens by providing a damages remedy for official misconduct and to protect officials who must exercise discretion while also vigorously exercising official authority.


20. See Mitchell v. Forsyth, 472 U.S. 511 (1985) (Attorney General's use of warrantless wiretaps not absolutely immune if not part of prosecution); Simons v. Bellinger, 643 F.2d 774, 784 (D.C. Cir. 1980) (provides a test to determine whether prosecutor is acting in a quasi-judicial or investigative role: the prosecutor's inquiry becomes sufficiently focused such that his efforts become advocacy); Chagnon v. Bell, 642 F.2d 1248, 1266 (D.C. Cir. 1980) (Attorney General was not performing prosecutorial functions when he authorized electronic surveillance and FBI officers relying on this authorization were therefore entitled to claim only qualified immunity); Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (Attorney General may be entitled to absolute immunity when exercising prosecutorial responsibilities, but electronic surveillance which he authorized was not part of a criminal prosecution), aff'd by an equally divided Court 452 U.S. 713 (1981); Forsyth v. Kleindienst, 599 F.2d 1203, 1214-16 (3d Cir. 1979) (FBI agents following their superiors' instructions to engage in warrantless electronic surveillance were entitled to only qualified immunity); Briggs v. Goodwin, 569 F.2d 10, 16 (D.C. Cir. 1977) (Justice Department's attorney entitled to only qualified immunity when alleged to have knowingly given a false statement to a district court); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) (state's attorney not absolutely immune for planning and executing illegal raid), cert. denied, 415 U.S. 917 (1974). See generally Note, Supplementing the Functional Test of Prosecutorial Immunity, 34 Stan. L. Rev. 487 (1982) (single act performed by prosecutor may involve functions requiring absolute and qualified immunity; therefore, strict functional test for determining appropriate degree of immunity is inadequate).


22. Butz v. Economou, 438 U.S. 478, 504-06 (1978). See also Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (an action for damages may offer the only realistic remedy for abuses of office, however, claims are also frequently brought against innocent government officials, resulting not only in cost to the defendant officials but also to society as a whole); Barr v. Matteo, 360 U.S. 564, 572-73 (rather than a badge of exalted office, immunity must be seen as an expression of policy designed to aid in the effective functioning of government), reh'g
In *Nixon v. Fitzgerald*, the Supreme Court for the first time considered the scope of immunity possessed by the President of the United States. A management analyst with the Department of the Air Force brought suit against the President for alleged constitutional and statutory violations which resulted in the loss of his government position. 

Justice Powell wrote for the majority and held that the President is absolutely immune from civil damage actions for all acts within the broadly defined "outer perimeter" of his authority. Justice Powell reasoned that this level of immunity is justified because of the distinctive functions inherent in the President's unique office which arise from the constitutional tradition of the separation of powers and are supported by history. The majority for the first time adopted an

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24. *Id.* Fitzgerald lost his job after he revealed substantial cost overruns on a transport aircraft to a joint congressional committee. The administrative hearing record did not support Fitzgerald's claim of retaliation, however, the Civil Service Commission ruled that it was illegal to fire Fitzgerald under the pretext of a general reorganization and ordered him reinstated with back pay. *Id.* at 738. Fitzgerald pursued his conspiracy claims in a civil damages suit against a number of Pentagon and White House officials. *Id.* at 739. The trial court held that the defendants were not entitled to absolute immunity. The District of Columbia Court of Appeals dismissed the defendants' separate appeals without opinion. *Id.* at 741.

25. *Id.* at 756. The Court rejected the argument that an illegal act is per se beyond the "outer perimeter" of the President's authority. *Id.* at 756-57. See also *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Judge Learned Hand suggested that an act is within the scope of an official's duties if it "[would have been] justified . . . had [the official] been using his power for any of the purposes on whose account it was vested in him." *Id.* at 581. The *Nixon* Court's analysis followed this approach. The majority noted that even if the personnel reduction was illegal, such a reduction for proper purposes was within the President's authority. *Nixon v. Fitzgerald*, 457 U.S. at 757.

26. *Nixon v. Fitzgerald*, 457 U.S. at 748-57. Justice Powell argued that the President occupies a unique position in the constitutional scheme. *Id.* at 749. Article III, § 1 of the Constitution provides that "the executive Power shall be vested in a President of the United States . . . ." The President was thus entitled to unique treatment because he was the only executive official who derived his authority from the Constitution. The "singular importance" of the President in the "effective functioning of government" mandated that he be accorded absolute immunity. *Id.* at 751. Justice Powell further noted that absolute presidential immunity was necessary since the visibility of his office rendered the President particularly vulnerable to civil actions for damages. *Id.* at 753. Defending private suits would divert the President's attention from official duties, thereby jeopardizing the presidency and the effective functioning of the entire nation. *Id.*

Justice Powell also suggested that absolute presidential immunity was justified because this protection was rooted in the need to preserve a balance between the three coordinate branches of the federal government. *Id.* at 754. Traditionally, courts exercised judicial deference and
approach that concentrated on the governmental office itself to determine the scope of immunity available to the President and rejected the traditional functional approach which instead focuses on the specific acts performed by an official in his governmental capacity. The Court thus granted to the presidential office itself absolute immunity from civil damage actions.

The Nixon majority noted that a rule of absolute immunity for the President would not leave the nation without protection against presidential misconduct. Impeachment is a constitutional remedy and there are formal and informal checks on presidential action that do not apply to the same degree to other executive officials. The press constantly scrutinizes presidential action and oversight by Congress may deter abuses of office. Moreover, the President’s reelection concern and need to maintain prestige to enhance presidential influence provide incentives to avoid misconduct. These alternative remedies and deterrents “establish that absolute immunity will not place the President ‘above the law.’”

restraint concerning presidential actions in accordance with the separation of powers doctrine which mandates that the judicial branch of the federal government refrain from undue interference with activities of the executive branch. See also 2 J. Story, Commentaries on the Constitution of the United States § 1569, at 386-87 (5th ed. 1891) (implication in the separation of powers is that the President must be permitted to discharge his duties undistracted by private lawsuits). But see Nixon v. Fitzgerald, 457 U.S. 731, 766 (1982) (White, J., dissenting) (absolute immunity would place the President above the law); United States v. Nixon, 418 U.S. 683, 707 (1974) (absolute presidential immunity would upset the constitutional balance of government); Smith v. Nixon, 606 F.2d 1183, 1188 (D.C. Cir. 1979) (President may be held liable for illegal wiretapping); Halperin v. Kissinger, 606 F.2d 1192, 1211 (D.C. Cir. 1979) (President is not entitled to absolute immunity in a damage action for an unconstitutional wiretap), aff’d by an equally divided Court 452 U.S. 713 (1981); Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973) (absolute presidential immunity cannot be inferred from the President’s broad authority); Recent Cases, Halperin v. Kissinger: The D.C. Circuit Rejects Presidential Immunity from Damage Action, 26 Loy. L. Rev. 144, 157 (1980) [hereinafter Recent Cases] (denying the President absolute immunity has a valid historical basis under the “equal justice under laws” doctrine and is essential to protect individual constitutional rights).


