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Absolute Immunity: General Principles and Recent Developments

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ABSOLUTE IMMUNITY: GENERAL PRINCIPLES AND RECENT DEVELOPMENTS

*Erwin Chemerinsky**

When individual government officers are sued for money damages they generally have either absolute or qualified immunity. The Supreme Court has said qualified immunity is the norm; absolute immunity is the exception.¹ This discussion focuses on the general principles of absolute immunity and then on the cutting-edge issues and recent developments with regard to absolute immunity.

I. OVERVIEW OF THE ENTITLEMENT TO ABSOLUTE IMMUNITY

How do courts determine who has absolute, as opposed to qualified, immunity? The Supreme Court has looked to a combination of historical and functional considerations in deciding whether to grant absolute immunity.² The Court looks to the nature of the immunity in 1871 when Section 1983 was adopted.³ The Court does

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¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 810-11 (1982) (holding absolute immunity is appropriate in limited circumstances (judicial, prosecutorial, and legislative functions), whereas executive officials only receive qualified immunity, which is the norm).

² *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (explaining how the Court has generally looked at a "historical or common-law basis" to determine the immunity in question); *Harlow*, 457 U.S. at 810-11 ("[I]n general our cases have followed a 'functional' approach to immunity law.").

³ *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993) ("[S]ome officials perform 'spe-

not conduct the research—the lawyers do—and they ask, as to the most comparable position that existed: What was the nature of tort immunity that existed then? This assumes a unanimity that rarely existed among the states in 1871. For example, the Supreme Court has said judges have absolute immunity under Section 1983 because the statute was written against the backdrop of common law immunity and judges had absolute immunity in 1871.⁴ Randolph Block, as a law professor at DePaul University School of Law, wrote an article twenty-five years ago where he researched every state that existed in 1871.⁵ He found a majority of those states did not accord absolute immunity. In fact, only a minority provided absolute immunity.⁶ Yet, the Supreme Court still extrapolated from those facts the rule of absolute immunity for judges today.⁷

The Court also looks to functional considerations, such as how often an office holder was sued for money damages and how much such suits interfered with the function of the office.⁸ In saying

cial functions' which, because of their similarity to functions that would have been immune when Congress enacted Section 1983, deserve absolute protection from damages liability.”)

⁴ *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (noting the long standing absolute “immunity of judges from liability for damages for acts committed within their judicial jurisdiction” at common law). See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872) (reasoning judges are exempt for their judicial acts “in all countries where there is any well-ordered system of jurisprudence”).

⁵ J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 899 (1980).

⁶ *Id.* (citing Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326-27 (1969-1970)) (“By 1871, thirteen states had adopted the absolute immunity rule [and] six states had ruled that judges were liable if they acted maliciously.” (alteration in original)).

⁷ See *Bradley*, 80 U.S. at 347.

⁸ *Harlow*, 457 U.S. at 814. “[T]here is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (alteration in original)).

that an elected official cannot be sued for acts he performed as President, the Court focused on the functional considerations of the frequency of suit and the interference with the function of the office. Likewise, the Court discussed its holding that police officers could not be sued for damages regarding their testimony as witnesses. Furthermore, the Court expressed concern over how many convicted defendants might sue police officers for their testimony and how much it would interfere with the function of the office.

A second general principle is that absolute immunity goes to the task, not to the office. This means a couple of things. Even office holders who are protected by absolute immunity only receive absolute immunity for certain tasks, not all of them. For instance, prosecutors have absolute immunity, but only for prosecutorial actions; judges have absolute immunity for their judicial acts, but not for administrative acts; legislators have absolute immunity for their legislative functions, but not for administrative tasks.

Another concept to understand regarding absolute immunity attaching to the task and not the office is that individuals, even if they do not have the office title, receive absolute immunity. One of the most important developments in this area is the granting of absolute judicial immunity to people one would never think of as judges: administrative or executive officials performing judicial tasks. Currently, there is a trend towards expanding absolute immunity from police officers serving as witnesses, to others testifying as witnesses, and even those providing affidavits. It is important to constantly remember that absolute immunity is something that goes with the task,

not with the office.

A third principle is that generally, with a few exceptions, absolute immunity claims are for money damages, not for injunctive relief.⁹ For example, judges, as a result of a 1996 federal law, generally have absolute immunity against suits and injunctions. Also, legislators have absolute immunity for injunctions for legislative functions. Otherwise, absolute immunity concerns damages, not injunctive relief.

Finally, the denial of absolute immunity is immediately appealable. The general rule is there are no interlocutory appeals in federal court. However, in *Mitchell v. Forsyth*, the Supreme Court held that absolute immunity is an immunity from suit and the denial of absolute immunity is therefore immediately appealable.¹⁰ In fact, the Supreme Court has even approved multiple appeals in terms of interlocutory review. In *Behrens v. Pelletier*, the Supreme Court said if immunity is raised and denied on a motion to dismiss, then it can be appealed.¹¹ If the court of appeals affirms the case and sends it back to the district court, the question becomes whether it is a motion to be addressed on summary judgment. It can be appealed at that level if the motion had been denied. If there is an interlocutory appeal, even multiple interlocutory appeals, it can become a motion to dismiss at the summary judgment stage.

⁹ *Pulliam v. Allen*, 466 U.S. 522, 541-42, 544 (1984) (making clear the absolute immunity of judges does not bar prospective relief, and although it is generally a bar to monetary damages, it is not a bar to an award of attorney's fees). See also *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

¹⁰ *Mitchell*, 472 U.S. at 519.

¹¹ 516 U.S. 299, 307 (1996).

II. ABSOLUTE IMMUNITY FOR PROSECUTORS

At this moment in time, the Supreme Court has approved absolute immunity in five contexts. The first is for prosecutors performing prosecutorial acts. There have been four Supreme Court cases on this point in terms of when prosecutors are entitled to absolute immunity.

