

NOTES

BIRTH OF A THIRD IMMUNITY? PRESIDENT BILL CLINTON SECURES TEMPORARY IMMUNITY FROM TRIAL

In recent history, United States government officials have enjoyed one of two types of immunity from civil damages suits: absolute immunity or qualified immunity.¹ Absolute immunity—granted only to the President,² judges,³ prosecutors,⁴ executive officials exercising judicial functions⁵ and legislators⁶—shields officials from liability predicated by actions taken within the scope of their authority.⁷ Absolute immunity prevails even when officials act with deliberate malice or with knowledge that they are breaking the law.⁸ In contrast, qualified immunity—accorded to executive branch officials (including Cabinet Secretaries),⁹ presidential aides,¹⁰ plus state and local officials¹¹—shields administrators only when they have reasonable grounds to believe their actions

¹ Lyman G. Bullard, Jr., Casenote, *Absolute Presidential Immunity from Civil Damage Liability: Nixon v. Fitzgerald*, 24 B.C. L. REV. 737, 744-54 (1983); Mary-Lynne Ricigliano, Note, *President Absolutely Immune from Civil Damages Liability for Official Acts—Nixon v. Fitzgerald*, 13 SETON HALL L. REV. 374, 374 (1983).

² *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

³ *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871).

⁴ *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

⁵ *Butz v. Economou*, 438 U.S. 478, 512-13 (1978).

⁶ U.S. CONST. art I, § 6. The so called "Speech and Debate Clause" cloaks Members of Congress with absolute immunity from civil or criminal proceedings related to their legislative actions, providing that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." *Id.* In *Tenney v. Bradhove*, the United States Supreme Court extended absolute immunity to state legislators as well. 341 U.S. 367, 376 (1951). In *Gravel v. United States*, the Court also extended derivative absolute immunity to congressional aides. 408 U.S. 606, 616 (1972).

⁷ *Imbler*, 424 U.S. at 419 n.13; Bullard, *supra* note 1, at 745; Ricigliano, *supra* note 1, at 374.

⁸ *Spalding v. Vilas*, 161 U.S. 483, 499 (1896); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871).

⁹ *Butz*, 438 U.S. at 505-06.

¹⁰ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹¹ *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

were not against the law.¹² Moreover, the action taken must be discretionary, as opposed to ministerial, in character.¹³

On December 28, 1994, in *Jones v. Clinton*, Judge Susan Webber Wright of the United States District Court for the Eastern District of Arkansas raised the specter of a third immunity: temporary immunity from trial.¹⁴ Available only to the President, this new immunity would shield him from trial, though not from discovery, while in office.¹⁵

The facts of *Jones v. Clinton* probably are familiar to even casual followers of current events due to high-profile media coverage. Former Arkansas state employee Paula Corbin Jones initially burst into the headlines on February 11, 1994.¹⁶ At a Washington, D.C., press conference, Jones accused President Bill Clinton of making improper and unwanted sexual advances to her while he was Governor of Arkansas.¹⁷

According to Jones, the encounter occurred at the Governor's Quality Control Conference at a Little Rock hotel on May 8, 1991.¹⁸ Arkansas State Trooper Danny Ferguson, then assigned to Governor Clinton's security detail, allegedly approached Jones while she was working at the conference registration desk.¹⁹ Ferguson told Jones that Clinton wished to meet her in a private hotel suite.²⁰ Ferguson escorted Jones to the designated suite, where Clinton allegedly touched her suggestively and requested sexual favors.²¹ According to Jones, she promptly refused the governor's advances and left the room within minutes.²² In contrast, President Clinton denies not only making improper advances, but that he has ever met Jones at all.²³

¹² *Harlow*, 457 U.S. at 818; Ricigliano, *supra* note 1, at 374.

¹³ See *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 589-91 (D.C. Cir. 1974); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1345-46 (2d Cir. 1972). Discretionary acts are those for which no hard and fast rules dictate the course of conduct an official must or must not follow. BLACK'S LAW DICTIONARY (6th ed. 1990).

¹⁴ *Jones v. Clinton*, 869 F. Supp. 690, 698-99 (E.D. Ark. 1994) [hereinafter *Jones II*].

¹⁵ *Id.* at 689-99.