30. Id.

31. Id.

32. Id.

33. Id. at 758. But see Nixon v. Fitzgerald, 457 U.S. at 764 (White, J., dissenting) (absolute immunity would place the President above the law); Halperin v. Kissinger, 606 F.2d 1192, 1212 (1979) (there is no rational basis for holding inferior officials liable for constitutional violations while immunizing those higher up), aff’d by an equally divided Court 452 U.S. 713 (1981); Marbury v. Madison 5 U.S. (1 Cranch) 137, 165 (1803) (the question of whether or not the legality of an act of a department head is examinable must depend on the nature of the act).
In *Harlow v. Fitzgerald*,\(^{34}\) the Supreme Court for the first time decided the scope of immunity available to the President's senior aides and advisers in a suit for damages based upon their official acts. The plaintiff brought suit against White House aides to former President Nixon who were codefendants with him and were claimed to have participated in the same alleged conspiracy to violate the plaintiff's constitutional and statutory rights as was involved in *Nixon v. Fitzgerald*.\(^{35}\) Contrary to the *Nixon* majority, the *Harlow* Court applied the traditional functional approach to determine the type of immunity available to the presidential aides and advisers.\(^{36}\) The Supreme Court rejected the defendants' claim that they were entitled to absolute immunity because of the special functions they performed as White House aides.\(^{37}\) The Court held that chief presidential aides generally were entitled to only qualified protection from civil suits arising out of official acts.\(^{38}\)

The functional approach did not warrant a blanket absolute exemption from civil liability for all presidential aides in the performance of all of their duties,\(^{39}\) although absolute immunity may be justified for aides entrusted with discretionary authority in such sensitive areas as national security and

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34. 457 U.S. 800 (1982).
35. Id. at 802-06. See supra note 24 and accompanying text.
37. Harlow v. Fitzgerald, 457 U.S. at 812. The Court also noted that the presidential aides were not entitled to absolute derivative immunity. Id. at 809-11. In *Gravel v. United States*, 480 U.S. 606 (1972), the Supreme Court held that legislative aides were a Senator's "alter egos" and therefore enjoyed the same absolute immunity from civil liability for legislative acts as that possessed by a Senator himself. Id. at 616-17. This derivative immunity extends only to acts within the "central" role of the speech or debate clause in permitting free legislative speech and debate. Id. at 620. See supra note 14. See also *Harlow v. Fitzgerald*, 457 U.S. at 822-28 (Burger, C.J., dissenting) (*Gravel* is not distinguishable from *Harlow* and the function of senior presidential aides as the "alter egos" of the President is an integral, inseparable part of the function of the President).

The majority in *Harlow* stated that some aides are assigned to act as presidential "alter egos" in the exercise of functions for which absolute immunity is essential for the conduct of public business. Id. at 812. 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 mandates without delegating functions nearly as sensitive as his own. Id. at 812 n.19.

The Court stated that its decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), did not abrogate the general rule of using a functional approach. Suits against such officials as presidential aides, generally do not invoke a separation of powers consideration to the same extent as suits against the President himself. *Harlow v. Fitzgerald*, 457 U.S. at 811 n.17. See supra note 26 and accompanying text.

38. Harlow v. Fitzgerald, 457 U.S. at 809. The Court noted that in *Butz v. Economou*, 438 U.S. 478 (1978), it had held that cabinet members, who are direct subordinates of the President and often have greater responsibilities than White House aides, possess merely a qualified immunity. The Court, therefore, maintained that it was unsound to accord the White House staff greater protection from civil damage suits than that granted to higher ranking cabinet officers. Furthermore, citing *Scheuer v. Rhodes* and *Butz v. Economou*, the Court stated that qualified immunity was the norm for executive officials.

foreign policy to protect the performance of functions vital to the national interest. 40 To receive absolute immunity, however, an aide would have to show that the responsibilities of his office included functions so sensitive as to require a total shield from liability and that he was performing such functions when he participated in the act in question. 41 The Court concluded that the defendants had not made this requisite showing. 42

The Supreme Court suggested in Harlow that absolute immunity may be justified for presidential aides entrusted with authority in sensitive areas such as national security and foreign policy. In Mitchell v. Forsyth, 43 however, the Court held that the Attorney General of the United States was not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions. The action was brought against Attorney General Mitchell for authorizing a warrantless wiretap for the purpose of gathering intelligence regarding the activities of a radical group that had made tentative plans to take actions threatening the Nation's security. 44 Mitchell argued that the Attorney General's national security functions were so sensitive and vital to the protection of the Nation's well-being that there could be no risk of personal liability in performing those functions. 45

The Court found that the Attorney General's status as a cabinet officer was not sufficient to invest him with absolute immunity 46 and then utilized the functional approach to determine the scope of immunity available to Mitchell. 47 Because Mitchell was not acting in a prosecutorial capacity in this situation, his national security functions did not warrant the same absolute immunity available to quasi-judicial officers. 48 The Court held that Mitchell was entitled to only qualified immunity in performing these functions for three reasons: 1) there is no analogous historical or common law basis for an absolute immunity for cabinet officers or other high executive officials. 49 Mitchell v. Forsyth, 472 U.S. 511 (1985). The Court stated that consideration of separation of powers that calls for absolute immunity for state and federal legislators and the President does not demand a similar immunity for cabinet officers or other high executive officials. 50

40. Id.
41. Id. at 813.
42. Id.
44. Id. at 513-15.
45. Id. at 520. See Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982); supra note 37.
48. Id. See supra note 16.
not subject an official to the same risks of vexatious litigation as does the carrying out of judicial or quasi-judicial tasks;⁵⁰ and 3) most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unre-
dressed.⁵¹

Through Nixon, Harlow, and Forsyth, the Supreme Court more clearly established the type of immunity available to various levels of high ranking government officials. These cases may be viewed as a series of progressive steps, each more specifically shaping the contours of the immunity doctrine. While the Nixon Court granted the President a blanket absolute immunity from suit for all acts within the “outer perimeter” of his authority, the Harlow Court was consistent with the existing immunity doctrine and granted presidential aides and advisers only a qualified immunity defense.⁵³ The Harlow Court did not, however, foreclose future arguments that some of the aides and advisers may be entitled to absolute immunity when performing “sensitive functions.”⁵⁴ In both Nixon and Harlow, the Court strongly implied that national security and foreign policy functions warrant absolute immunity.⁵⁵ The Forsyth Court, however, held that the United States Attor-

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⁵⁰. Mitchell v. Forsyth, 472 U.S. at 521. The judicial process is an “arena of open conflicts” and there is usually a winner and a loser. It is expected that many of those who lose will blame judges, prosecutors, and witnesses and will bring suit against them to try and relitigate the underlying conflict. National security tasks, however, are carried out in secret and it is thus more likely that actual abuses will go uncovered than that perceived abuses will give rise to unfounded and burdensome litigation. The threat of litigation, therefore, will not affect the performance of the Attorney General’s national security tasks to the same degree as it may affect those functioning within the judicial process. Id. See also Imbler v. Pachtman, 424 U.S. 409, 421-24 (1976) (insulation of the prosecutor’s role in the judicial process is a primary justification for absolute immunity).

The Court in Forsyth also noted that Mitchell himself had faced a significant number of lawsuits stemming from his authorization of warrantless national security wiretaps. However, the Court concluded that this did not suggest that absolute immunity instead of qualified immunity was necessary for the proper performance of the Attorney General’s role in protecting national security. Mitchell v. Forsyth, 472 U.S. at 522.

⁵¹. Mitchell v. Forsyth, 472 U.S. at 522. The Court noted that legislators are accountable to their constituents while the judicial process is mainly self-correcting through procedural rules, appeals, and collateral challenges. Similar built-in restraints on the Attorney General’s role in a national security context do not exist. The danger that high ranking federal officials will disregard constitutional rights in their eagerness to protect national security is also sufficiently real to not justify absolute immunity for such officials. Id. at 522-23. But see Mitchell v. Forsyth, 472 U.S. at 538-42 (Stevens, J., concurring) (congressional intent suggests that in national security matters, cabinet officials are entitled to the same absolute immunity as the President).


ney General was entitled to only qualified immunity in performing national security functions. The Court did not indicate how broadly or narrowly its decision should be applied to future cases. It is thus unclear whether the Court intended that national security and foreign policy functions always warrant qualified versus absolute immunity for high ranking government officials.

