PRESIDENTIAL IMMUNITY AND ALL THE KING'S MEN: THE LAW OF PRIVILEGE AS A DEFENSE TO ACTIONS FOR DAMAGES*

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I. *Introduction*

The question to which we address ourselves concerns the immunity of the President and his top men from civil suits for damages arising from the exercise of their official duties. This subject seems to be very timely and relevant in our setting considering the rash of civil cases for graft against the former President and his Cabinet officials, and considering two recent Supreme Court decisions touching on immunity of executive officials from suit.[1]

II. *Absolute Immunity of the President*

The doctrine of absolute Presidential immunity

We begin with the proposition that immunity of Government officials from personal liability is merely an adjunct of the doctrine of the sovereign immunity of the state. It is a judge-made creation of the common law, conveniently tacked on to the sovereignty of the state. In other words, the law of privilege as a defense to damages actions against officers of the Government has in large part been of judicial legislation.[2]

Before the judges created this privilege, not only was there no doctrine of immunity from suit, but the courts were even harder on public officers who committed positive wrongs. As late as 1703, Chief Justice Holt of England ruled in one case that "if public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offenses."[3]

Jurisprudence has come to recognize two aspects of immunity from suit of executive officials: absolute immunity and qualified immunity. Absolute immunity would extend even to actions taken with express knowledge that the conduct was clearly contrary to controlling statute or clearly

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* Second Vicente G. Sinco Professorial Chair Lecture.

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1 PCGG v. Hon. Peña, G.R. No. 77663, April 12, 1988; Aberca v. Ver, G.R. No. 69866, April 15, 1988.

2 Barr v. Mateo, 360 U.S. 569 (1959).

3 W. Gellhorn & Byse, ADMINISTRATIVE LAW: CASES AND COMMENTS (1960) 361.

violative of the Constitution. On the other hand, qualified immunity would not spare executive officials from liability in damages if their conduct violated well-established law and if they should have realized that their conduct was illegal.[4] Thus, for officials covered by qualified immunity, the scope of their defense varies in proportion to their official functions and the range of decisions that conceivably might be taken in good faith.[5]

Absolute immunity, since it stems from the old doctrine that the King can do no wrong, has always been limited in the United States to the President. This form of immunity was carried over into emerging democracies garbed in the modern-day dress of separation of powers. But in former colonies like the Philippines, it was imported into the country by the colonial administrators because it suited their purposes. While they taught the natives the concept of the equality before the law, they also emphasized, at the same time, that they were more equal than others. Of course, they did not tell us in so many words; the rationalization was in terms of separation of powers, public interest, or just plain *stare decisis*. But whether it was here or in the United States, the most common justification was the principle of separation of powers. Our Supreme Court, in holding the Governor General immune from suit, stated that "if the courts are without authority to interfere in any manner, for the purpose of controlling or interfering with the exercise of political powers vested in the chief executive authority of the Government, then it must follow that the courts cannot intervene for the purpose of declaring that he is liable in damages for the exercise of this authority."[6] In the U.S., Presidential absolute immunity, said the majority of the U.S. Supreme Court in the Nixon case, "derives from and is mandated by the constitutional doctrine of separation of powers."[7]

There are two qualifications even to absolute immunity, however. The first is that the immunity is limited to civil damages claims. The second is that it does not extend to acts outside official duties.[8]

In the Philippines, though, we sought to do the Americans one better by enlarging and fortifying the absolute immunity concept. First, we extended it so as to shield the President not only from civil claims but also from criminal cases and other claims. Second, we enlarged its scope so that it would cover even acts of the President outside the scope of official duties. And third, we broadened its coverage so as to include not only the President but also other persons, be they government officials or private individuals, who acted under orders of the President. It can be said that at that point most of us were suffering from AIDS (or absolute immunity defense syndrome).

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[4] Wood v. Strickland, 420 U.S. 308 (1975).
[5] Scheur v. Rhodes, 416 U.S. 232 (1974).
[6] Forbes v. Chuoco Tiaco, 16 Phil. 534, 579 (1910).
[7] Nixon v. Fitzgerald, 451 U.S. 731, 759 (1982).
[8] *Id.* at 755.