¹⁶ Michael Isikoff et al., *Clinton Hires Lawyers as Sexual Harassment Suit is Threatened*, WASH. POST, May 4, 1994, at A1. A woman named only as "Paula" appeared in the press linked with President Clinton a month earlier. David Brock, *His Cheatin' Heart*, THE AM. SPECTATOR, January 1994, at 26. A January 1994 magazine expose of Clinton's alleged womanizing while Governor of Arkansas contained a one-paragraph narrative of an hour-long sexual encounter between the President and "Paula" in a Little Rock hotel room. *Id.* The article contends that after the encounter "Paula" offered to become the President's regular girlfriend, an allegation Paula Corbin Jones hotly denied. *Id.*; see Plaintiff's Complaint at ¶ 42, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *Complaint*].

¹⁷ Isikoff et al., *supra* note 16.

¹⁸ *Complaint* at ¶¶ 7-8, *Jones II* (No. LR-C-94-290).

¹⁹ *Id.* at ¶¶ 8-10.

²⁰ *Id.*

²¹ *Id.* at ¶¶ 13, 18-21.

²² *Id.* at ¶¶ 23-24.

²³ *Complaint* at ¶ 48, *Jones II* (No. LR-C-94-290).

On May 6, 1994, just days before a three-year statute of limitations was to expire, Jones filed suit in the United States District Court in Little Rock, Arkansas, against both President Clinton and Trooper Ferguson.²⁴ The complaint alleged that Clinton, acting under color of law as Governor of Arkansas, deprived Jones of her equal protection and due process rights²⁵ by acts of sexual harassment,²⁶ professional retaliation²⁷ and defamation.²⁸ Jones further alleged state law claims of defamation²⁹ and intentional infliction of emotional distress.³⁰ Speaking at a news conference the day of the filing, Clinton attorney Robert S. Bennett first suggested that the President might assert an immunity defense, arguing that a sitting President could not be sued for civil damages during his term.³¹ Previewing an argument based on public policy grounds, Bennett urged reporters to consider the consequences resulting if the President could face suit: "There could be thousands of lawsuits . . . Your President would be tied down for 365 days a year being asked questions by lawyers."³² In a July 21, 1994, ruling, Judge Wright agreed to consider Clinton's immunity defense as a threshold question, delaying trial on the merits of the case.³³ In compliance with Wright's ruling, Clinton moved on August 10, 1994, to dismiss Jones's complaint without prejudice on grounds of absolute immunity and to

²⁴ Michael Isikoff, *Clinton Named Defendant in Sexual Harassment Suit*, WASH. POST, May 7, 1994, at A1. Prior to filing the suit, lawyers for Clinton and Jones engaged in lengthy negotiations to craft a mutually agreeable presidential statement that would have avoided court action. *Id.* Their efforts proved unsuccessful. *Id.*

²⁵ Complaint at ¶ 65, *Jones II* (No. LR-C-94-290). Jones grounded her claims on 42 U.S.C. §§ 1983, 1985 (1988). *Id.* Under § 1983, first enacted in 1871, any person who deprives an individual of the equal protection of the Constitution or law shall be civilly liable to the injured party. 42 U.S.C. § 1983. Under § 1985, also first enacted in 1871, two or more persons who conspire to deprive an individual of his or her civil rights are civilly liable to the injured party. 42 U.S.C. § 1985.

²⁶ Complaint at ¶ 60, *Jones II* (No. LR-C-94-290).

²⁷ *Id.* at ¶ 61. Specifically, Jones alleges that after the encounter her superiors at her state job treated her rudely, denied her opportunities for advancement and denied her merit pay increases. *Id.*

²⁸ *Id.* at ¶¶ 49-50. Specifically, Jones alleges that Clinton's authorized spokesperson accused her of lying. *Id.*

²⁹ *Id.* at ¶¶ 76-77.

³⁰ *Id.* at ¶¶ 71-74.

³¹ Ruth Marcus, *Clinton Lawyer May Assert Presidential Immunity From Lawsuit*, WASH. POST, May 7, 1994, at A4.