B. Satisfaction of the Qualified Immunity Standard

In Wood v. Strickland, the Supreme Court held that the qualified immunity doctrine included an objective and a subjective test. In Wood, the parents of high school students brought suit against school board members and the school district claiming that the students' constitutional due process rights were violated when they were expelled for violating a regulation prohibiting alcoholic beverages at school or school activities. The Court granted the defendants qualified immunity and stated that they were immune from liability because they had satisfied an objective and a subjective test. The objective test required that the school board members not know nor should know that their actions violated the students' constitutional rights. The subjective test required that the school board members act without malicious intent to deprive the students of their rights or cause them injury. The objective test of qualified immunity thus involved a presumptive knowledge of and respect for basic established constitutional rights. The subjective test referred to "permissible intentions." A plaintiff needed only to prove

58. Id. at 321. The Court explained that these tests did not impose an unfair burden on a person assuming a responsible public office which requires a high degree of intelligence and judgment or an unwarranted burden in light of the value which civil rights have in our legal system. Id. at 322.
59. Id. at 309-10. See also Gomez v. Toledo, 446 U.S. 635, 640 (1980) (although an action under 42 U.S.C. § 1983, the Wood Court's analysis indicates that immunity may also be a defense in an action under the Constitution and laws of the United States).
60. Wood v. Strickland, 420 U.S. at 322. In Wood, the Court limited its holding to immunity pleaded in a section 1983 action for damages related to a school board member in the context of school discipline. Subsequent cases have interpreted Wood as formulating the qualified immunity standard and have applied it to other situations. See Procunier v. Navarette, 434 U.S. 555, 562-63, 565 (1978) (prison officials were immune because there was no clear right to privacy as to a prisoner's mail and the officials acted in good faith); O'Connor v. Donaldson, 422 U.S. 563 (1975) (jury was instructed to determine whether the hospital superintendent, who committed the plaintiff to a state mental hospital, knew or should have known that his action violated constitutional rights and whether he acted maliciously); Dellums v. Powell, 660 F.2d 802, 807-08 (D.C. Cir. 1981) (police chief immune from suit if he reasonably believed his actions were legal and his conduct was not malicious).
61. Wood v. Strickland, 420 U.S. at 322. The Court stated that school board members do not have to predict the future course of constitutional law but are held to know established law. See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
62. Wood v. Strickland, 420 U.S. at 322. An official will be denied qualified immunity if he has acted with such an impermissible motivation that his action cannot reasonably be characterized as being in good faith. See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
an official violated one of these two tests in order for the defendant to lose his immunity from suit.63

In Harlow v. Fitzgerald,64 the Supreme Court modified the qualified immunity standard and held that government officials performing discretionary functions are generally shielded from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.65 The Court thus eliminated the subjective element of the qualified immunity defense.66

The Supreme Court observed that the subjective element of the defense had frequently proved incompatible with the goal that insubstantial claims should not proceed to trial and noted that many frivolous cases go to trial because an official's subjective intent generally cannot be decided on a motion for summary judgment and instead frequently requires a jury determination.67 Elimination of the subjective test, therefore, may decrease the

67. Harlow v. Fitzgerald, 457 U.S. at 815-16. To shield government officers from undue interference, the Court admonished lower courts applying the qualified immunity standard to engage in firm application of the Federal Rules of Civil Procedure to ensure that federal officials are not harassed by frivolous law suits and endorsed the idea of resolving the immunity issue of damage suits at summary judgment stage. Id. at 816; Butz v. Economou, 438 U.S. 478, 508 (1978). "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." Harlow v. Fitzgerald, 457 U.S. at 816.

The Court quoted Pierson v. Ray, 386 U.S. 547, 554 (1967), saying that "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." Harlow v. Fitzgerald, 457 U.S. at 819. The Court clarified that the "consequences" at issue are not limited to liability for monetary damages; they also include the general costs of subjecting officials to the risks of trial, distraction from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. Id. at 816. The Court emphasized that even such pretrial matters as discovery are to be avoided if possible because "inquiries" of this kind can be particularly disruptive to effective government. Id. at 817. See also Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring) (many suits result from the subjective good faith test because it is not difficult to create an issue of material fact as to the defendant's mental processes), aff'd by an equally divided Court 452 U.S. 713 (1981). But see Recent Cases, supra note 26, at 158 (rejects the view that qualified immunity under Wood would lead to an increase in frivolous suits).

The Harlow Court further explained that if the trial judge determines that the law was not clearly established at the time the conduct occurred, the inquiry ceases and the official is entitled to summary judgment. If the law was clearly established, the official is presumed to have
The incidence of frivolous claims brought against government officials. The Court noted the importance of supporting uninhibited official discretionary decisions and also acknowledged the public’s interest in deterring unlawful governmental conduct and redressing the injuries sustained by victims of such conduct. The Court asserted that the revised qualified immunity standard would result in a more appropriate balance between these competing societal interests by promoting independent official decision-making without unnecessary fear of potential liability.

The revised qualified immunity standard appears simple and direct. In cases involving a violation of clearly established rights, the objective test will ensure that factual disputes and broad-ranged discovery will less frequently occur. Cases involving nonestablished or ambiguous areas of the law, however, comprise a large number of all constitutional tort claims. In such cases federal officials would be entitled to qualified immunity for even intentional abuses of office. Many plaintiffs would thus be left with no compensation for their injuries. The Harlow Court stated that by revising the qualified immunity standard to an objective inquiry it was not providing a license to lawless conduct. The Court, however, did not address the issue of the potentially resulting large number of constitutional tort claims that may go unredressed because a civil damages remedy for intentional abuses of office by government officials has been eliminated. In addition, the Harlow Court did not address how the objective test should be applied to cases in which the official conduct in question is legal or illegal depending upon the intent with which it is performed.

II. Halperin v. Kissinger

In Halperin v. Kissinger (Halperin II), the District of Columbia Court of Appeals was confronted with the questions that the Forsyth and Harlow Courts left unanswered. The Supreme Court modified, revised, and developed the law regarding both the type of immunity afforded to various levels of government officials and the qualified immunity standard during Halperin v. Kissinger’s seventeen year procedural history. Halperin II is one of three known about it; unless he can bring forward undisputed facts establishing that because of extraordinary circumstances he neither knew nor should have known of the unlawfulness, summary judgment in his favor must be denied. Until the threshold immunity question of whether or not the law was clearly established at the time of the action is resolved, discovery should not be allowed. Harlow v. Fitzgerald, 457 U.S. at 818-19.

69. Id. at 819.
70. See id.; supra note 22.
72. See The Supreme Court, 1981 Term, supra note 53, at 234.
73. Id.
75. 807 F.2d 180 (D.C. Cir. 1986).
companion cases decided in which the court of appeals applied the qualified immunity standard of *Harlow v. Fitzgerald* to situations where federal officials claimed to have been motivated by national security concerns.

### A. Factual and Procedural History

In 1973, Halperin, previously a National Security Council staff member, his wife, and three minor children brought suit for damages against President Nixon, National Security Advisor Kissinger, Attorney General Mitchell, and various presidential aides for allegedly violating their constitutional and statutory rights in initiating and continuing a twenty-one month warrantless wiretap of their private telephone. A complex factual background shows that the wiretap was purportedly part of a program designed by Nixon and several high level executive officials to stem what they perceived to be an alarming deluge of classified information leaks to the press. The impetus for the Halperin wiretap was a May 9, 1969, *New York Times* article reporting classified bombing raids on Cambodia. An investigation by FBI Director Hoover identified Halperin as the prime suspect. The wiretap was approved by Attorney General Mitchell and placed on Halperin's phone. The wiretapping continued until February 1971 even though it was not producing evidence of a leak and Halperin had resigned from his position in September 1969. After Halperin's resignation, the FBI reports on the wiretap were no longer sent to the National Security Advisor but instead were sent to Nixon's chief administrative aide, Haldeman. The summary letters from the FBI covered such topics as planned publications criticizing the United States Vietnam policy, congressional lobbying on war-related legislation, and political campaign plans, including potential opposition to Nixon in 1972. There is some evidence that the political information was valued at the White House.

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77. 457 U.S. 800 (1982). See *supra* notes 64-70 and accompanying text.