Thus, the 1981 amendments to the 1973 Constitution provided:

> "The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure."[9]

Note that this provision of the 1973 Constitution talks in terms of immunity from suit and not merely of immunity from liability. During his tenure, this should cover not only official acts of the President but also unofficial acts. After his tenure, suit may be brought against him or any person acting under his orders only for unofficial acts, but not for official acts, committed during his tenure. While the second aspect of this immunity clause corresponds to the concept of absolute immunity, it is much broader in scope because it protects not only the president but also other persons, be they public officers or private persons, who acted under instructions of the President. As Prof. P. V. Fernandez has correctly surmised, this kind of immunity could only be intended to provide a shield for official acts in violation of law.[10] Fortunately, the EDSA revolution of 1986 made short shrift of this kind of Presidential sleight-of-hand. However, the legal questions remained to bedevil lawyers and judges for the years to come.

In fairness, it must be mentioned here that our crude attempts to constitutionalize absolute immunity are not without precedent. In the United States after the Civil War, the U.S. Congress in 1863 enacted an "immunity act" which provided

> "that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress . . ."[11]

In the Philippines, as early as 1910, our jurisprudence had already laid down the rule that the Chief Executive is immune from suits for lawful acts, and even for erroneous acts, done during his tenure in office. Otherwise, said the Supreme Court, the time and substance of the Chief Executive will be spent in wrangling litigation, disrespect upon his person will be generated, and distrust in the government will soon follow.[12]

More recently, the doctrine of absolute immunity was affirmed by the U.S. Supreme Court which laid down the ruling that a former President of the United States, Richard Nixon, was entitled to absolute immunity from damages liability predicated on his official acts.[13] In so ruling, the Court

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[9] CONST. (1973), Art. VII, sec. 17.

[10] P. Fernandez, POSITION PAPER ON THE PROPOSED CONSTITUTIONAL AMENDMENTS IN THE 1981 PLEBISCITE (1981).

[11] U.S. Immunity Act of March 3, 1863, Ch. 81, sec. 4; 12 Stat. 755, 756.

[12] Forbes v. Chuoco Tiaco, 16 Phil. 534 (1910).

[13] Nixon v. Fitzgerald, *supra.*

here rejected the so-called "functional" approach to immunity, that is, the notion that the President's absolute immunity should extend only to acts in performance of particular functions of his office. This construction, according to the Court, "would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose, and adoption of this construction thus would deprive absolute immunity of its intended effect."[14] The Court concluded that —

> "In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility.
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> Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action."[15]

Application in the Philippine setting

One question before us is whether the rule on absolute immunity would be applicable in the Philippines. Suppose a President has been charged with abuse of power, unjust enrichment, and breach of public trust in the performance of his official functions, would immunity from suit save him from an action for damages or recovery?

Of course, the answer to this question would be obvious if we assume that the charges of abuse of power, unjust enrichment, and breach of trust were proven by overwhelming evidence. It has always been the rule that the immunity doctrine does not protect public officers from personal liability for their wrongful acts in excess of their official authority.[16] The reason is that acts of officials which are not lawfully authorized are not acts of the state, and an officer who acts illegally is not acting as such, but stands in the same light as any other trespasser.[17]

But our legal problem is more complicated than that, because we had a President who exercised the powers of a legislature during martial law.[18] Lifting himself by his legislative bootstraps, he decreed himself to do acts which incidentally redounded to the benefit of either a friend or a relative. This legislative authority by means of a Presidential Decree should preclude all complaints based on excess of authority or illegality.

In cases of unjust enrichment, the difficulty lies in determining whether or not the President went beyond the outer perimeter of his official functions. For instance, does investment of funds of government corporations in

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[14] *Id.* at 756.
[15] *Ibid.*
[16] Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1943).
[17] 72 Am. Jur. 2d Sec. 115.
[18] CONST. (1973), amendment No. 6.

private enterprises lie within the outer perimeter of the President's functions? Investment of large sums of money in business enterprises is a function of a paternally-inclined government, observed our Supreme Court in *Government of PI v. Springer*,[19] and it devolves on the Chief Executive to exercise this function. Therefore, the exercise of this proprietary function of the government lies within the perimeter of the President's official duties. The implication is that, if this is so, an investment ordered by the President, for example of government corporate funds in favored private corporations, even if it was aimed at enriching a golfing partner, would be protected by the rule on absolute immunity, and any suit against the President would not be allowed to prosper.