The initial and key case was *Imbler v. Pachtman*.¹² In this case, a prosecutor knowingly used perjured testimony, and an innocent person was convicted and sentenced to nine years in prison. The person sued the prosecutor for money damages.¹³ The Supreme Court said prosecutors have absolute immunity for their prosecutorial acts and only qualified immunity for investigative or administrative acts.¹⁴ However, the Court did not elaborate as to what constitutes prosecutorial action versus what makes action administrative or investigative. This is a distinction courts continue to apply and struggle with, though the *Imbler* Court found the use of testimony at trial, even perjured testimony, was prosecutorial in nature.¹⁵ It is also important to realize this distinction does not come from statutes or from common law; it was created by the Supreme Court and remains a holding with which lower courts struggle.

The next effort by the Supreme Court to clarify this distinc-

¹² 424 U.S. 409 (1976).

¹³ *Imbler*, 424 U.S. at 414-16.

¹⁴ *Id.* at 430.

¹⁵ *Id.* at 430-31 (stating the prosecutor's activities were "intimately associated with the judicial phase of the criminal process").

tion was in *Burns v. Reed*.¹⁶ *Burns* is a case with colorful facts. A woman awoke one night to discover her two sons had been shot. Thankfully, both fully recovered. The police had no suspects but focused on the mother, Cathy Burns.¹⁷ Written in lipstick on the mirror in her bathroom were the words, “I have taken from you what you love the most.” Interestingly, the handwriting was from a left-handed person, and Cathy Burns was right-handed. They gave her a lie detector test and a voice stress test.¹⁸ She passed both, but the police still had no suspects.

An officer developed a theory that Cathy Burns had multiple personality disorder, and one of her alternate personalities was responsible.¹⁹ The officer called the local prosecutor, Rick Reed, and asked for permission to have Cathy Burns hypnotized to determine whether she suffered from multiple personality disorder. According to the Seventh Circuit’s opinion, the police officer hired a friend, a grocery store clerk who had just completed a course in hypnosis, to perform the analysis. Soon after, the police officer’s friend hypnotized Cathy.

At one point, while under hypnosis, she referred to herself by another name in the third person. Based on this revelation, the officer concluded she suffered from multiple personality disorder and the prosecutor obtained a warrant for her arrest. The prosecutor never disclosed to the judge that hypnosis was used, nor did he disclose that

¹⁶ 500 U.S. 478 (1991).

¹⁷ *Burns*, 500 U.S. at 481.

¹⁸ *Id.* at 481-82.

¹⁹ *Id.* at 482.

Cathy was told under hypnosis to fully answer all questions put to her by the police officers. As a result, Cathy lost her job, and for a period of time, also lost custody of her children. Ultimately, she was exonerated because there was no evidence linking her to the crimes. Subsequently, she filed suit against the prosecutor and some of the police officers. The officers settled, but the prosecutor asserted absolute immunity.²⁰ The Supreme Court held that the prosecutor had absolute immunity for his prosecutorial act of going into court and requesting the arrest warrant, but that the prosecutor had only qualified immunity for the investigative act of approving the hypnosis.²¹ This case follows the *Imbler* distinction while clarifying that the distinction is fine.

In the third case, *Buckley v. Fitzsimmons*, a high profile, publicized murder occurred in the suburbs of Chicago.²² The sheriff was eligible for reelection. Right before his reelection, he held a press conference announcing the capture of the culprit, and gave the individual's name. The key evidence to the crime were footprints left at the scene. The prosecutor went to experts all over the country trying to match the bootprints to the defendant's boots. Every expert questioned found no match, until the prosecutor finally found one expert in North Carolina who said not only could she testify that the bootprints match, but also that only this person could have made those bootprints. This expert had a theory that every person has a unique

²⁰ *Id.* at 483.

²¹ *Id.* at 492, 496 (explaining absolute immunity was necessary for prosecutorial independence in furtherance of their duties).

²² *Buckley*, 509 U.S. at 261.

walk, and she claimed she could match bootprints to specific individuals. We now know a number of innocent people were convicted, in part, by her testimony. Ultimately, the individual in this case was completely exonerated and he sued the prosecutor.²³ The innocent individual brought two claims—first, for holding the press conference, and second, for allegedly fabricating evidence by shopping for a witness to provide testimony.²⁴

In a unanimous decision, the Supreme Court ruled that when a prosecutor holds a press conference, the action is administrative, not prosecutorial.²⁵ Therefore, there was no basis for absolute immunity.²⁶ To suggest an example, imagine a prosecutor named Mike Nifong, and imagine he holds press conferences making statements to the press declaring the guilt of three Duke University lacrosse players. It is clear, after *Buckley*, that he has no prosecutorial immunity for his statements to the press.

As to fabricating evidence, the Supreme Court said, in a five-four decision, this too is protected by qualified, not absolute immunity, but is a much more difficult issue to resolve.²⁷ Obviously, a prosecutor seeks evidence for use at trial. However, this is a function traditionally performed by the police. That is why the Court saw this

²³ *Id.* at 261-64.

²⁴ *Id.* at 261. The “expert” witness who made the positive identification was an anthropologist who was allegedly “well known for her willingness to fabricate unreliable expert testimony.” *Id.* at 262.

²⁵ *Id.* at 278.

²⁶ *Id.* at 277.

²⁷ *Buckley*, 509 U.S. at 275 (reasoning that the defendant may only be protected by qualified immunity because absolute immunity was not given at common law for fabricating evidence).

as investigative, not prosecutorial. However, this also shows how fine the distinction can be.