³² *Id.*

³³ *Jones v. Clinton*, 858 F. Supp. 902, 906-07 (E.D. Ark. 1994) [hereinafter *Jones I*]. As support, the court noted the extreme importance of immunity considerations, which would "directly impact the institution of the Presidency." *Id.* at 906. The court further noted that the separation of powers doctrine required the court to exercise restraint in exercising its power over the executive branch. *Id.*

freeze the statute of limitations until he was no longer in office, at which time Jones could refile.³⁴

The court subsequently refused to dismiss the suit, denying Clinton's claim of absolute immunity.³⁵ The court did agree to stay the trial until the end of Clinton's term, but allowed discovery to proceed.³⁶ The court's creation of what it termed "temporary immunity from trial"³⁷ marks the first judicial determination of whether a sitting President can claim immunity from civil damages suits based on actions that occurred before he took office.³⁸ Both sides have already appealed the court's decision,³⁹ and the controversy may well reach the United States Supreme Court.⁴⁰

Jones v. Clinton charts entirely new waters in the presidential immunity area.⁴¹ In all previous immunity cases, the litigants claimed damages based on official acts taken during the President's or other official's term.⁴² Jones, on the other hand, bases her claim on an encounter that occurred *before* the President assumed office and bears no relation to any official duty.⁴³

This Note argues that although the court reached the correct decision in denying President Clinton's absolute immunity claim, it

³⁴ President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 1, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290). Clinton requested the court to dismiss the suit against trooper Danny Ferguson as well, arguing that the conspiracy charges against the two plaintiffs were inseparable. Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 51-53, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290).

³⁵ *Jones II*, 869 F. Supp. at 698.

³⁶ *Id.* at 698-99.

³⁷ *Id.* at 699.

³⁸ *Id.* at 700.

³⁹ President Clinton filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit on December 30, 1994. *Clinton Lawyers Plan to Appeal Judge's Ruling*, BALTIMORE SUN, Dec. 31, 1994, at 8A. Paula Jones likewise filed papers on January 17, 1995. *Jones Appeals Decision Granting Clinton Trial Delay*, ORLANDO SENTINEL, Jan. 19, 1995, at A16.

⁴⁰ Viveca Novak and Ellen Joan Pollock, *Clinton Lawyers Seek Immunity Ruling Before Sex-Harassment Case Proceeds*, WALL ST. J., June 17, 1994, at A16.

⁴¹ *Jones II*, 869 F. Supp. at 700; Viveca Novak, *Clinton May Have Solid Legal Grounds for Delaying Trial on Paula Jones Suit*, WALL ST. J., May 23, 1994, at A16 (noting that there were no Supreme Court precedents or constitutional provisions providing clear guidance on the question).

⁴² *E.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 739 n.18 (1982) (plaintiff alleged President Nixon conspired to deny him employment in retaliation for testimony before Congress regarding cost overruns); *Halperin v. Kissinger*, 606 F.2d 1192, 1195 (D.C. App. 1979) (plaintiff sued President Nixon and other top administration officials for illegally tapping his telephone).

⁴³ *Jones II*, 869 F. Supp. at 691. Presidents have faced lawsuits for acts predating their terms three times before, but have declined to invoke an absolute immunity defense. Statement of Interest of the United States at n.1, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *U.S. Brief*]. President Theodore Roosevelt faced suit in 1904 based on

subsequently erred in staying the trial. Rather, the courts should adopt a presumptive amenability doctrine, permitting a lawsuit based on unofficial conduct to go forward unless the President can show specifically why it would render him unable to govern. Section I traces the development of sovereign immunity doctrine in the United States up to the *Jones v. Clinton* controversy. Section II then summarizes the arguments presented both for and against President Clinton's immunity motion. Section III discusses in detail the decision reached by the district court. Finally, Section IV analyzes that decision and presents arguments why it should be, in part, reversed.

I. DEVELOPMENT OF PRESIDENTIAL IMMUNITY DOCTRINE

A. *English Common Law Roots and the Framers' Intent*

All Anglo-American sovereign immunity doctrine can trace its roots to the English maxim that "The King can do no wrong."⁴⁴ This maxim did not mean specifically that the King could not be sued, although it has so been interpreted.⁴⁵ It swept far more broadly, meaning that the Sovereign was in fact incapable of committing an illegal or malicious act.⁴⁶ But precise definitions notwithstanding, by the early thirteenth century settled law proclaimed that the King could not be subject to judicial process.⁴⁷ In fact, the Queen enjoys absolute immunity from tort claims to this day, her protection ensured by the Crown Proceedings Act of 1947.⁴⁸