In the Philippines, it is doubtful that such a tolerant attitude will be adopted by our courts. In the hypothetical example given, we should re-examine the Presidential immunity doctrine to determine if there is any legal justification for extending its protection to acts of the President in the exercise of proprietary functions of the government. Since this form of immunity is just a strand in the doctrine of sovereign immunity, it should follow that it should apply only to acts of the President which are political in character, or which involve the exercise of the functions of sovereignty. It should not apply to acts which are in exercise of the proprietary functions of government. The doctrine of sovereign immunity protects the state against interference with the performance of its governmental functions,[20] and extends as well to officers carrying on such functions and exercising acts of state.[21] Such immunity attaches only to particular functions, not to particular offices.[22] Acts involving the mere exercise of proprietary functions involve a lesser public interest than those involving governmental functions. Since absolute immunity of the President is extended only in order to advance public interest, the rationale for extending immunity for acts in the exercise of proprietary functions should be counterbalanced by the need to afford relief where individual rights, or the rights of the people, have been violated.

But even for acts which are in exercise of the sovereign functions of the state, it is problematical if the American doctrine of absolute immunity could be extended to the Philippine President under present circumstances. In the first place, the doctrine of absolute immunity is a device fashioned by the judiciary to advance "compelling public ends."[23] It is not an inflexible rule that is automatically applied every time the President is sued for damages. This explains why the cases on absolute immunity have followed the "functional" approach. This protection "has extended no further than

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19 50 Phil. 259 (1927).
20 U.S. v. Lee, 106 U.S. 196 (1882).
21 Forbes v. Chuoco Tiaco, *supra*.
22 Butz v. Economou, 438 U.S. 478 (1978).
23 Nixon v. Fitzgerald, *supra*, at 758.

its justification would warrant."[24] Applying these principles to the Philippine context, we can distinguish the situation in the United States during the term of President Nixon from that in the Philippines during the time of President Marcos. The *Fitzgerald* case involved merely an illegal dismissal of one Federal government employee and it was relatively easy for the Supreme Court to reassert the doctrine of absolute Presidential immunity after resorting to the balancing test. If we use the same test in the present civil cases against Marcos, where there are allegations of organized conspiracies to raid the public treasury which are not at all difficult to prove, there is no reason to adopt the rule of immunity for the President and his co-conspirators. Thus, if a Presidential order, memorandum or instruction was clearly intended to favor close friends or relatives, for instance, it would be difficult to defend this before any court on grounds of advancing public interest. Thus, the Supreme Court found in one case that Pres. Marcos took undue advantage of his public position and abused his powers, authority, or influence to acquire a multi-million peso private company by issuing instructions to convert its loans from government institutions into equity and by ordering government corporations to infuse equity into a favored private entity.[25]

It must be noted that the U.S. Supreme Court in the Nixon case had emphasized that the extension of immunity to the President is not automatic, but must involve a proper balance of interests.

> "But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and function of the Executive Branch. When judicial action is needed to serve broad public interests — as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, or to vindicate the public interest in an ongoing criminal prosecution — the exercise of jurisdiction has been upheld. In the case of this merely private suit for damages based on a President's official acts, we hold it is not."[26]

In the second place, immunity from suit of executive officials, being only a judge-made law, has always varied in application according to time and place. It was only after the Civil War in the United States that new respectability was invested on the doctrine of immunity from suit. That national calamity, according to one author, produced some changes in American values, and one of them was the change initiated in the immunity doctrine. It seems that, at the end of the Civil War, the government of the country was deeply in debt. And the state governments were likewise under strong pressure of fiscal exigencies. This forced them to repeal the consents to be sued which they had earlier enacted. Thus, the desire to facilitate

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[24] *Id.* at 800, 811.
[25] BASECO v. PCGG, 150 SCRA 180 (1987).
[26] Nixon v. Fitzgerald, *supra*, at 754.

recovery from the depredations of the Civil War resurrected the idea of immunity from suit and gave it an importance it had not had.[27]

In our case, our traumatic experience with the last regime is a psychological block that dictates adoption of a different set of judicial values. The calamity brought about by the martial law regime — the ballooning of our national debt, the destruction of our democratic institutions, the countless deaths and tortures endured by hundreds of citizens, and the organized pillage of our public coffers, are too deeply embedded in our national psyche so as to call for a rejection of the American doctrine of absolute immunity from suit. This is the only way we can vindicate the principle that no man is above the law.