Another Supreme Court case dealing with the absolute immunity of prosecutors is *Kalina v. Fletcher*.²⁸ In this case, computers were stolen from a school. The police and the prosecutor focused on an individual, and the prosecutor filled out an application for an arrest warrant for this suspect. The application pointed to two key facts linking the suspect to the crime. First, the suspect's fingerprints were found on the partitions in the school, near the area where the computers were stolen. Second, the prosecutor stated the suspect went to local computer stores to check the price of the same computers that were stolen. Unfortunately, there was a problem with both of these facts. As to the partitions, the suspect installed them in the school himself, so it made sense his fingerprints were on them. But this fact was never disclosed in the warrant application. Secondly, the allegations he went to computer stores to price them were baseless. He never did, and there was no factual support for that fact. As a result, the individual was exonerated and sued the prosecutor.²⁹

The Supreme Court held that going to court and obtaining the arrest warrant was protected by absolute immunity, but filling out the declaration in support of the arrest warrant was only protected by qualified immunity.³⁰ Additionally, the Court stated that police offi-

²⁸ 522 U.S. 118 (1997).

²⁹ *Kalina*, 522 U.S. at 122.

³⁰ *Id.* at 122-23, 129. The court found filling out a declaration of probable cause is only protected by qualified immunity because “[a]lthough the law require[s] [the] document to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification.” *Id.* at 129-30.

cers receive qualified immunity when they fill out the declarations in support of arrest warrants, therefore the prosecutor should receive the same immunity as an officer would.³¹ Notice how fine the distinction is. Going to court for an arrest warrant entitles an official to absolute immunity. Filling out the declaration for that same arrest warrant only entitles an official to qualified immunity. It seems the Supreme Court distinguishes between what is done in-court and what is done out-of-court. In this case, the prosecutor's action in-court was protected by absolute immunity, while his actions out-of-court were only given qualified immunity. The Court is also looking to see if this is something traditionally done by the prosecutor, or something traditionally done by the police or others. If it is the latter, only qualified immunity would be granted.

III. EXTENDING PROSECUTORIAL IMMUNITY

Three recent cases with regard to prosecutors are representative of some of the cutting-edge issues. The first recent case, *Shmueli v. City of New York*,³² involved Linda Fairstein, a former Assistant District Attorney. She allegedly engaged in malicious criminal prosecution of a woman who harassed her partner. Ultimately, all the charges were dismissed. The woman sued Fairstein and another attorney for malicious prosecution, asking for \$100 million in both compensatory and punitive damages.³³ The question was whether improper motivation was a proper basis for suit.

³¹ *Id.* at 126.

³² 424 F.3d 231 (2d. Cir. 2005).

The Second Circuit, in an opinion by Judge Kearse, held that the prosecutor was protected by absolute prosecutorial immunity.³⁴ The Second Circuit found that a key aspect of absolute prosecutorial immunity for courts to inquire into is the underlying motivations of prosecutors.³⁵ The plaintiff alleged Fairstein was a close friend of Lieberman, the woman's former partner, as well as the man who was allegedly criminally harassed. Furthermore, the prosecution was started because of this friendship.³⁶ The Second Circuit said that the motivation was irrelevant; Fairstein's acts were prosecutorial and, even if there was an improper motive, she was protected.³⁷

*Yarris v. County of Delaware*³⁸ is a particularly important case. An innocent man was convicted of murder and spent twenty-two years in prison. Ultimately, DNA evidence exonerated him. He sued the prosecutor for many things, including the destruction of exculpatory evidence and failure to turn over exculpatory evidence as required under *Brady v. Maryland*.³⁹

In *Yarris*, the Third Circuit drew a distinction between de-

³³ *Shmueli*, 424 F.3d at 235.

³⁴ *Id.* at 239.

³⁵ *Id.* at 237 (“[T]he prosecutor is shielded from liability for damages for commencing and pursuing the prosecution, regardless of any allegations that his actions were undertaken with an improper state of mind or improper motive.”).

³⁶ *Id.* at 234. The prosecutor and Lieberman cohabitated for two years until the plaintiff asked Lieberman to move out. *Id.* The plaintiff alleged that Lieberman told her “he and his ‘friend ADA Fairstein’ would ‘make her life miserable if Plaintiff did not continue the relationship’” *Id.* at 234.

³⁷ *Id.* at 237 (stating the “initiation and pursuit of a criminal prosecution are quintessential prosecutorial functions” and are protected by absolute immunity).

³⁸ 465 F.3d 129 (3d. Cir. 2006).

³⁹ *Yarris*, 465 F.3d at 131, 141. So-called *Brady* material is any evidence tending to exonerate the accused. Prosecutors are under a legal duty to disclose such evidence to the suspect prior to trial. *Brady*, 373 U.S. 83, 87 n.3 (1963).

stroying evidence and failing to turn it over to the accused.⁴⁰ The Third Circuit held it was not part of a prosecutor's job to destroy evidence.⁴¹ When a prosecutor destroys exculpatory evidence, it is not a prosecutorial act, and thus only qualified immunity applies.⁴² Conversely, under *Brady*, it is quintessentially a prosecutorial act to turn over exculpatory evidence.⁴³ If the prosecutor fails to comply with his or her *Brady* obligations, that failure is protected by absolute immunity.⁴⁴ It is interesting to think of *Brady* as regarding prosecutorial or investigative acts. Here, the Third Circuit, and most of the other related cases, treat the prosecutor's *Brady* obligations as prosecutorial.

In *Genzler v. Longanbach*,⁴⁵ a Ninth Circuit case from 2005, the prosecutor and police officers attempted to speak to prospective witnesses. Allegedly, they intimidated the witnesses, attempting to get them to change their testimony, and even tried to have them testify perjurally.⁴⁶ The question was whether a prosecutor who met with witnesses and acted improperly engaged in actions that were prosecutorial or investigative in nature? The Ninth Circuit held such acts to be investigative in nature because police officers traditionally arraigned witnesses.⁴⁷ The action was something that occurs outside

⁴⁰ *Yarris*, 465 F.3d at 136-137.

⁴¹ *Id.* at 136.

⁴² *Id.* at 136-37.

⁴³ *Id.* at 137, 141 (citing *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427, 442 (3d Cir. 2005)).