Instead, English citizens could request redress of grievances against the King by a "petition of right," a privilege open to Crown subjects since the late thirteenth century.⁴⁹ The Chancellor or Privy

actions taken while serving as a member of New York City Board of Police. *U.S. Brief* at n.1 (citing *People ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904) (resolved in Roosevelt's favor). In 1946, President Harry Truman was sued for damages based on his conduct as a state court judge. *U.S. Brief* at n.1. (citing *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946)) (resolved in Truman's favor). Finally, in 1962, President John Kennedy faced liability for damages arising from an automobile accident during his campaign. *U.S. Brief* at n.1. (citing *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. July 5, 1962). President Kennedy unsuccessfully sought a stay on the basis of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. §§ 501-25 (1988), which stays suits against military personnel in wartime, but did not claim immunity on constitutional or common law grounds. *U.S. Brief* at n.1.

⁴⁴ R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 305 (1959).

⁴⁵ Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3-4 (1963).

⁴⁶ *Id.* at 4.

⁴⁷ *See id.* at 2.

⁴⁸ Gray, *supra* note 44, at 307.

⁴⁹ *See Jaffe, supra* note 45, at 5.

Council screened petitions to determine whether the supplicant had a legitimate cause of action under the common law.⁵⁰ If so, they referred the petition to the King's Bench, Chancery or the Exchequer for final disposition according to the law.⁵¹ Although the King could refuse a petition at his pleasure, scholars contend that he rarely did so without substantial legal reasons.⁵² They characterize the petition of right as a delicate social contract: in return for his position as the sovereign source of all law, the King must in turn subject himself to the law he promulgated.⁵³ Thus, although technically immune from damages claims, the King acquiesced to them in practice.⁵⁴

At early common law, the philosophy that "the King could do no wrong" extended to his judges as well.⁵⁵ To fault a judge for his execution of the King's law, early jurists reasoned, was the same as faulting the King.⁵⁶ Thus, suits against a judge based on his official actions were prohibited as tantamount to suits against the King himself.⁵⁷

As the common law developed, seventeenth-century English courts crafted a public policy rationale to further justify judicial immunity.⁵⁸ Jurists such as Coke argued that subjecting a judge to civil damages for his decisions would weaken the court's authority and subject the bench to constant harassment from losing litigants.⁵⁹ Thus, English courts dispensed justice swaddled in a warm cloak of immunity spun not only from the Divine Right of Kings, but from solid pragmatism as well.⁶⁰

In the case of administrative officials, the King similarly could insulate them from suit by claiming their acts as the Crown's own.⁶¹ If the King could do no unjust act, jurists reasoned, neither could officers carrying out his wishes.⁶² But like the petition of right, this maxim held more rhetorical weight than practical significance.⁶³ Merely local

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 3 & n.5.

⁵⁴ Gray, *supra* note 44, at 307; see Jaffe, *supra* note 45, at 5.

⁵⁵ Gray, *supra* note 44, at 311.

⁵⁶ *Id.*

⁵⁷ *Id.* Unlike the King, a judge's immunity extended only to acts done while acting in a judicial capacity. *Id.* at 309 (citing cases).

⁵⁸ See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-48 (1871).

⁵⁹ *Id.*

⁶⁰ See *id.*; see also Gray, *supra* note 44, at 311.

⁶¹ Jaffe, *supra* note 45, at 9. If an official claimed to be acting in the King's name at the time of the injury, his immunity held until the King specifically disclaimed the action. *Id.*

⁶² Gray, *supra* note 44, at 326.

⁶³ See Jaffe, *supra* note 45, at 9-10; see also Gray, *supra* note 44, at 325-26.

officials lost immunity protection because the courts reasoned they were just functionaries of the Privy Council, not agents of the King himself.⁶⁴ Moreover, litigants could bypass the immunity cloak shielding higher officials simply by suing them in their own names, rather than in the name of the Crown.⁶⁵ By doing so, plaintiffs no longer called into question the inviolability of the King.⁶⁶ Lords of the Admiralty, Cabinet Secretaries and Colonial Governors all answered to the courts for their actions as a result.⁶⁷