78. Halperin v. Kissinger, 807 F.2d at 182.


80. *Id.* at 840. In their view, the leaks limited the Administration's flexibility in developing foreign policy and could have eroded the candor of foreign governments in dealings with the country.

81. *Id.* Three criteria were established for identifying individuals to be investigated: 1) access to sensitive data that was being revealed publicly; 2) information in security files that raised "questions about an individual;" and 3) other incriminating information in FBI files. Hoover believed Halperin's file raised questions regarding his reliability. Halperin had been a roommate of the reporter who had written the story; he had failed to report in a 1966 Department of Defense form that he had stopped in Greece, Yugoslavia, and the Soviet Union on a previous round-the-world trip; and he had incorrectly identified a Russian national with whom he had lunched in 1967.

82. Halperin v. Kissinger, 606 F.2d 1192, 1197-98 (D.C. Cir. 1979), aff'd by an equally divided Court 452 U.S. 713 (1981). After Halperin's resignation, the FBI reports on the wiretap were no longer sent to the National Security Advisor but instead were sent to Nixon's chief administrative aide, Haldeman. The summary letters from the FBI covered such topics as planned publications criticizing the United States Vietnam policy, congressional lobbying on war-related legislation, and political campaign plans, including potential opposition to Nixon in 1972. There is some evidence that the political information was valued at the White House.

The Halperins filed suit one month after that disclosure and alleged that the wiretap violated their rights under the fourth amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.84

The district court initially held Nixon, Mitchell, and Presidential Aide Haldeman jointly liable for violating only the fourth amendment's reasonableness requirement and granted summary judgment to the remaining defendants.85 In 1977, the Halperins were awarded $1 in nominal damages.86

The court of appeals (Halperin I) reversed and held that the wiretap violated 1) Title III's procedural requirements for any period (to be determined by the district court on remand) in which the wiretap's purpose was not the protection of national security information against foreign intelligence activities,87 2) the fourth amendment's reasonableness requirement for any period (also to be determined by the district court) in which the wiretap's scope or

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

In 1968, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520, to regulate wiretapping and electronic surveillance. The Act represents an attempt by Congress to promote more effective crime control while protecting individual privacy. Much of Title III was enacted to meet the constitutional requirements for electronic surveillance enunciated in Katz v. United States, 389 U.S. 347 (1967). The issue in Katz was whether recordings of the defendant's end of telephone conversations, obtained by attaching an electronic listening and recording device to the outside of a public telephone booth, had been obtained in violation of the fourth amendment. The Supreme Court held that the government action constituted a search and seizure within the meaning of the fourth amendment. Id. at 354-59. Katz thus made it clear that, with the possible exception of party consent, wiretapping and electronic eavesdropping are subject to the limitations of the fourth amendment.


87. Halperin v. Kissinger, 606 F.2d at 1205. The application of Title III to the Halperin wiretap hinged on section 2511(3), which enumerates national security situations in which surveillance would not be covered by the statute. The Supreme Court in United States v. United States District Court (Keith), 407 U.S. 297 (1972) held that as an "expression of congressional neutrality" on national security surveillance, "[N]othing in Section 2511(3) was intended to expand or to contract or to define whatever presidential surveillance powers existed in matters affecting the national security." Keith, 407 U.S. at 308 (emphasis in original). Therefore, if a surveillance falls under section 2511(3), it is subject to constitutional limitations but not to Title III's requirements and prohibitions. Halperin v. Kissinger, 606 F.2d at 1203.

Only one circumstance listed in section 2511(3) applied to the Halperin wiretap: nothing in Title III "shall limit the constitutional power of the President . . . to protect national security information against foreign intelligence activities." Halperin v. Kissinger, 606 F.2d at 1203. The court of appeals held that the proper inquiry for the district court, therefore, was whether the wiretap was a valid national security action and Title III requirements would apply to any period during which the wiretap did not involve protecting national security information against foreign intelligence activities. Id. at 1205.
duration were unreasonable, even though its purpose was the protection of national security, and 3) the fourth amendment's warrant requirement.

On defendants' qualified immunity defense, the court affirmed the district court's ruling that the defendants were unshielded for any violation of the fourth amendment's clearly established reasonableness requirement, but remanded to the district court to decide whether the defendants were shielded for violations of the fourth amendment's warrant requirement or Title III.

The court of appeals also reversed the grant of summary judgment to Kissinger. In 1981, an equally divided Supreme Court affirmed without opinion. While the case was on remand, the Supreme Court decided *Harlow v. Fitzgerald* which altered the qualified immunity defense to an objective inquiry. The district court granted summary judgment in favor of all defendants, reasoning that since the wiretap had a "rational national secu-

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88. Halperin v. Kissinger, 606 F.2d at 1206. The court of appeals stated that even if the Halperin wiretap was genuinely based on national security concerns and thus not subject to Title III requirements, the wiretap still violated the fourth amendment's reasonableness standard. *Id.* at 1206. The duration and scope of the wiretap may have been unreasonable in view of the information obtained from the surveillance. The district court on remand was to determine when the wiretap became unreasonable. *Id.* See *supra* note 82.

89. Halperin v. Kissinger, 606 F.2d at 1206. The court of appeals held that a warrant was required for the Halperin wiretap as there was no basis in its view, for applying *Keith* and *Zweibon I* only prospectively. *Id.*

Since at least 1940, there had been presidential sanction for warrantless electronic surveillance in furtherance of national security. *Mitchell v. Forsyth*, 472 U.S. 511, 530-31 (1985). The apparent purpose of Title III section 2511(3) was not to disturb whatever powers in this regard the President actually has under the Constitution. W. LAFAVE & J. ISRAEL, *supra* note 84, at § 4.3. The scope of these powers was at issue in *Keith*, 407 U.S. 297 (1972). In *Keith*, the government claimed that its warrantless surveillance of a domestic radical group engaged in a conspiracy to destroy federal government property was authorized under Title III, § 2511(3). The Supreme Court held that a warrant was necessary before a domestic target deemed a threat to national security could be wiretapped. *Keith*, 407 U.S. at 316-18. In *Zweibon v. Mitchell (Zweibon I)*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), cert. denied *sub nom.* Barrett v. Zweibon, 425 U.S. 944 (1976), the court of appeals stated that the mere fact that the actions of a domestic organization might provoke action abroad harmful to the United States, was not enough to put the case into a foreign affairs category. The court held that a "warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." *Id.* at 614. See generally Note, *Constitutional Law—Electronic Surveillance and the Fourth Amendment: Warrant Required for Wiretapping of Domestic Subversives*, 22 DePaul L. Rev. 430 (1972) (overview of the history of the search warrant provision of the fourth amendment in relation to electronic eavesdropping).

90. Halperin v. Kissinger, 606 F.2d at 1210. The court of appeals found no basis for disturbing the district court's ruling that the continuation of the wiretap for twenty-one months was unreasonable and thus a violation of the fourth amendment. *Id.*

91. *Id.*

92. *Id.* at 1214. The plaintiffs raised genuine issues of material fact as to Kissinger's role in the installation and maintenance of the wiretap.


rity” basis, they were immune under Harlow. The plaintiffs appealed, contending that the defendants were not entitled to immunity because the stated national security justification was pretextual.96

B. Halperin II

The central issues that the court addressed on this appeal were the identification of the level of immunity available to Kissinger, Mitchell, and Haldeman and the application of the Harlow qualified immunity standard on a motion for summary judgment where the asserted national security purpose was challenged as pretextual.97

1. Type of immunity granted

Each defendant claimed that he was entitled to absolute immunity, both derivatively from his position as a key presidential aide and functionally because he was discharging a special function so sensitive as to require a total shield from liability.98 The court held that each defendant was entitled to only a qualified immunity defense99 and reasoned that the Supreme Court had repeatedly held that status as a cabinet member or high official did not alone entitle an official to absolute immunity.100 The Supreme Court had also rejected national security as a basis for functional absolute immunity of the Attorney General.101 The court of appeals reasoned that if performance of a national security function does not entitle the Attorney General to absolute immunity, then the fact that the National Security Advisor’s entire function is defined by national security and foreign policy does not justify granting absolute immunity to the National Security Advisor.102 The Attorney General’s central legal functions and a presidential aide’s critical role in the