⁴⁴ *Id.* at 141.

⁴⁵ 410 F.3d 630 (9th Cir. 2005).

⁴⁶ *Genzler*, 410 F.3d at 634.

⁴⁷ *Id.* at 641 (reasoning the prosecutor was "in the process of acquiring or manufacturing

the courtroom. On the other hand, a prosecutor traditionally goes to talk to witnesses to arrange for their testimony at the forthcoming trial, so it does not make sense to draw this distinction.

IV. JUDICIAL ABSOLUTE IMMUNITY

Judges performing judicial tasks also receive absolute immunity.⁴⁸ But in *Forrester v. White*,⁴⁹ the Supreme Court held judges only have qualified immunity for administrative tasks.⁵⁰ In terms of its scope, there have been two major Supreme Court cases regarding a judge's qualified immunity. One is *Stump v. Sparkman*,⁵¹ where an Indiana woman went to see a judge in his chambers regarding her teenage daughter, who was staying out at night and likely to get in trouble. The mother did not think her daughter was very bright, even though her daughter was at a grade level appropriate for her age in school; she asked the judge to sign an order to have her daughter surgically sterilized. The judge issued such an order and the girl was told she was having an appendectomy. A few years later, when she tried to become pregnant, she learned a tubal ligation had been performed instead. She then sued the judge.⁵²

It is important to note the judge had no authority under Indi-

evidence during the performance of police-type investigative work”).

⁴⁸ *Mireles v. Waco*, 502 U.S. 9, 12-13 n.4 (1991) (“[T]his Court’s precedents acknowledge[d] . . . a judge is immune from a suit for money damages.”).

⁴⁹ 484 U.S. 219 (1988). Cynthia Forrester, a probation officer, contended her demotion and discharge were a result of sexual discrimination. *Id.* at 220-21. Howard Lee White was the Circuit Judge who discharged Forrester from her position. *Id.* at 221.

⁵⁰ *Forrester*, 484 U.S. at 228-230. In *Forrester*, the administrative task carried out by Judge White was demoting and discharging the plaintiff. *Id.* at 229.

⁵¹ 435 U.S. 349 (1978).

⁵² *Stump*, 435 U.S. at 351-53.

ana law to issue such an order—no case was ever filed in the judge’s court, no docket number was ever assigned, no notice was ever given to the girl, and no hearing was ever provided.⁵³ Nevertheless, the Supreme Court ruled the judge was protected by absolute judicial immunity.⁵⁴ The Court looked to the common law backdrop for Section 1983.⁵⁵ In doing so, it found judges had absolute immunity, and this action should be regarded within the scope of the judge’s duties.⁵⁶ From this case, the scope of judicial duties was very broad.

The breadth with which the Supreme Court defined the scope of judicial duties is illustrated in *Mireles v. Waco*.⁵⁷ In *Mireles*, a public defender failed to appear in court for the morning calendar call. The judge allegedly instructed a pair of police officers to find the attorney and rough him up, in an effort to show him he could not ignore the judge’s expectations in his own court. The attorney alleged the officers proceeded to drag him to the courtroom and hurl him through its doors. The public defender then sued the judge, alleging there was no judicial authority to have someone beaten up.⁵⁸ The Supreme Court ruled, per curiam, in favor of absolute judicial

⁵³ The state’s statutes only permitted the sterilization of certain individuals who were institutionalized in limited circumstances, but the statutes did not expressly authorize a judge to approve a tubal ligation. *Id.* at 358.

⁵⁴ *Id.* at 364.

⁵⁵ *Id.* at 355-56.

⁵⁶ *Id.* at 359-60 (holding Judge Stump was immune from liability because he presides over a court of general jurisdiction, which means that “neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions”).

⁵⁷ 502 U.S. at 9.

⁵⁸ *Mireles*, 502 U.S. at 10.

immunity.⁵⁹ It seems that no matter what the judge does with his robe on and in his chambers, it is within the scope of judicial immunity.

Traditionally, absolute judicial immunity was only for money damages.⁶⁰ In *Pulliam v. Allen*, the Supreme Court held judges had no absolute immunity for suits for injunctions, or claims for attorney's fees resulting from successful injunctions.⁶¹ However, judges lobbied from the time of the *Pulliam* decision to persuade Congress to adopt an amendment to Section 1983 to create absolute judicial immunity for suits for injunctions as well.⁶² In 1996, the judges' efforts were rewarded when the Judicial Improvement Act was adopted.⁶³ The Act states that judges may not be sued for injunctive relief unless they violated a declaratory judgment or there was a situation where declaratory judgment was impossible.⁶⁴ There are surprisingly few cases interpreting or applying this provision, but it broadly extends absolute immunity subject to the exceptions men-

⁵⁹ *Id.* at 12. The case came to the Court on a motion to dismiss for failure to state an actionable claim. The facts of the case were never litigated because the public defender could not get past the immunity defense. However, the Court found that even if all the plaintiff's allegations were true, the judge exceeded his judicial authority, but did not act completely outside of it. "Because the Court of Appeals [wrongly] concluded that [Judge] Mireles did not act in his judicial capacity, the court did not reach the [issue of] . . . whether Judge Mireles' actions were taken in the complete absence of *all* jurisdiction. We have little trouble concluding that they were not." *Id.* at 13 (emphasis added).

⁶⁰ *Pulliam*, 466 U.S. at 529.

⁶¹ *Id.* at 541-42, 543-44.

⁶² See generally DEMOSTHENES LORANDOS, IMMUNITY BROKEN, http://www.familyrightsassociation.com/bin/white_papers-articles/immunity_broken.htm. The author argued that since the United States Supreme Court decision in *Pulliam v. Allen*, the American Bar Association, until recently, was unable to convince Congress to legislatively abrogate the Supreme Court's holding in *Pulliam*.

⁶³ Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847 (West 1996).

tioned.