In contrast, legislative immunity in England sprang from Parliamentary invention, not from judicial reasoning.⁶⁸ In the seventeenth-century struggles between Parliament and the Stuart monarchs, the Crown frequently used imprisonment for treason or seditious libel to silence critics in Parliament.⁶⁹ Once the Glorious Revolution had swept the Stuarts from power, Parliamentarians concluded that they must protect themselves from such coercion in the future.⁷⁰ To accomplish this, Parliament passed the Bill of Rights in 1689, which proclaimed "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court."⁷¹

In laying the foundations of American immunity doctrine, the Founding Fathers paralleled the English structure in place at the time. They enacted legislative immunities into positive law,⁷² while leaving presidential, judicial and other official immunities up to the courts.⁷³ But even though presidential immunity is mentioned neither in the Constitution nor in any statute, it did prove a topic for debate among early statesmen.⁷⁴

John Adams and Oliver Ellsworth argued that "the President, personally, was not the subject to any process whatsoever," reasoning that to do otherwise would allow the courts to "stop the whole machine of Government."⁷⁵ Writing somewhat later, in 1833, Justice Story simi-

⁶⁴ Jaffe, *supra* note 45, at 9.

⁶⁵ Gray, *supra* note 44, at 326.

⁶⁶ *See id.*

⁶⁷ *Id.* at 325-26 (citing cases).

⁶⁸ *Id.* at 319.

⁶⁹ *Id.*

⁷⁰ Gray, *supra* note 44, at 319.

⁷¹ *Id.*

⁷² *See supra* note 6.

⁷³ *See infra* notes 83-183 and accompanying text.

⁷⁴ *See Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982); *see also* Bullard, *supra* note 1, at 742-43.

⁷⁵ *Fitzgerald*, 457 U.S. at 750 n.31 (citing W. MACLAY, *THE JOURNAL OF WILLIAM MACLAY* 167 (1890 ed.)).

larly argued that the separation of powers doctrine dictated that the President "must be deemed, in civil cases at least, to possess an official inviolability."⁷⁶ Moreover, Thomas Jefferson, piqued at the Virginia District Court's enforcement of a subpoena duces tecum against him,⁷⁷ complained that amenability to process undermined the President's ability to function.⁷⁸

In contrast, Chief Justice Marshall, in his 1803 *Marbury v. Madison* opinion, counselled in expansive terms against denying citizens their legal right of redress: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."⁷⁹ Moreover, Charles Pinckney argued that the framers deliberately chose *not* to grant the President immunity because they "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here."⁸⁰ In sum, a search for consensus among the founding fathers regarding presidential immunity leads to the conclusion that none existed.⁸¹ Justice Powell in *Nixon v. Fitzgerald* stated his belief that the opinions of Adams, Jefferson and Ellsworth represented the great weight of evidence on the issue.⁸² Nonetheless, those statesmen comprising the great weight of evidence never memorialized their opinions regarding presidential immunity into positive law.

B. *Judicial Grants of Absolute Immunity*

The absence of Constitutional authority left the creation of an American immunity doctrine where it had been in England: in the

⁷⁶ *Id.* at 749 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (1833 ed.)).

⁷⁷ See *United States v. Burr*, 25 F. Cas. 30, 187, 192 (C.C.D. Va. 1807) (No. 14,464).

⁷⁸ Specifically, Jefferson questioned whether:

[T]he executive [would] be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

Fitzgerald, 457 U.S. at 750 n.31 (quoting 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford ed., 1905)).

⁷⁹ 5 U.S. (1 Cranch.) 137, 163 (1803). In addition to being a masterpiece of legal rhetoric, *Marbury v. Madison* is remembered for establishing the precedent of judicial review of acts of Congress. *Jones II*, 869 F. Supp. at 696.

⁸⁰ *Fitzgerald*, 457 U.S. at 777 (White, J., dissenting) (citing 10 ANNALS OF CONG. 72 (1800)).

⁸¹ Bullard, *supra* note 1, at 743.