96. Halperin v. Kissinger, 807 F.2d at 183. The plaintiffs contended that Halperin was initially targeted in order to bolster within the Nixon administration, the political credibility of Kissinger’s staff appointments.
97. Id. In the previous appeal, the court affirmed the district court’s holding that Nixon was not entitled to absolute immunity. Halperin v. Kissinger, 606 F.2d at 1210-13. In light of the Supreme Court’s intervening finding to the contrary in Nixon v. Fitzgerald, 457 U.S. 731, 755-57 (1982), the Halpers voluntarily dismissed the suit against Nixon. See supra notes 25 & 26 and accompanying text.
100. Id. See supra notes 19 & 37 and accompanying text.
101. Halperin v. Kissinger, 807 F.2d at 194. See Mitchell v. Forsyth, 472 U.S. 511 (1985); supra notes 49-51. But see Mitchell v. Forsyth, 472 U.S. at 542 (Stevens, J., concurring) (Congress has enacted legislation comprehensively regulating the field of electronic surveillance but has specifically declined to impose a remedy for certain national security wiretaps; therefore, congressional intent suggests that in national security matters, cabinet officers are entitled to the same absolute immunity as the President).
functioning of the modern Presidency also do not warrant a grant of absolute immunity based on the Supreme Court's application of a functional analysis. The court of appeals also noted that in light of the additional protection afforded by the objective test in the national security context as applied in this case, qualified immunity adequately protected those positions from undue interference.

2. Application of Harlow's qualified immunity standard

In addressing the defendants' alternative claim of qualified immunity, the court identified what it perceived to be a basic problem in applying the Harlow objective standard. The Harlow Court held that government officials performing discretionary functions are generally shielded from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Two subsequent Supreme Court decisions have described Harlow as removing subjective elements from the qualified immunity doctrine and favoring a wholly objective standard. The Halperin court explained that whether or not conduct violates clearly established statutory or constitutional rights, however, often depends upon the intent of the conduct. It is thus impossible to rely on the objective reasonableness of an official's conduct as measured by clearly established law, when this clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed. This perception guided the court's analysis in applying the Harlow standard to the defendants' claim of qualified immunity.

The court first determined whether or not the fourth amendment's warrant and reasonableness requirements and Title III requirements were clearly established during the dates of initiation and continuation of the wiretap. The court then addressed whether or not the defendants had violated any of these requirements which were clearly established during the time of the wiretap. The court finally applied its version of Harlow's objective standard to the defendants' motion for summary judgment based on their claims for qualified immunity.

Title III requirements were clearly established in 1969, and the court stated that the legality of the wiretap under Title III depended upon its purpose.

103. Id. See supra note 28.
105. Id. at 184.
109. Id.
110. Id. at 188-93.
111. Id. at 184. "A wiretap legitimately directed to the protection of national security information from foreign intelligence activities, while it might have been unconstitutional, was at least exempted from Title III's specific procedural requirements." See Title III, 18 U.S.C. § 2511(3); supra note 87.
Title III requires that all electronic surveillance comply with intricate approval and minimization requirements, but it does not limit the constitutional power of the President to protect national security information against foreign intelligence activities. The court concluded that the defendants were entitled to immunity for their failure to comply with Title III if the purpose of their conduct was to protect national security information from disclosure.

The fourth amendment's warrant requirement was not clearly established in 1969. The court of appeals stated that the legality of the wiretap under the warrant requirement also turned on the wiretap's purpose. The court held that the defendants were entitled to immunity for their failure to obtain a warrant if their activity had a national security purpose because in 1969 it was unclear whether the warrant requirement applied to national security wiretaps.

The court stated that compliance with the fourth amendment's reasonableness requirement depended upon the duration and scope of the wiretap. Circuit Justice Scalia, who wrote the Halperin opinion, did not believe that the reasonableness requirement was clearly established in the national security context in 1969. The other two circuit judges, however, concurred on this issue and thus comprised the majority. They agreed with the finding in Halperin I that this requirement was clearly established in 1969. The defendants were entitled to qualified immunity for the period of time in which there was a national security purpose behind the duration and scope of the wiretap.

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112. Title III, 18 U.S.C. §§ 2510-2520. See supra notes 84 & 87 and accompanying text.
114. Id. See supra notes 84 & 89; Mitchell v. Forsyth, 472 U.S. at 533 ("Uncertainty regarding the legitimacy of warrantless national security wiretapping during the period between Katz and Keith is also reflected in the decisions of the lower federal courts.").

As of 1970, the Justice Departments of six successive administrations had considered warrantless domestic security wiretaps constitutional. In 1972, Keith finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to national security. In 1970, therefore, the legality of a warrantless domestic security wiretap was not clearly established. Mitchell v. Forsyth, 472 U.S. at 517.
117. Id. at 192-93. Justice Scalia cites a number of opinions in support of his finding. In Sinclair v. Kleindienst, 645 F.2d 1080 (D.C. Cir. 1981), the court stated that there "was no judicially imposed reasonableness requirement for national security wiretaps in 1969-71." Id. at 1082. In Zweibon v. Mitchell ( Zweibon IV), 720 F.2d 162 (D.C. Cir. 1983), the court stated that "it is plain therefore that there existed no clearly established warrant or reasonableness requirements at the time Mitchell authorized the JDL surveillance [in 1970-71]." Id. at 169-70.
118. Halperin v. Kissinger, 807 F.2d at 194 (concurrency). The two concurring Circuit Judges stated that the cases cited by Circuit Justice Scalia were not directly applicable and did not analyze the reasonableness issue. See supra note 117. In Halperin I, the court stated that "there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution . . . ." Halperin v. Kissinger, 606 F.2d at 1210.
The court discussed in detail its decision to apply Harlow’s objective inquiry to the defendants’ intent to protect national security.\textsuperscript{120} The court acknowledged Harlow’s proscription of subjective inquiries but believed that examination of the defendants’ intent and motivation would not vastly expand immunity and that it would be faithful to the Supreme Court’s rationale in Harlow.\textsuperscript{121} The court reasoned that exceptions for national security matters had been made before in other areas of the law\textsuperscript{122} and thus a purely objective inquiry into the pretextuality of the purpose behind the wiretap was appropriate.\textsuperscript{123} If the facts established that the purported national security motivation was reasonable, the immunity defense would prevail.\textsuperscript{124}

The court then applied the summary judgment standard to the objective national security inquiry and found that the defendants would be entitled to qualified immunity if no reasonable jury, looking at the evidence in the light most favorable to the plaintiffs, could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons.\textsuperscript{125}

After application of this standard, the court affirmed the district court’s grant of summary judgment to the defendants as to the initiation of the wiretap.\textsuperscript{126} Finally, the court remanded to the district court to determine the period during which a jury could not find the defendants had a national security motivation with regard to the Title III and fourth amendment reasonableness claims.\textsuperscript{127}

\begin{itemize}
  \item \textsuperscript{120} Id. at 188-89.
  \item \textsuperscript{121} Id. at 187. The court lists four reasons for its finding: 1) the separation of powers concerns that underlay Harlow are especially prominent in the national security field; 2) the potential chilling effect on official conduct by the threat of suit is particularly severe in the national security field since no governmental interest is more compelling; 3) broad-range discovery is inordinately harmful in the national security field since the need for secrecy is so great; 4) in Mitchell v. Forsyth, the Court rejected the claim of absolute immunity for officers performing national security functions on the assurance that an objective qualified immunity inquiry would decrease the incidence of insubstantial claims. That assurance is vastly less secure if Mitchell v. Forsyth’s description is erroneous as to the basic subjective factor of whether the officer had a genuine national security motivation. See Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982).
  \item \textsuperscript{123} Halperin v. Kissinger, 807 F.2d at 188.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id. at 189.
  \item \textsuperscript{126} Id. at 191.
  \item \textsuperscript{127} Id.
\end{itemize}
III. ANALYSIS AND CRITICISM OF HALPERIN v. KISSINGER