V. EXTENDING JUDICIAL IMMUNITY

The key cutting-edge issue here is the extension of absolute judicial immunity to those traditionally called judges, but who merely perform adjudicatory tasks. The main development for absolute immunity is the willingness of lower courts to dramatically extend absolute judicial immunity. There are four representative cases, but there are many more that would fit.

The first case is *Dotzel v. Ashbridge*.⁶⁵ Landowners wanted a permit to have a gravel pit and went to the town Board of Supervisors for permission.⁶⁶ This appears to be a paradigm of an administrative or legislative task. The Third Circuit held that determining whether a particular individual gets a permit is adjudicatory in nature, and therefore it is protected by absolute judicial immunity.⁶⁷

In *Root v. Liston*,⁶⁸ a man was arrested and the judge set a \$1,000 bond. The prosecutor believed Root was guilty of a more serious crime—threatening a prosecutor—so the prosecutor ordered the trooper to hold him unless he posted a \$250,000 bond. The man’s lawyer arrived with the bail bondsman and attempted to post the \$1,000 bond. But the police officer was told the order was for a \$250,000 bond and did not allow Root to leave. The prosecutor was

⁶⁴ *Id.*

⁶⁵ 438 F.3d 320 (3d Cir. 2006).

⁶⁶ *Dotzel*, 438 F.3d at 322. The Board denied the application because they believed it interfered with objectives of a town ordinance. *Id.*

⁶⁷ *Id.* at 323 (holding the Board acted in a “quasi-judicial capacity”).

⁶⁸ 444 F.3d 127 (2d Cir. 2006).

sued as a result.⁶⁹ The Second Circuit held the prosecutor was not protected by absolute prosecutorial immunity.⁷⁰ Setting bond was not a traditional function of prosecutors.⁷¹ However, the Second Circuit found the prosecutor was protected by absolute judicial immunity.⁷² It was “just arguabl[e],” under Connecticut law that this was something a prosecutor could do even though it was typically a task performed by judges.⁷³ Interestingly, the prosecutor unilaterally ordered an increase in bond without any form of a hearing and was protected by absolute judicial immunity.⁷⁴

The next of the four cases is *Killinger v. Johnson*.⁷⁵ Here, the mayor suspended a restaurant’s liquor license for allegedly selling alcohol to a minor. The restaurant responded by suing the mayor.⁷⁶ The Seventh Circuit held the mayor was engaged in an adjudicatory function when deciding whether or not the restaurant should keep its liquor license.⁷⁷ The action is adjudicatory only in the sense it is a decision about a specific restaurant.⁷⁸ The usual attributes of adjudication were not present here—there was neither notice nor a hearing,

⁶⁹ *Root*, 444 F.3d at 129-30.

⁷⁰ *Id.* at 131.

⁷¹ *Id.*

⁷² *Id.* at 132. Judicial immunity has been extended to various individuals for actions that are judicial in nature. *Id.* Here, the prosecutor’s conduct was clearly judicial in nature. *Id.* Furthermore, “[j]udicial immunity protects the actor unless he ‘acted in clear absence of all jurisdiction.’” *Id.* (quoting *Tucker v. Outwater*, 118 F.3d 930, 933 (2d Cir. 1997) (alteration in original)). The Court of Appeals concluded Liston believed he was authorized to increase bail. *Id.* at 134.

⁷³ *Id.* at 129,134.

⁷⁴ *Root*, 444 F.3d at 134.

⁷⁵ 389 F.3d 765 (7th Cir. 2004).

⁷⁶ *Killinger*, 389 F.3d at 767.

⁷⁷ *Id.* at 771. *Killinger* did not argue the mayor’s actions did not qualify as judicial, only that the mayor lacked jurisdiction. *Id.*

but the Seventh Circuit still found absolute judicial immunity.⁷⁹

The last of the four cases is *Olsen v. Idaho State Board of Medicine*.⁸⁰ An individual had his medical license suspended and sued members of the medical licensing board.⁸¹ Despite sovereign immunity already protecting the board in the state, the Ninth Circuit held that when board members make decisions about particular individuals' medical licenses, they are engaged in an adjudicative task and therefore are protected by absolute immunity.⁸² Of all of the trends, this is the most important because these cases represent the great expansion of individuals entitled to absolute judicial immunity.

VI. LEGISLATIVE IMMUNITY

The third set of individuals who receive absolute immunity are legislators performing legislative tasks. The leading recent Supreme Court case on this issue is *Bogan v. Scott-Harris*,⁸³ decided a decade ago. A psychologist for the city's police department claimed that after he made a public speech, racial discrimination and retaliation motivated his termination from the position. He sued the mem-

⁷⁸ *Id.* at 770.

⁷⁹ *Id.* at 769-71 (holding that even though the mayor ignored the procedures mandated by the act, "[a] quasi judicial actor enjoys immunity 'for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors' " (quoting *Stump*, 435 U.S. at 359)).

⁸⁰ 363 F.3d 916 (9th Cir. 2004).

⁸¹ *Olsen*, 363 F.3d at 918-19. On January 7, 1996, Olsen overdosed on a combination of over-the-counter and prescription drugs. *Id.* at 919. Due to this, "Olsen's supervising physician then withdrew sponsorship, automatically terminating Olsen's registration, as mandated by then-applicable Idaho regulations." *Id.*

⁸² *Id.* at 926 (holding the licensing board is afforded absolute immunity because it is acting in a sufficient "judicial and prosecutorial capacity").