⁸² *Fitzgerald*, 457 U.S. at 752 n.31.

courts.⁸³ Until the 1970's, the United States Supreme Court followed a strict "all or nothing" approach: the Court granted public officials either absolute immunity from civil damages suits based on official actions or no immunity at all.⁸⁴ At its most expansive, absolute immunity shielded the discretionary official acts of judges, quasi-judicial officers and executive branch officials ranging from the President and Cabinet Secretaries to mid-level bureaucrats.⁸⁵

In 1871, in *Bradley v. Fisher*, the United States Supreme Court held judges absolutely immune from civil damages liability for judicial acts, provided they did not knowingly exceed their jurisdiction.⁸⁶ In *Bradley*, an attorney sued a District of Columbia judge for striking his name from the roll of lawyers admitted to plead before the court, alleging a malicious campaign to put him out of business.⁸⁷ In reaching its decision, the Court adopted the English doctrine of judicial immunity based on public policy, but made no reference to the common law maxim of absolute immunity descending from the sovereign.⁸⁸ Citing Coke, the Court reasoned that judges must be free to follow their consciences without fear of litigation or else the legal system could not function.⁸⁹ The Court further noted that judges were particularly vulnerable to a deluge of suits due to the great financial and emotional consequences of their decisions.⁹⁰ Accordingly, the Court dismissed the suit on absolute immunity grounds, noting that disciplining an attorney, even if done maliciously, still constituted a judicial act.⁹¹

⁸³ *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974) (immunity for executive and judicial branches long a creature of the common law); *Barr v. Matteo*, 360 U.S. 564, 569 (1959) (law of privilege as defense against civil suit for government officials largely of judicial making).

⁸⁴ See Bullard, *supra* note 1, at 744-46; Theodore P. Stein, Note, *Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 763-65 (1983).

⁸⁵ Stein, *supra* note 84, at 763-65; see *infra* notes 86-114 and accompanying text.

⁸⁶ 80 U.S. (13 Wall.) 335, 351-52 (1871).

⁸⁷ *Id.* at 336. The incident that provoked the judge's action occurred at the 1867 trial of John H. Suratt for the murder of Abraham Lincoln. *Id.*

⁸⁸ See *id.* at 349. Nineteenth-century English jurists turned away from derived monarchical perfection as the rationale for judicial immunity as well. Gray, *supra* note 44, at 311. In *Fray v. Blackburn*, Mr. Justice Compton opined that judicial immunity "exists for [the public's] benefit, and was established in order to secure the independence of the judges, and prevent them from being harassed by vexatious actions." *Bradley*, 80 U.S. (13 Wall.) at 349.

⁸⁹ *Id.* at 347-48; see *supra* notes 58-60 and accompanying text.

⁹⁰ See *Bradley*, 80 U.S. (13 Wall.) at 348.

⁹¹ *Id.* at 354. Following its reasoning in *Bradley*, the Court subsequently extended absolute immunity to other judicial and quasi-judicial officials, including prosecutors and executive branch employees performing adjudicative functions. *Butz v. Economou*, 438 U.S. 478, 513 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Like a judge, the Court reasoned, these officials required absolute immunity to make the difficult decisions their jobs required, free from the threat of financial retribution. *Butz*, 438 U.S. at 512-13. Also like a judge, a prosecutor's decision

High-ranking executive branch officials donned the judge's absolute immunity cloak in 1896.⁹² In *Spalding v. Vilas*, the United States Supreme Court held that the Postmaster General could not face civil damages liability for actions taken within the scope of his official authority, even if he acted maliciously.⁹³ An attorney who had lobbied the government on behalf of local postmasters brought suit after the Postmaster General sent his clients a letter branding his representation unnecessary.⁹⁴ As in *Bradley*, the Court grounded its decision on public policy imperatives.⁹⁵ Just as the judicial system could not function if judges feared lawsuits, the Court reasoned, the executive branch could not function if officials could not act in the public interest without fearing liability.⁹⁶ Again, the Court dismissed the suit on absolute immunity grounds, finding the Postmaster General's actions to be within the scope of his official authority.⁹⁷

The doctrine of absolute immunity from civil damages reached its broadest extension in 1959, when the United States Supreme Court in *Barr v. Matteo* held that absolute immunity extended to executive branch officials far below cabinet rank, provided they acted within the scope of their authority.⁹⁸ In *Barr*, suspended employees of the Office of Rent Stabilization sued the agency's acting director for allegedly libeling them in a press release.⁹⁹ The Court noted that executive officials of lower rank, such as an acting director, often performed discretionary functions as complex as those of their superiors.¹⁰⁰ The Court thus concluded that lesser officials required the same ability to act without fear of financial liability.¹⁰¹ Accordingly, the Court dismissed

to prosecute or a hearing officer's decision to levy a stiff fine handed litigants ample motive to seek revenge through civil damages. *See id.*, 438 U.S. at 512-13; *Imbler*, 424 U.S. at 423.