A. Type of Immunity Granted

Each defendant claimed that he was entitled to absolute immunity because of his official status and the sensitive nature of national security functions.\(^{128}\) The court of appeals held that the Attorney General, National Security Advisor, and presidential aide were entitled to claim only a qualified immunity defense.\(^{129}\) The court’s analysis follows previous Supreme Court rationale and also addresses the question left unanswered by the Forsyth Court as to how broadly or narrowly Forsyth should be applied. Numerous Supreme Court decisions have held that status as a cabinet member or high government official does not alone entitle an official to absolute immunity.\(^{130}\) The defendants were therefore left with only their claim that national security functions were so sensitive that a total shield from liability was required. Because the Forsyth Court had already held that the Attorney General was not entitled to absolute immunity in performing national security functions,\(^{131}\) the Halperin court only had to decide the question of whether the Forsyth holding applied to the National Security Advisor and the presidential aide. The court reasoned that because the Forsyth Court had held that the Attorney General was not absolutely immune in performing national security duties and since the National Security Advisor’s entire role is defined by national security and foreign policy, he is not entitled to absolute immunity when performing these functions.\(^{132}\) In rejecting absolute immunity for the Attorney General and presidential aide, the court specifically noted that the functions of both offices displayed the same characteristics as described by the Forsyth Court.\(^{133}\)

The Forsyth Court listed three reasons for rejecting an official’s performance of national security functions as an entitlement to absolute immunity: 1) history and common law do not support a total shield from liability, 2) there is not the likelihood of vexatious litigation, and 3) these officials are not subject to checks that would help prevent abuses of authority.\(^{134}\) These characteristics would apply to all three defendants to the same degree as they applied to the Attorney General in Forsyth. The Halperin court, therefore, broadly applied the Forsyth holding and expanded it to include additional levels of government officials. In doing so, the Halperin court continued the Supreme Court’s progression of more specifically defining the type of immunity afforded to various levels of government officials.

\(^{128}\) Id. at 193.

\(^{129}\) Id. at 194.

\(^{130}\) Id. at 193-94. See supra notes 19 & 37 and accompanying text.

\(^{131}\) Mitchell v. Forsyth, 472 U.S. at 520.

\(^{132}\) Halperin v. Kissinger, 807 F.2d at 194.

\(^{133}\) Id. See supra notes 49-51 and accompanying text.

B. Application of Harlow's Qualified Immunity Standard

On a motion for summary judgment, each defendant in Halperin alternatively claimed that he was entitled to qualified immunity because instituting the wiretap had not violated clearly established law. The court of appeals acknowledged that the Supreme Court in Harlow had eliminated any subjective inquiry from the qualified immunity doctrine and applied Harlow's objective qualified immunity standard to determine whether the defendants were entitled to summary judgment.135 In applying this standard, the court required the defendants' intent in initiating and continuing the wiretap be determined as part of an objective inquiry.136 The Halperin court misapplies the revised qualified immunity standard and its holding contradicts and negates the Harlow Court's objective approach which eliminated subjective inquiries.

The Harlow Court eliminated subjective inquiries because it believed that the subjective element of the qualified immunity doctrine had been responsible for insubstantial claims against government officials proceeding to trial since subjective inquiries frequently require resolution by a jury.137 A defendant's motion for summary judgment is often denied because of the nature of subjective inquiries into official discretionary conduct.138 An official's judgment in performing his discretionary duties is almost inevitably influenced by his values and experiences. An official's subjective good faith is, therefore, frequently considered a genuine issue of material fact.139 The Harlow Court also stated that subjective inquiries usually entail broad-range discovery and the deposing of numerous persons because there is often no clear end to the relevant evidence involved in questions of intent.140 The qualified immunity doctrine is designed to balance important societal objectives,141 and the subjective element has tipped the balance of these objectives in favor of redressing violations of individual citizens' rights and against the vigorous exercise of official authority free from threats of potential suits.142 The Harlow Court believed that this resulted in excessive disruption of governmental decision-making and therefore eliminated the subjective element from the qualified immunity defense.143

The revised qualified immunity standard relies on the objective reasonableness of an official's conduct as measured by reference to clearly established law.144 The Supreme Court held that a trial judge must first determine

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136. Id. at 187-88.
139. Id.
140. Id. at 817.
141. Id. at 814-17. See supra note 22.
143. Id.
144. Id.
whether or not the applicable law was clearly established at the time of the official’s conduct. Until this threshold question is resolved, discovery should not be allowed. If the law at the time was not clearly established, the official would be entitled to immunity since he could not be expected to anticipate future legal developments or to know that his conduct was illegal. If the law at the time was clearly established, however, the inquiry focuses on the objective question of whether a reasonable official would believe the defendant’s action to be lawful in light of the established law and the particular circumstances.

The District of Columbia Court of Appeals stated that the problem presented in Halperin is how a court should apply the objective qualified immunity standard when violation of the law in question is dependent upon a defendant’s intent. The Harlow decision did not address this issue because the revised objective qualified immunity standard does not extend to such an inquiry. Whether the law in question was clearly established and the objective reasonableness of a defendant’s actions in light of this law is the focus of the inquiry. The Halperin court responded by holding that in situations where officials claiming immunity profess to have been motivated by national security concerns, an objective inquiry into the pretextuality of their purpose is appropriate. Through this process, the court shifted its

145. Id. See also Anderson v. Creighton, 107 S. Ct. 3034, 3039 (1987) (applicable law must be clearly established in a more particularized sense: “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . . in the light of preexisting law the unlawfulness must be apparent.”).
147. Id.
148. Id. at 818-19; Anderson v. Creighton, 107 S. Ct. at 3040.
149. Halperin v. Kissinger, 807 F.2d at 184. See also Smith v. Nixon, 582 F. Supp. 709, 715 (D.D.C. 1984) (the problem presented in “improper purpose” wiretap cases after Harlow is that questions regarding purpose or rationale are not segregable from improper inquiries into motive).
150. Halperin v. Kissinger, 807 F.2d at 184. See also Kenyatta v. Moore, 744 F.2d 1179, 1185 (5th Cir. 1984) (because the Supreme Court in Harlow did not purge constitutional doctrine of all subjective issues, it did not totally eliminate subjective inquiry from every qualified immunity analysis: some laws may be violated by conduct performed with permissible intent but not by the same conduct performed with permissible intent, cert. denied, 471 U.S. 1066 (1985); Hobson Stathos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984) (to be held liable under § 1983, the law was clear that the defendant officials must have purposefully discriminated against the plaintiffs); Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984) (Harlow’s concerns will be adequately addressed by requiring that plaintiffs present some factual allegations to support claims of unconstitutional motive), cert. denied, 470 U.S. 1084 (1985). But see Mitchell v. Forsyth, 472 U.S. 511, 517 (1985) (Harlow removed all subjective components from the qualified immunity doctrine); Davis v. Scherer, 468 U.S. 183, 191, reh’g denied, 468 U.S. 1226 (1984) (Harlow rejected inquiries into state of mind and no other circumstances beyond the objective reasonableness of an official’s conduct are relevant to the issue of qualified immunity); Tubbesing v. Arnold, 742 F.2d 401, 405 (8th Cir. 1984) (since whether or not defendants are entitled to qualified immunity depends only upon the objective reasonableness of their conduct, disputed factual issues concerning malice are irrelevant to the determination of qualified
focus from the threshold question of whether or not a law was clearly established followed by a subsequent objective inquiry as directed by Harlow, to whether or not the defendants had violated the law. The court must have recognized this shift because although it noted that its decision was in keeping with the Harlow Court’s intent, it stated that further inquiry was necessary and it based its analysis on past precedent which supports special treatment for national security matters.\textsuperscript{151} The Halperin court’s holding, however, extends Harlow without any indication from the Supreme Court that such an extension is appropriate and carves out an exception for applying the qualified immunity doctrine.