⁸³ 523 U.S. 44 (1998).

bers of the city council who slashed the funding for his position; he also sued the mayor.⁸⁴ The Supreme Court, in an opinion by Justice Thomas, held that both the members of the city council and the mayor were protected by absolute legislative immunity.⁸⁵ It was not controversial that the members of the city council would be protected by absolute legislative immunity; budget-setting is a classic function of local government, and the city council is a local government. What was more dramatic was the extension of absolute legislative immunity to the mayor. The Supreme Court said the mayor was participating in the budget process, which is quintessentially legislative, therefore the mayor was protected by absolute legislative immunity.⁸⁶ The President participates in the budget process; governors participate in the budget process; mayors traditionally participate in the budget process, yet their actions are still regarded as an executive function. Here, however, the Supreme Court held that the action is legislative even when the executive is participating.

Another fascinating case regarding absolute legislative immunity is *Baraka v. McGreevey*.⁸⁷ Baraka was the poet laureate of New Jersey. Soon after his appointment, he read a poem asking why so many Jewish individuals were not present in the World Trade Center during the September 11 attacks, and former Governor James McGreevey decided to de-fund his position and withhold the \$10,000

⁸⁴ *Bogan*, 523 U.S. at 46-47.

⁸⁵ *Id.* at 53-56 (holding both the mayor and the city council were acting in a legislative capacity and therefore accorded absolute immunity).

⁸⁶ *Id.* at 55-56.

⁸⁷ 481 F.3d 187 (3d Cir. 2007).

honorarium to which Baraka was entitled.⁸⁸ The question was whether the Governor's choice to have him fired and not paid was protected by absolute or qualified immunity. Following the same reasoning as the *Bogan* case, the Court of Appeals for the Third Circuit found the governor was involved in the budget process. Furthermore, the governor's instruction to withhold funds for the position was regarded as legislative in nature, not executive.⁸⁹ This, like *Bogan*, blurs the lines between traditionally executive and traditionally legislative action.

Another recent legislative immunity case, *Fowler-Nash v. Democratic Caucus of Pennsylvania House of Representatives*,⁹⁰ involved an individual who claimed to have been fired on account of speech and political party affiliation, even though she worked for the caucus of the state legislature.⁹¹ The Supreme Court held that making a decision to fire a particular person should be considered administrative in nature, not legislative.⁹²

Almonte v. City of Long Beach,⁹³ a 2007 Second Circuit case, can be seen as going the other way. The case involved several former city employees who claimed to have been fired on account of their political party affiliation—they claimed they were fired for being

⁸⁸ *Baraka*, 481 F.3d at 193-94.

⁸⁹ *Id.* at 197 (reasoning the process of signing a bill into legislation is legislative in nature, and therefore the signor—the mayor—is protected by absolute immunity).

⁹⁰ 469 F.3d 328 (3d Cir. 2006).

⁹¹ *Fowler-Nash*, 469 F.3d at 329.

⁹² *Id.* at 337, 340 (reasoning the decision to fire the employee was neither based upon a broad policy consideration, nor creating a new policy; it was the classic example of an administrative function and as such is not protected by absolute immunity).

⁹³ 478 F.3d 100 (2d Cir. 2007).

Democrats after the Republicans had taken over.⁹⁴ The district court held that the decision to remove the positions was protected by absolute immunity, but all the meetings that occurred before the legislative session were only protected by qualified immunity.⁹⁵ The Second Circuit disagreed, holding that absolute immunity protected every aspect of the decision. The Second Circuit held both the pre-meeting conversations and the meetings themselves were ultimately legislative functions, and therefore protected by absolute legislative immunity.⁹⁶

One more interesting case was *Scott v. Taylor*.⁹⁷ The issue was whether members of the legislature could be sued for alleged racial discrimination with regard to how they drew election districts. Is reapportioning election districts administrative or legislative in nature? Here, the Eleventh Circuit Court of Appeals found that traditionally the legislature drew election districts, so even though this was not a traditional passing of statutes, it was protected by absolute legislative immunity.⁹⁸

VII. LAW ENFORCEMENT ABSOLUTE IMMUNITY

The fourth category of individuals who receive absolute im-

⁹⁴ *Almonte*, 478 F.3d at 103. Despite being longtime employees, the plaintiffs were fired after a new budget proposal was adopted which terminated the funding of their positions. *Id.* at 104.

⁹⁵ *Id.* at 103, 107.

⁹⁶ *Id.* at 107.

⁹⁷ 405 F.3d 1251 (11th Cir. 2005). Jacqueline Scott was elected as a DeKalb County Commissioner and served from 1991 to 2002. *Scott*, 405 F.3d at 1253. In 2002, the district county lines were reapportioned causing her to reside in another district. *Id.* Scott contended this occurred as a result of racial discrimination. *Id.*

⁹⁸ *Scott*, 405 F.3d at 1254.

munity are police officers who testify as witnesses. In *Briscoe v. LaHue*,⁹⁹ the Supreme Court held that when a police officer testifies as a witness, even perjurally, the police officer is protected by absolute immunity.¹⁰⁰ The Court stressed the functional considerations previously mentioned and was concerned about the number of convicted individuals who might bring civil suits against police officers.¹⁰¹ Additionally, the Court expressed concern about the effect such suits would have on the functioning of officers.¹⁰² This is true with regard to prosecutors as well. There could be a criminal prosecution of an officer, or even a prosecutor, if they support perjury.¹⁰³ There can also be administrative discipline of the officer or prosecutor, but there cannot be a civil suit for money damages.¹⁰⁴

*Manning v. Miller*¹⁰⁵ involved a police officer who allegedly testified perjurally and an officer who concealed exculpatory evi-

⁹⁹ 460 U.S. 325 (1983). *LaHue*, a member of the police force, testified at *Briscoe*'s criminal trial regarding a burglary in which *Briscoe* was "one of no more than 50 to 100 people . . . whose [finger]prints would match a partial thumbprint on a piece of glass found at the scene of the crime." *Id.* at 326-27. *Briscoe* claimed *LaHue*'s testimony was false because the FBI considered partial prints insufficient for identification purposes. *Id.* at 327. After *Briscoe* was convicted of burglary, he filed a Section 1983 challenge against *LaHue* on the grounds that his false testimony constituted a violation of due process. *Id.* at 326.