So what will happen to the concept of Presidential immunity in the Philippines? We should just limit ourselves to the lesser concept of "functional" immunity for the President and his men. This is the doctrine that the sphere of protected action must be related closely to the justifying purposes for executive immunity. The "functional" concept of immunity would extend protection only to certain officials because the sensitive nature of their duties and functions, like that of the judges and of public prosecutors, require recognition of immunity only insofar as their judicial and prosecutorial functions are concerned. Historically, judicial, legislative, and prosecutorial functions have been accorded immunity from suit because without its protection, malicious actions for damages, in the words of Judge Learned Hand, "will seriously dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[28] This rejects the extension of the protection to acts of the President which are not official in nature, but are rather private acts not related to the exercise of his political and purely executive duties. In the words of Justice Moreland of the Philippine Supreme Court, "he is not protected if the lack of authority is so plain that two such men could not honestly differ over its determination; in such case, he acts, not as (President), but as a private individual and as such, must answer for the consequences of his act."[29]

III. *Immunity of Presidential Subordinates*

Below the President, we have the level of Cabinet secretaries, heads of commissions, and presidents of financing institutions.

Our problem here becomes more complicated since they are farther away from the seat of sovereignty and yet they may claim immunity from suit. What we have here is a pyramiding of concepts: at the base we have

[27] Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 COLO. L. REV. 1 (1972).

[28] Gregoire v. Biddle, 177 F. 2d 579, 581 (1949).

[29] Moreland, concurring in *Forbes v. Chuoco Tiaco, supra* at 650.

sovereign immunity from suit, next we have Presidential immunity derived from state immunity, and on top of this we have derivative immunity of Presidential subordinates.

Origins of the doctrine of derivative immunity

The immunity of Presidential subordinates from civil damages, being a form of derivative immunity, finds its basis in the principles of agency. These were grafted into the law of public officers. As time went on, these principles were modified and, in the process of engrafting, the principles of agency became unrecognizable as such. The "alter ego" theory supplanted the doctrine of "respondeat superior." Our Supreme Court has come full circle by rejecting the application of "respondeat superior" to military officers, saying that the doctrine is limited only to principal and agent, not to superior officers and their subordinates.[30]

In the beginning, the application of the rules of agency to public officers worked adversely against the latter. Thus, executive officers acting on Presidential orders were held personally liable not only for their negligence and for positive torts but even for acts they were authorized to do if, due to constitutional or statutory provisions, their authority to do such acts were legally insufficient.[31] This is because the rule of *respondeat superior,* while applicable in private agency situations, could not be applied to public officers, as the doctrine of "the King can do no wrong" stood in the way. Thus, public officers, unlike private agents, were held personally and solely liable for their negligence and positive torts committed within the scope of their employment.[32] This was the result of a countervailing doctrine, the "rule of law," which received one of its most striking embodiments in the notion that "a king's official was as much subect to the common law of the king's courts as was the private citizen."[33]

Also, the principles of agency did not permit the defense of *respondeat superior* to the public officer who committed a positive tort on the reasoning that "no man (as principal) can authorize another (as agent) to do a positive wrong."[34] The accepted doctrine at this stage was that a public officer is personally liable for a positive wrong which in fact had been authorized by his superior, because even though he was authorized in fact, he was not authorized in contemplation of law. The reasoning of our Supreme Court in the case of *Aberca v. Ver*[35] is that, under Art. 32 of our Civil Code which imposes damages on public officers guilty of violating constitutional rights, the principal as well as the agent may both be guilty of such violation, and thus be jointly liable for damages to the aggrieved parties.

30 Aberca v. Ver, G.R. No. 69866, April 15, 1988.
31 Engdahl, *op. cit. supra,* note 27.
32 *Id.* at 15.
33 L. Jaffe & N. Nathanson, Administrative Law, 799 (1961).
34 Engdahl, *op. cit. supra,* note 27 at 17, citing Story on Agency, sec. 309.
35 Aberca v. Ver, *supra.*

The facile rule of "authorized in fact but not in law" is illustrated in an old American case (cited by our Supreme Court in the case of *Moon v. Harrison*[36]) decided by the U.S. Supreme Court, *Little v. Barreme*,[37] which held the commander of an American warship liable in damages for the wrongful seizure of a Danish cargo ship on the high seas. Here the American Congress passed a statute which directed the President to intercept any vessel suspected of being en route to a French port. The President, however, promulgated an order to naval commanders authorizing the seizure of suspected vessels, whether going to or coming from French ports. The commander involved here seized the Danish vessel which was coming from a French port. In holding the commander liable for damages, the Supreme Court, speaking thru Justice Marshall, held that the instructions of the President could not legalize the seizure by the American commander, for it could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been plain trespass."[38] The Court concluded that although there was probable cause to believe that the ship was engaged in traffic with the French, the seizure was not among the class of seizures that the Executive had been authorized by statute to effect.