The Halperin court did begin its analysis by examining the threshold questions of whether or not the fourth amendment’s warrant and reasonableness requirements and Title III requirements were clearly established during 1969-1971.\textsuperscript{152} The court concluded that the fourth amendment’s warrant requirement, as it related to national security matters, was not clearly established during that time frame,\textsuperscript{153} and that the Title III exception pertaining to the President’s power to protect national security information was clearly established during that time.\textsuperscript{154} The majority of the court also found that the fourth amendment’s reasonableness requirement was clearly established during 1969-1971.\textsuperscript{155} The Halperin court did not, however, continue its analysis as directed by Harlow. An application of Harlow would next focus on the objective reasonableness of the defendants’ actions in light of Title III and the fourth amendment’s reasonableness requirements and would preclude any inquiry into whether or not the defendants were actually motivated by national security concerns when initiating and continuing the wiretap.\textsuperscript{156} The Halperin court held that the defendants were entitled to qualified immunity if their purported national security motivation was reasonable because the legality of the wiretap under the fourth amendment and Title III depended on the purpose of the wiretap.\textsuperscript{157} The Halperin court focused on a subjective inquiry, which is exactly what the Supreme Court rejected in Harlow.\textsuperscript{158} A literal application of Harlow’s qualified immunity standard would entitle the defendants to qualified immunity for not obtaining a warrant before

\textsuperscript{151} Halperin v. Kissinger, 807 F.2d at 187-88.
\textsuperscript{152} Id. at 183.
\textsuperscript{153} Id. at 192. See supra notes 89 & 114.
\textsuperscript{154} Halperin v. Kissinger, 807 F.2d at 185. See supra notes 87 & 111.
\textsuperscript{155} Halperin v. Kissinger, 807 F.2d at 194 (concurrence). See supra note 118. But see supra note 117 (Circuit Justice Scalia cites opinions in support of his contention that the fourth amendment’s reasonableness requirement was not clearly established as it related to national security matters in 1969-1971).
\textsuperscript{156} Harlow v. Fitzgerald, 457 U.S. at 815-19.
\textsuperscript{157} Halperin v. Kissinger, 807 F.2d at 184-85.
\textsuperscript{158} Harlow v. Fitzgerald, 457 U.S. at 815-19.
initiating the wiretap on the Halperin's telephone because the fourth amendment's warrant requirement in relation to national security matters was not clearly established until the Supreme Court's Keith decision in 1972. Under Harlow, an official is not expected to predict the future course of the law and is not held to what is not clearly established at the time of the official’s conduct. Although the Halperin majority held that the fourth amendment's reasonableness requirement was clearly established in 1969, there is support for Circuit Justice Scalia's contention that it was not clearly established as it related to national security matters. Under Harlow, if this requirement was not clearly established, the defendants would be entitled to qualified immunity for the duration and scope of the wiretap because officials are not expected to know that the law prohibits conduct not previously identified as unlawful. If the fourth amendment's reasonableness requirement was clearly established, the court would then examine the defendants' actions in light of this requirement to determine whether a reasonable official would think the duration and scope of the wiretap was lawful under the circumstances. The court found that Title III requirements were clearly established and that the Halperin wiretap would fall under a Title III exception if it was instituted for national security purposes. A proper application of Harlow would thus inquire whether a reasonable official under the circumstances would believe that the wiretap was instituted for national security purposes.

The Halperin court identified the law in this area as clear or unclear solely as it related to national security matters. In applying Harlow, however, the court held that an objective inquiry into the actual purpose of the wiretap was necessary, whether or not the law was clearly established. A correct application of Harlow would instead focus on the objective reasonableness of the defendants' actions in those areas where the law was clearly established. The defendants' actual intent in initiating and continuing the wiretap is not part of the Harlow inquiry, even if the Halperin court states that this intent is only looked at objectively and not subjectively.

A narrow interpretation of Halperin demonstrates its application to cases in which a government official claims to have been motivated by national security concerns. The court stated that exceptions have been made for national security matters in other areas of the law and that an inquiry into the defendants' motives would not violate the Harlow Court's objectives.

162. Id. at 192. See supra notes 117 & 155.
166. Id. at 187-88. See supra note 122.
The court proceeded to explain that the separation of powers concerns are especially important in the national security field, and the governmental interest in decision-making in this area is particularly important. The court concluded that it was providing officials with additional protection through its interpretation of Harlow's objective standard in a national security context.

The Halperin court's interpretation of the Harlow standard, however, would not provide these defendants, or other officials claiming an entitlement to qualified immunity in similar situations, with increased protection from claims against them proceeding to trial. Interjecting a subjective element back into the qualified immunity doctrine would result only in increased discovery and an increased likelihood of denial of an official's motion for summary judgment. Thus, the balance of the qualified immunity doctrine's objectives would once again tip in favor of individual citizens' rights and against the vigorous exercise of official authority. Government officials performing national security functions would receive increased protection from suit by an application of Harlow's objective inquiry, but they would receive decreased protection by the Halperin court's interpretation of this inquiry.

A broad interpretation of Halperin demonstrates its application not only to cases in which an official claims the existence of a particular motive, such as national security, but also to cases in which an official denies the existence of a particular motive, such as purposeful discrimination. The Halperin court acknowledged that not only is it common for a plaintiff's claim to rest on an official's lack of necessary motive, such as in the national security context, but also that it is even more common for a claim to rest on the existence of an illegal motive, such as racial or political discrimination. This would increase the likelihood of subjective inquiries in a large number of cases brought against government officials and negate Harlow's objective of eliminating subjective inquiries. In particular, officials defending against allegations of constitutional violations would almost always be confronted with subjective inquiries into their motives. These officials would receive less protection from the Halperin court's approach.

The Halperin court stated that it applied the modified qualified immunity doctrine to a case in which the law in question makes an official's conduct legal or illegal depending upon the intent with which it is performed. Since the 1982 Harlow decision, the Supreme Court has described Harlow as favoring a totally objective inquiry and removing all subjective components from the qualified immunity doctrine. The Court has not provided any

168. Id. See supra note 121.
170. Id. at 186.
171. Id. at 184.
guidance to lower courts applying Harlow to situations such as that confronted in Halperin.\textsuperscript{173}

The strength of the Halperin decision is that it interpreted and applied Harlow in a manner that attempted to answer the questions which Harlow did not address. The Halperin court's decision shows the difficulty of fashioning a purely objective inquiry to claims against government officials. The Harlow Court, however, believed that officials were unduly restrained in executing their discretionary functions and modified the qualified immunity doctrine to favor these officials.\textsuperscript{174} The weakness of the Halperin court's analysis and holding is that it reintroduces subjective inquiry into the qualified immunity doctrine and negates Harlow's objective of eliminating such inquiries. The Halperin decision again subjects officials to an increased risk of trial and an inhibition of discretionary action. Restraining governmental decision-making, especially in the national security context, is potentially dangerous because it negatively affects the Nation's ability to defend itself and its vital interests.\textsuperscript{175}

IV. IMPACT OF HALPERIN V. KISSINGER

The Halperin decision reintroduces a subjective inquiry into the qualified immunity doctrine and thus decreases the protection afforded to government officials from liability for alleged constitutional and statutory violations. This result is contrary to the Harlow Court's holding and increases the likelihood that officials will be subjected to the risks of trial, burdens of broad-range discovery, inhibitions of discretionary action, and distractions from governmental responsibility.