¹⁰⁰ *Briscoe*, 460 U.S. at 345-46.

¹⁰¹ *Id.* at 343 (predicting the availability of civil damages against police officers for perjury under Section 1983 would flood courts with improper allegations of perjury by resentful defendants).

¹⁰² *Id.* (indicating if officers were subject to damages under Section 1983, fear might undermine the "effective performance of their other public duties").

¹⁰³ *Id.* at 342 (stating a "police officer performs the same function as any other witness" by taking an oath and facing criminal penalty for perjury).

¹⁰⁴ *See id.* at 345 n.32 (noting prosecutors, judges, and official witnesses are subject to criminal prosecution for "willful deprivations of constitutional rights"). *See also* 18 U.S.C.A. § 242 (West 2000) which provides, in relevant part: "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution . . . shall be fined under this title or imprisoned not more than one year, or both."

dence.¹⁰⁶ The question was whether these acts were protected by absolute immunity. The Seventh Circuit held that when a police officer testifies, the *Briscoe* reasoning controls. Even false testimony before a grand jury was protected by absolute immunity, but the court found that when the police officer failed to turn over exculpatory evidence, that action was only protected by qualified immunity.¹⁰⁷ *Brady* did not speak to the absolute immunity police officers receive as witnesses. If combined with *Yarris*, the holding indicates prosecutors are protected by absolute immunity despite not complying with *Brady*. Some circuit courts of appeals cases, such as this, hold police officers only receive qualified immunity if they fail to comply with *Brady*.¹⁰⁸ This is important if one is filing a civil suit with regard to *Brady* violations.

*Todd v. Weltman, Weinberg & Reis, Co.*¹⁰⁹ is a particularly troubling case. This was a civil suit against a firm for allegedly filing a false affidavit with regard to a garnishment proceeding.¹¹⁰ Although the defendant was not a police officer, the Court of Appeals

¹⁰⁵ 355 F.3d 1028 (7th Cir. 2004).

¹⁰⁶ *Manning*, 355 F.3d at 1030. Manning alleged FBI agents retaliated against him when he stopped working as an informant. *Id.* He claimed federal agents induced a witness to falsely identify him in a lineup and induced a jailhouse informant to falsify Manning's confession to a murder and kidnapping. *Id.* After being convicted of those crimes, Manning's sentences were overturned, and he brought a Section 1983 claim against the FBI agents for conspiring to violate his constitutional rights. *Id.* at 1030-31.

¹⁰⁷ *Id.* at 1032, 1034.

¹⁰⁸ *Id.* at 1033. The court found that Manning presented a viable *Brady* claim, and that the agents did not prevail on their qualified immunity claim. *Id.* at 1035.

¹⁰⁹ 434 F.3d 432 (6th Cir. 2006).

¹¹⁰ *Todd*, 434 F.3d at 442. Defendant initiated a garnishment proceeding to extract funds from plaintiff to satisfy a default judgment. *Id.* To garnish plaintiff's property, defendant filed an affidavit stating he reasonably believed the plaintiff's bank account contained non-exempt assets. *Id.*

for the Sixth Circuit was willing to extend the absolute immunity that police officers traditionally receive for their testimony to a private witness filing a declaration.¹¹¹ The rationale behind *Briscoe* was the need to protect police officers from the large number of suits that might interfere with their functioning as officers. It is hard to extend this rationale to a non-government official, let alone a non-government official filing an affidavit outside of court. *Weltman* was filed under a Section 1983 proceeding by arguing it was an action under color of law. Generally, non-government officials are not protected, even by qualified immunity.¹¹² This is a very troubling extension of absolute immunity.

VIII. ABSOLUTE IMMUNITY FOR THE PRESIDENT

There is a fifth instance where the Supreme Court has applied absolute immunity. The President of the United States has absolute immunity for acts taken while in office. A 1982 Supreme Court case, *Nixon v. Fitzgerald*, involved Ernie Fitzgerald, an analyst in the Defense Department who testified before Congress about cost overruns in building a C-5 transport plane. President Nixon was furious at Fitzgerald for embarrassing the Defense Department, and ordered

¹¹¹ *Id.* at 439-40 (finding the form of testimony does not affect the status of immunity, therefore testimony in the form of an affidavit may be protected under absolute witness immunity).

¹¹² *Id.* at 447 (holding defendants were not entitled to absolute immunity because it is reserved for those who serve as “integral parts of the judicial process,” rather than those private parties who submit false affidavits to commence a garnishment proceeding (quoting *Briscoe*, 460 U.S. at 335)). See also *Wyatt v. Cole*, 504 U.S. 158 (1992). “[A]lthough public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who . . . set the wheels of government in motion by instigating a legal action.” *Id.* at 164-65 (internal citation omitted).

him fired. Fitzgerald sued Nixon and the staff member who fired him for unlawful motivation for termination. Fitzgerald had evidence—the White House tapes where Nixon ordered the staff member to fire him.¹¹³ The Supreme Court held that the President has absolute immunity for presidential acts taken during office.¹¹⁴ The Court was concerned about the large number of suits and the unique nature of the presidency as well as how such suits might interfere with the function of the presidency.¹¹⁵

Currently, there is a case pending in the District of Columbia Circuit addressing whether the Vice President is entitled to absolute immunity.¹¹⁶ Valerie Plame and her husband, Joseph Wilson, brought suit against Vice President Dick Cheney and others, and I am their attorney. Vice President Cheney claims that the Vice President should be entitled to absolute immunity.¹¹⁷ In the district court, every quote from former Vice Presidents indicate the office is useless compared to the office of the President. In July, the district court dismissed the lawsuit on *Bivens* grounds.¹¹⁸ The case is currently on ap-

¹¹³ See Brief for Respondent at 7, *Nixon*, 457 U.S. 731 (Nos. 79-1738, 80-945) (explaining that Nixon was aware of the decision to fire Fitzgerald as evidenced by a recording).