The doctrine that held public officers personally liable for their negligent acts and positive torts prevailed in the common law until the courts in the U.S. realized that personal liability threatened the effective administration of the law. It was recognized that the gains from discouraging official excesses might be more than offset by the losses from diminished zeal. This happened at a time when the U.S. was no longer a thoroughly individualistic frontier; when, for example, a whole urban community might be exposed to the spread of a contagious disease unless a health officer acted promptly to quarantine a disease carrier.[39] At this juncture, discouragement of official zeal ebbed, and doctrines more protective of public officers began to evolve in American jurisprudence.

It was the end of the Civil War in America which marked the change in the doctrine of immunity of public officers from suit. As observed by one author, it was the desire to facilitate recovery from the depredations of the civil war that helped put the mantle of respectability on the doctrine of immunity from suit.[40] It started with the statute of 1863, part of which was quoted above, which conferred protection for acts committed by public officers and soldiers during the Civil War. In addition, statutes similar to that enacted by the Federal Congress in 1863 were enacted in some of the states during the 1860s. Thus, when the case of *Spalding v. Vilas*[41]

36 43 Phil. 27 (1922).
37 2 Cranch 170, 2 L.ed. 243 (1804).
38 *Id.*, at 179.
39 Gellhorn & Byse, *op. cit. supra*, note 3 at 363.
40 Engdahl, *op. cit. supra*, note 27 at 21.
41 161 U.S. 483 (1896).

came before the U.S. Supreme Court in 1896, the way had been paved for the assumption of the doctrine of executive immunity from civil damages.

Spalding v. Vilas[42] involved a department head who was sued for circulating among the postmasters a notice that injured the reputation of the plaintiff. In denying relief to the plaintiff, the U.S. Supreme Court held that the same general considerations of public policy and convenience which demand for judges immunity from civil suits for damages arising from acts done by them in the course of the performance of their functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The ruling also made clear that a malicious intent will not subject the public officer involved to liability for performing his authorized duties.

Philippine law on derivative immunity of public officers

Essentially, our law on derivative immunity is a spin-off from the hoary doctrine of sovereign immunity of the state, and modified subsequently by the *alter ego* theory. This is shown in the case of *Moon v. Harrison*,[43] where our Supreme Court held that the heads of executive departments of the government are exempted from liability for damages suffered by individuals as a result of their official functions where they act only as agents of the state. In this case, the defendants, which included a department secretary and some subordinates, seized several thousand kilos of Siam rice (which the plaintiffs, private traders, bought at a cost of ₱26.32 per kilo) on the promise of paying the owners at ₱16.25 per kilo. The owners went to court attacking the seizure as illegal confiscation of private property, and the defendants invoked the provisions of Act 2868 passed by the legislature and Executive Orders 56 and 67 of the Governor General issued by authority of said Act. The Supreme Court held that, assuming that the defendants did confiscate the property of plaintiffs in violation of their property rights, they could not be personally held liable in damages, for they were acting as agents of the Government.

> "Their acts were official and discretionary, and they had a legal right to assume that the law was valid. In the commission of the alleged acts, they were acting for, and representing, the Government of the Philippine Islands under a law enacted by the legislature, and it is elementary that without its consent no suit or action lies against the Government itself."[44]

In exculpating the defendants, the Court also cited *Mechem* that, referring to Presidential immunity, "the same immunity has been extended to cabinet officers and heads of departments in the performance of those duties which are confided to their official judgment and discretion."[45]

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42 *Id.*
43 43 Phil. 27 (1922).
44 *Id.*, at 39.
45 *Id.* at 37.