The qualified immunity doctrine attempts to balance two societal objectives: to provide redress for citizens whose rights have been violated and to support the vigorous exercise of official duties so that our government functions effectively.\textsuperscript{176} The Harlow Court adjusted the balance of these competing values because it believed that the qualified immunity doctrine's subjective inquiry unduly hampered governmental decision-making.\textsuperscript{177} The

\textsuperscript{173} Mitchell v. Forsyth, 472 U.S. 511 (1985), is the only Supreme Court case since the 1982 Harlow decision that dealt with the application of the objective qualified immunity standard in a national security context. The Court, however, did not respond to the plaintiff's claim that the wiretap was not actually initiated for national security purposes. The Court instead deferred to the lower court's decision, which took the Attorney General at his word that the wiretap was a national security interception. Id. at 535-36 n.13.

\textsuperscript{174} Harlow v. Fitzgerald, 457 U.S. at 817-18.

\textsuperscript{175} See generally Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting) ("the most basic function of any government is to provide for the security of the individual and his property"); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("civil liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses").

\textsuperscript{176} Harlow v. Fitzgerald, 457 U.S. at 813-14; Butz v. Economou, 438 U.S. at 504-06. See supra note 22.

\textsuperscript{177} Harlow v. Fitzgerald, 457 U.S. at 818.
result of Harlow increased the protection afforded to officials in performing their discretionary responsibilities. The effect of Halperin is to readjust the balance of these societal values in favor of individual citizens who seek redress for purported violations of their rights.

The compelling interests addressed in Halperin stress the impact of this decision. Halperin represents the conflict between the plaintiffs’ right to privacy and the government’s need to safeguard the Nation’s security. The significance of these competing interests is particularly strong and an acceptable balance between the two is often tenuous. The Supreme Court and Congress have recognized that unreasonable electronic surveillance substantially injures personal rights. The Court, however, has deferred to presidential decisions to protect the Nation’s security, even at the expense of individual rights. The Halperin court’s decision to examine the defendants’ motive for initiating and continuing the wiretap sends a message to lower courts that an individual's right to privacy may outweigh the government’s interest in national security matters. In addition, it is common for plaintiffs’ claims to rest not only on an official’s lack of necessary motive, such as in the national security context, but also on the presence of an illegal motive, such as purposeful discrimination. If the Halperin decision is interpreted expansively and applied to the latter type of claim, subsequent court decisions will have to address this shift in balance in favor of citizens’ rights and against vigorous governmental decision-making where an official denies the existence of a particular motive. The Halperin decision will force other courts to determine whether Harlow or Halperin more appropriately applies to a given situation. Given the frequency with which plaintiffs’ claims rest on the absence or presence of an official’s motive, courts will be more likely to look to Halperin for guidance. The effect of such a result would be to gradually erode the impact of the Harlow decision.

The Halperin decision demonstrates the difficulty involved in trying to apply a purely objective inquiry to claims against government officials. The

178. Id. at 816-19.
180. Halperin v. Kissinger, 606 F.2d at 1198. See also United States v. Robel, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (right to privacy is highly valued and every unreasonable government invasion of this right is a violation of the fourth amendment).
184. Id.
Harlow decision expresses the unacceptability of allowing subjective inquiries based on such claims. It is difficult to imagine the Supreme Court readjusting the balance of competing values every few years to favor one approach over the other and yet it may be undesirable and impractical to try and consistently favor uninhibited official discretionary decisions over redressing injuries sustained because of governmental action. The Supreme Court could adopt a balancing test as part of the qualified immunity doctrine. In each case where an official claims qualified immunity, whether the applicable law is clearly established or not, the courts would balance the plaintiff's constitutional and statutory rights and the importance of redressing injury against the government interest in freely exercising discretionary responsibility in a specific area.

The majority of constitutional rights enjoyed by citizens are not expressed in absolute terms and, therefore, are subject to a balancing of interests. The courts would first need to identify whether the applicable law was clearly established and if it was, whether the defendant acted reasonably in light of this law. The courts then would identify the plaintiff's and defendant's interests in a particular case. For example, the interests involved in Harlow are the plaintiff's first amendment right to freely provide congressional testimony regarding Department of Air Force cost overruns and the government's interest in not having internal difficulties made public and thereby erode public confidence in the Department. In Halperin, the interests involved are the plaintiffs' fourth amendment right to be free from unreasonable governmental searches and seizures and the government's need to safeguard the Nation's security.

The courts would next weigh the plaintiff's rights and the importance of redressing injury against the government's interest. If the plaintiff's interest was found to outweigh the government interest, and the applicable law was clearly established, the defendant government official would not ordinarily be entitled to qualified immunity. If the government interest outweighed the plaintiff's interest, and the applicable law was not clearly established, the official would be entitled to qualified immunity and, therefore, not subject to liability for actions taken in the exercise of his official discretion and decision-making. If the plaintiff's interest outweighed the government interest and the law was not clearly established, immunity still may not be granted, even though the official would not be expected to know that his conduct was illegal. In this situation, the strength of the plaintiff's interest and the importance of redressing any injury sustained could defeat the claim of qualified immunity. If the government's interest outweighed the plaintiff's interest and the law was clearly established, the reasonableness of the defen-

186. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.7 (3d ed. 1986). See also United States v. United States District Court (Keith), 407 U.S. 297, 314 (1972) (because the fourth amendment is not absolute in its terms, the Court must examine and balance the basic values involved in this case).
dant's actions in light of the law may tip the balance in favor of granting the defendant qualified immunity. In Harlow, the government interest would most likely not outweigh the plaintiff's right to free speech. If the court found that the law was clearly established, the defendant officials would not be entitled to qualified immunity and would be subject to a suit for damages for violating the plaintiff's rights. If the court found that the law was not clearly established, the officials still may be liable depending on the strength of the plaintiff's interest. The Supreme Court has previously deferred to governmental decisions to protect the Nation's security, and in Halperin, the government's interest would thus outweigh the plaintiffs' fourth amendment rights. In this case, the defendant officials would be entitled to qualified immunity and not subject to suit for instituting the warrantless wiretap if the defendants' actions were reasonable, even if the applicable law was clearly established. To decrease the likelihood of official abuse of authority in areas where the government interest would most often outweigh a plaintiff's rights, such as in the national security context, the court could require that the government action be the least restrictive alternative means for accomplishing the government objective.

Application of a balancing test to determine whether a government official is entitled to qualified immunity would give the courts increased discretionary responsibility and require a more careful case-by-case analysis. This approach, however, would not reintroduce a subjective inquiry and would be more likely to achieve an acceptable balance of the competing societal objectives addressed by the qualified immunity doctrine.

V. CONCLUSION

In Halperin II, the District of Columbia Court of Appeals was consistent with previous Supreme Court decisions in holding that defendant government officials were entitled only to a partial qualified immunity from suit for instituting a purported national security wiretap. Contrary to previous Supreme Court rulings, the court applied the qualified immunity objective test in a manner which focused on a subjective analysis and concluded that an objective inquiry into the actual purpose of the wiretap was appropriate.

The Halperin court's holding decreases the protection afforded to government officials from liability for alleged constitutional and statutory violations. This decision increases the likelihood that officials will be subjected to the risks of trial, burdens of broad-range discovery, inhibitions of discretionary action, and distractions from governmental responsibility. The court's holding readjusts the balance of competing values addressed by the qualified immunity doctrine and tips this balance in favor of an individual's right of privacy and against the government's interest in uninhibited decision-making as it relates to protecting the Nation's security. Restraining governmental decision-making, especially in the national security context, is potentially

187. See supra note 182.
dangerous because it negatively affects the Nation’s ability to defend itself and its vital interests.

The Supreme Court should adopt a balancing test as part of the qualified immunity doctrine. In each case where an official claims qualified immunity, the court would balance the plaintiff’s constitutional and statutory rights and the importance of redressing injury against the government interest in freely exercising discretionary responsibility in a specific area. To decrease the likelihood of abuse of official authority, the Supreme Court should require that when the government interest outweighs the plaintiff’s interest, the government employ the least restrictive alternative available to accomplish the government’s goal.

*Gayle M. Erjavac*