¹¹⁴ *Nixon*, 457 U.S. at 749.

¹¹⁵ *Id.* at 751, 753 (reasoning absolute immunity is necessary to avoid the disruption of government due to the President's prominence and visibility, which may cause him or her to become an easy target for civil damages suits).

¹¹⁶ *Wilson v. Libby*, 498 F. Supp. 2d 74, 96 (D.D.C. 2007).

¹¹⁷ *Id.* at 96.

¹¹⁸ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395, 397 (1971) (recognizing an implied private cause of action for damages against federal officers alleged to have violated a citizen's constitutional rights). *Wilson*, 498 F. Supp. 2d at 82-86, 93. In *Wilson*, plaintiffs requested that the district court recognize a *Bivens* remedy in the form of an implied private cause of action under the First and Fifth Amendments for the alleged disclosure of Valerie Plame's identity as a covert CIA operative. *Id.* at 82. The court found that under the circumstances, a *Bivens* remedy would violate the separation-of-

peal in the D.C. Circuit.¹¹⁹ The four defendants—Cheney, Carl Rove, I. “Scooter” Libby, and Richard Armitage—filed one brief. Cheney also filed a separate motion arguing he should be entitled to file a separate brief because he wants to argue absolute vice presidential immunity.

The Supreme Court has said the President has no immunity for acts prior to taking office.¹²⁰ That of course was *Clinton v. Jones*, where Paula Jones sued former President William Clinton for sexual harassment that allegedly occurred while he was Governor of Arkansas.¹²¹ The Supreme Court unanimously held, in an opinion by Justice Stevens, that absolute immunity existed.¹²² However, the exercise of discretion in office does not apply to acts prior to taking office.¹²³ Justice Stevens said there is no reason to believe a civil suit against the President would take much of the President’s time, or interfere with his functioning in office.¹²⁴

powers doctrine. *Id.* at 93. Further, the court found that Congress, by enacting both the Privacy Act and the Intelligence Identities Protection Act, provided a comprehensive remedial scheme that would militate against the court formulating a *Bivens* remedy or private cause of action for damages. *Id.* at 77-78.

¹¹⁹ See *Wilson*, 498 F. Supp. 2d 74, *appeal filed*, No. 06-CV-01258 (D.C. Cir. July 13, 2007).

¹²⁰ *Clinton v. Jones*, 520 U.S. 681, 696 (1997) (holding that when the President acts in his official capacity, he is protected by absolute immunity from private lawsuits for damages and may only be disciplined by impeachment; however, there is no presidential immunity for purely private acts).

¹²¹ *Id.* at 685 (explaining that Jones brought a Section 1983 action for damages against Clinton for allegedly making sexual advances which caused Jones to face employment discrimination).

¹²² *Id.* at 694.

¹²³ *Id.* at 696.

¹²⁴ *Id.* at 702 n.36 (noting the President has more contact with people in his official capacity than with private individuals, therefore the class of plaintiffs is much smaller and the risk of litigation is less).

IX. SPLITS ON SOCIAL SERVICES ABSOLUTE IMMUNITY

An area where there is a potential split among the circuits is whether social workers are protected by absolute immunity. It is only a matter of time before the Supreme Court resolves this split. Some circuits, including the Second Circuit, have held social workers are protected by qualified immunity.¹²⁵ On the other hand, the Eighth Circuit, in a number of cases, has held social workers are protected by absolute immunity.¹²⁶ Then there are circuits like the District of Columbia Circuit and the Sixth Circuit, which hold the type of immunity depends on the task.¹²⁷ Sometimes the social worker is more like a prosecutor, in which case absolute immunity would be invoked;¹²⁸ sometimes the social worker is more like a caseworker and administrator, in which case qualified immunity is invoked.¹²⁹ It all

¹²⁵ See, e.g., *Van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 865-66 (2d Cir. 1990) (finding Child Protective Services caseworkers are entitled to qualified immunity in connection with the removal of a child from the custody of her parents during a child abuse investigation).

¹²⁶ See *Abdouch v. Burger*, 426 F.3d 982, 989 (8th Cir. 2005) (holding absolute immunity shields social workers to the extent that their role is functionally equivalent to that of a prosecutor (citing *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1373 (8th Cir. 1996))).

¹²⁷ See *Gray v. Poole*, 275 F.3d 1113, 1117-18 (D.C. Cir. 2002) (holding qualified immunity covers social workers acting as investigators, while social workers testifying as witnesses are protected by absolute immunity); *Rippy ex rel. Rippy v. Hattaway*, 270 F.3d 416, 421 (6th Cir. 2001) (holding absolute immunity protects social workers who initiate proceedings on behalf of a child).

¹²⁸ See *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 495 (3d Cir. 1997) (holding social workers "are entitled to absolute immunity for their actions on behalf of the state in preparing for, initiating, and prosecuting dependency proceedings"); *Millsbaugh v. County Dep't of Pub. Welfare of Wabash County*, 937 F.2d 1172, 1176 (7th Cir. 1991) (holding social workers "are entitled to absolute immunity in child custody cases on account of testimony and other steps taken to present the case for decision by the court"). *Vosburg v. Dep't of Soc. Servs.*, 884 F.2d 133, 138 (4th Cir. 1989) (holding social workers are entitled to absolute immunity only when performing prosecutorial duties).

¹²⁹ See *Snell v. Tunnell*, 920 F.2d 673, 690-91 (10th Cir. 1990) (holding social workers engaged in investigative work are entitled to qualified immunity); *Austin v. Borel*, 830 F.2d

depends. This is an area that is producing a lot of litigation and the Supreme Court will have to resolve this soon.

1356, 1363 (5th Cir. 1987) (holding child protection workers were not entitled to absolute immunity when they filed an “allegedly false verified complaint seeking the removal of two children” from the family home).