With respect to acts of Cabinet officers and department heads, our Supreme Court later seized on the alter ego theory to bolster the doctrine of immunity from suit of executive officers. Under this theory each head of a department is the President's alter ego in matters of that department where the President is required by law to exercise authority, and the acts of that department head are presumptively the acts of the Chief Executive.[46] This doctrine applies with equal force to the ministerial set-up during the Marcos regime because of the provision of the 1973 Constitution vesting control of all ministries in the President.[47] Thus, according to Fernando, what was done by the ministers in the regular course of business would be presumptively the acts of the President.[48]

This does not mean that wrongful acts of Cabinet officials and department heads should all be laid at the doorstep of the President. According to Pres. Sinco, in his treatise on Political Law, subordinate officers are civilly liable for wrongful acts done by them in the performance of their duties enjoined by law. They may not escape responsibility in any given case by alleging that they acted under orders or instructions of their superiors, when the performance of the act that has caused damages is by law vested upon them as principals.[49]

A number of examples can be cited to illustrate this. For instance, the law vests discretion on the Secretary of Labor to issue a labor injunction under certain circumstances. He issues one to favor a strike-bound company in obedience to a secret instruction from the President. In this example, a person suffering damages as a result of such wrongful issuance of the writ of injunction could recover damages from the Secretary. Another example would be where the head of a government financial institution, who has the responsibility of approving big loans to private businessmen, approves a dubious application for a loan only because of a marginal note written by the President, disregarding the fact that the applicant is not worthy of credit. Here, the head of the financial institution cannot take refuge behind the Presidential note to shield him from liability for damages. Another example would be where the Secretary of Justice, who has the function of reviewing and approving on appeal resolutions of the City Fiscal recommending the filing of criminal informations against resondents, reverses the recommendation of a City Fiscal on the strength of a confidential memo from the President and without regard to the merits of a case. Again, in this instance, the Secretary would be liable for damages to an aggrieved party, and he cannot invoke the Presidential memo to protect himself from suit, because the law precisely vested the responsibility upon his office and not on that of the President.

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[46] Villeña v. Sec. of Interior, 67 Phil. 451 (1939).
[47] CONST. (1973), art. IX, sec. 11.
[48] E. Fernando, Constitution of the Philippines 275 (1977 ed.).
[49] V. Sinco, Philippine Political Law 429-430 (1962 ed.).

In all these instances, mere office-holding under the aegis of Malacañang will not protect the Presidential aide from a suit for damages, because it was the law which vested upon them some discretion to decide on a given matter, not on the President. This explains why public officers are susceptible to damages and also to criminal prosecution if they abused such discretion to violate laws like the Anti-Graft or Corrupt Practices Act.[50] For instance, where a Cabinet member enters, on behalf of the Government, into a contract or transaction manifestly and grossly disadvantageous to the same, or where he causes any undue injury to any party, or gives a person any unwarranted benefit, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith, or gross inexcusable negligence, then such official becomes liable under the Anti-Graft Act, and he cannot hide behind the skirt of the President to evade prosecution and restitution. This is similar to the position of a judge who, even if he enjoys immunity from suit for damages in the performance of his judicial functions, may be prosecuted under the Revised Penal Code[51] if he knowingly renders an unjust judgment.

Unlike in the U.S., our Supreme Court has not really evolved a broad concept of immunity for the President's men. This development, or non-development, of our jurisprudence on immunity is for the better, for there is really no reason for us to adopt the American principles on immunity of Presidential aides. It must be noted that the immunity rule in American jurisprudence evolved from historical origins completely different from ours. The American rule finds legal basis in their federal system of government; the immunity of federal executive officials began as a system of protecting them in the execution of their federal statutory duties from criminal and civil actions based on state law.[52]

So, under our civil and penal laws, the mere holding of a high public office will not protect an individual from an action for damages. Our Supreme Court has construed qualified immunity to cover only acts done by officers in the performance of official functions within the ambit of their powers. Even if such individual did not profit from a tainted transaction, for instance, he would still be liable for damages arising from a criminal act. Sharing in the benefits of a corrupt or dishonest act is not the proper test of liability. A test used by our Supreme Court, which is more in accord with sound morality, is intent to aid in an unlawful purpose; a person may be deemed to be a participant in the unlawful purpose if, with knowledge thereof, he does anything which facilitates the carrying out of such purpose.[53] Thus, even if such official acted under superior orders, this does not necessarily exempt him from liability, unless the President of the Philippines gave

50 Rep. Act No. 3019, as amended (1960).
51 Act No. 3815, as amended (1930).
52 *See* Butz v. Economou, *supra*.
53 E. Razon v. PPA, 151 SCRA 223 (1987).

him the order to do so, and the President is himself immune from suit under the circumstances.

The only instances of immunity from civil actions given to executive officers are those granted by law. In the case of the commissioners of the PCGG, the law gives them immunity from civil actions for anything done or omitted in the discharge of their assigned task.[54] This is obviously a "functional" immunity similar to that given to judges and prosecutors, and covers only acts done in the performance of their prosecutorial functions, as Chief Justice Teehankee pointed out in his addendum in *PCGG v. Hon. Peña.*[55] But in the same case, Justice Feliciano, in his concurring opinion with qualifications, would take issue with the former Chief Justice on this point. So, one of the important qualifications in the former's concurring opinion is that the immunity granted to the PCGG Commissioners under Executive Order No. 1 is that, not only must the acts in question be done in the performance of official duty, but further, that such Commissioner must have acted in good faith and within the scope of his lawful authority.[56] Otherwise, according to Justice Feliciano, "the constitutionality of Sec. 4(a) of E.O. No. 1 would be open to most serious doubts. For so viewed, Sec. 4(a) would institutionalize the irresponsibility and non-accountability of members and staff of the PCGG, a notion that is clearly repugnant to both the 1973 and the 1987 Constitutions and a privileged status not claimed by any other official of the Republic under the 1987 Constitution."[57]

The issue between the two brethren in the decision adverted to seems to boil down to the question of whether malice, bad faith, negligence, or dishonesty of purpose will remove the mantle of protection cast over the PCGG members and transform an otherwise privileged act to a cause of action for damages. It is an issue that has been settled for sometime in the United States, hence we should look at the recent developments there and compare judicial notes.

Recent developments in the doctrine of immunity for Presidential subordinates

As stated earlier, it was *Spalding v. Vilas,*[58] decided in 1896, which made clear that even a malicious intent will not take away the immunity of a public officers from liability arising from acts in performance of his authorized duties. This case involved an executive official who was sued for circulating among the postmasters a letter-notice that assertedly injured the reputation of the plaintiff. Even in the face of substantial evidence of

[54] Executive Order No. 1, sec. 4 (1986).
[55] G.R. 77663, April 12, 1988.
[56] *Id.*
[57] *Id.*
[58] 161 U.S. 483 (1896).

malicious intent on the part of the public officer, the U.S. Supreme Court ruled:

> "The same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of performance of their judicial functions, apply to a large extent to official communications made by the heads of Executive departments when engaged in the discharge of duties imposed upon them by law."[59]

After the *Spalding v. Vilas* decision in 1896, the U.S. Supreme Court retreated somewhat and held in a number of civil rights actions for damages that a plaintiff may rebut an official's immunity defense by introducing facts to show that the official had acted with malicious intent to cause a constitutional deprivation or other injury,[60] where the Court permitted a police officer to raise the defense of good faith and probable cause in an action alleging unconstitutional arrest; *Scheuer v. Rhodes*,[61] recognizing good faith as an element of qualified immunity defense; *Wood v. Strickland*,[62] where the Court ruled that qualified immunity would not be available as a defense if the official acted with malicious intent to cause a deprivation of constitutional rights or other injury.

But all that changed with the recent case of *Harlow v. Fitzgerald*,[63] where the U.S. Supreme Court declared that there was a need to radically depart from earlier rulings recognizing malicious intent as a valid rebuttal to the defense of qualified immunity, saying that such a drastic revision of the doctrine of qualified immunity was necessary to protect executive officials from unsubstantiated lawsuits based solely on conclusory allegations of malice. Thus, the Court ruled that a plaintiff could no longer allege malicious intent to defeat an executive official's immunity defense doctrine in a civil rights action for damages. The doctrine therefore is that an executive official performing discretionary functions is entitled to immunity from civil damages insofar as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The *Harlow v. Fitzgerald* ruling would also qualify the *alter ego* theory as applied to members of the President's cabinet. The Court would set up a hierarchy of officials in determining who of the Cabinet members would have the strongest claim to immunity. These officials, according to the Court, would have the strongest claim to immunity in such "central" Presidential domains as foreign policy and national security in which the President could not discharge his singularly vital mandate without dele-

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[59] *Id.* at 498.
[60] Pierson v. Ray, 366 U.S. 547 (1967).
[61] 416 U.S. 232 (1974).
[62] 420 U.S. 308 (1975).
[63] 457 U.S. 800 (1982).

gating functions "nearly as sensitive as his own."[64] It is with respect to such Presidential aides that the *alter ego* theory would be particularly appropriate and it is this group of men who would be in the best position to invoke immunity as a defense against damages actions. "We may fairly assume," continued the Court, "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.' "[65]

There are two requisites before this affirmative defenses can be availed of: first, the Presidential staffer must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability; second, he must show that he was discharging the protected function when performing the act for which liability is asserted by the plaintiff.[66] In other words, an executive officer's claim to immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.[67]

This form of immunity therefore requires a balancing act where absolute immunity does not. The competing values in the balance involve three elements: 1) the importance of a damages action as a means to protect the rights of citizens; 2) the need to protect officials who are required to exercise discretion, and 3) the public interest in encouraging the vigorous exercise of authority.[68]

In two decisions rendered last year, the U.S. Supreme Court upheld the defense of qualified immunity put up by executive officers against actions for damages, holding that 'special factors' sometimes warrant a court in withholding relief against a government official who has engaged in tortious conduct committed in connection with military service.[69] The Court said that officials entitled to qualified immunity generally may not be held liable for damages "so long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[70]

IV. *Conclusion*

Going back to the issue raised by Justice Feliciano in the *PCGG v. Peña* decision, what is the role of good faith as an element of the immunity defense of the PCGG Commissioners? The majority decision is completely silent on the element of good faith as a requisite of this privilege. In this sense, we may take it to mean that the Commissioners' state of mind is not quite relevant in determining whether they are entitled to immunity or not. Otherwise, as pointed out in the opinion, the Commission "would be em-

[64] *Id.*
[65] *Id.*, at 812.
[66] *Id.* at 800.
[67] Butz v. Economou, *supra.*
[68] Nixon v. Fitzgerald, *supra.*
[69] U.S. v. Stanley, 107 S.Ct. 3054 (1987).
[70] Anderson v. Creighton, 107 S.Ct. 3034 (1987).

broiled in and swamped by legal suits before inferior courts all over the land, since the loss of time and energy required to defend against such suits would defeat the very purpose of its creation."[71] In this respect, therefore, it is congruent with the recent American rulings on qualified immunity.

With respect to immunity of public officers from suit as a defense against a suit for damages for violation of constitutional rights, our Supreme Court has spoken unequivocally in defense of civil liberties. It declared that this form of immunity "cannot be construed as a blanket license or a roving commission untrammelled by any constitutional restraint to disregard or transgress upon the rights and liberties of the individual citizen enshrined in and protected by the Constitution."[72]

The whole doctrine of immunity from suit is an anachronism. This is especially true in a republican state like ours, where the Constitution locates the situs of sovereignty not in the state, but in the people. The government and its high officials cannot continue to enjoy immunity from suit at the expense of the people. For every right there must be a remedy, and we cannot let the immunity doctrine stand in the way of an effective remedy. A government of laws and not of men, said Chief Justice Marshall in *Marbury v. Madison*[73] "ceases to deserve this high appellation if the laws furnish no remedy for the violation of vested legal rights."[74]

The justification advanced by the courts for Presidential immunity is separation of powers. But this kind of argument cuts both ways. It can also be argued that separation of powers proceeds from an underlying assumption that the "wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by the institutions whose authority is in question, but by an impartial judiciary."[75]

As for the argument of public good, it can also cut both ways. While it is true that the President should not waste his time defending himself from damages suits, it is likewise true that public accountability will sow the fear of God in his mind, and that will goad him into truly devoting his efforts to the public good. Furthermore, in case of suits against the President, he has a whole department, the Solicitor General's Office, to handle such litigations for him, not to mention the obeisance of the whole judicial system to the President. While the privilege may be invoked against actions instituted during his term of office, this should not shield him from liability after his term ends. Also, public accountability should

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[71] PCGG v. Peña, *supra*.
[72] Aberca v. Ver, *supra*.
[73] 1 Cranch 137 (1803).
[74] *Id.*, at 163.
[75] Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 968 (1988).

be an effective deterrent to authoritarian personalities who may be tempted to arrogate dictatorial powers unto themselves while they are in power.

As for subordinates of the President, the picture of a selfless and devoted public servant using his discretionary powers for the common good and rendering bold and forthright public service is beautiful to behold. But in some cases this is a fairy tale, a figment of the political imagination. To accord Presidential aides immunity from suit is to tolerate abuse or misuse of power. Since power corrupts, the only way to check this form of corruption is to make power-wielders accountable for their official acts. No less than the Constitution mandates this for public officers.[76] Otherwise, as Recto put it, we will have a "leadership of the incompetent by the irresponsible."

[76] CONST., art. XI, sec. 1.