⁹² *Spalding v. Vilas*, 161 U.S. 483, 499 (1896).

⁹³ *Id.*

⁹⁴ *See id.* at 484-89.

⁹⁵ *See id.* at 498.

⁹⁶ *Id.*

⁹⁷ *Spalding*, 161 U.S. at 499.

⁹⁸ *Barr v. Matteo*, 360 U.S. 564, 572 (1959).

⁹⁹ *Id.* at 565.

¹⁰⁰ *Id.* at 572-73. The Court quoted extensively from Judge Learned Hand's opinion in *Gregoire v. Biddle*, in which he lamented the prospect of denying compensation to victims of abusive officials. *Id.* at 571-72 (citing 177 F.2d 579, 581 (1949)). On balance, Judge Hand concluded that "[i]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.*

¹⁰¹ *Id.* at 573.

the suit, finding that issuing a press release fell within the outer perimeter of the acting director's authority.¹⁰²

Although none of these cases specifically cloaked the President with absolute immunity from civil damages, lower courts nonetheless considered it to be a matter of settled law.¹⁰³ In the early 1970's, for example, a wave of suits filed against President Nixon all were dismissed on absolute immunity grounds.¹⁰⁴ As precedent, many courts employed the 1866 United States Supreme Court holding in *Mississippi v. Johnson*.¹⁰⁵

In *Mississippi v. Johnson*, the Court concluded that it lacked jurisdiction to enjoin President Andrew Johnson from enforcing the Reconstruction Acts.¹⁰⁶ The State of Mississippi had sought to block enforcement, claiming the Acts were unconstitutional.¹⁰⁷ The Court reasoned, however, that enjoining the President from performing his constitutional duty to enforce the laws would violate the separation of powers doctrine.¹⁰⁸ Such judicial interference, the Court feared, would hurtle the executive branch towards a head-on collision with either the judiciary, if President Johnson refused to obey the injunction, or with Congress if he did.¹⁰⁹ Accordingly, the Court refused to hear the merits of Mississippi's case.¹¹⁰

One hundred and six years later, in *Reese v. Nixon*, the United States District Court for the Central District of California held that the separation of powers doctrine likewise precluded it from hearing a civil

¹⁰² *Id.* at 574. The Court noted that absolute immunity would cloak only a narrow range of actions performed by lower-level executive branch officials, as their scope of discretionary authority was much narrower than that of their superiors. *Id.* at 573. Lesser officials did not don an absolute immunity cloak without opposition, however. *Id.* at 578-86 (Warren, C.J., dissenting). In a vigorous dissent, Chief Justice Warren worried that *Barr* would stifle the public's ability to call officials to account, as the challenged official was left free to retaliate with a libelous press release. *Id.* at 585 (Warren, C.J., dissenting).

¹⁰³ *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672, 672 (N.D. Cal. 1971) (judicial reluctance to entertain suits against the President enjoys the status of a positive rule); Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L.J. 739, 757-58 (1992).

¹⁰⁴ See Bullard, *supra* note 1, at 744 & n.66 (listing cases).

¹⁰⁵ *E.g.*, *Reese v. Nixon*, 347 F. Supp. 314, 317 (C.D. Cal. 1972); *Atlee v. Nixon*, 336 F. Supp. 790, 791 (E.D. Pa. 1972); see also *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866); Ray, *supra* note 103, at 757-58.

¹⁰⁶ 71 U.S. (4 Wall.) at 501.

¹⁰⁷ *Id.* at 497.

¹⁰⁸ *Id.* at 499-501.

¹⁰⁹ *Id.* at 500-01.

¹¹⁰ *Id.* at 501.

damages claim against the President.¹¹¹ The plaintiffs sought damages for alleged civil rights violations committed by President Nixon and more than 500 other federal, state and local officials, including "various unnamed 'agents-provocateurs.'"¹¹² The court reasoned, however, that the broad separation of powers philosophy expounded in *Mississippi v. Johnson* precluded not only injunctive relief, but civil damages relief as well.¹¹³ Thus, the court dismissed President Nixon as a defendant.¹¹⁴

C. Development of a Qualified Immunity Doctrine

It took no less potent a lever than the United States Constitution to pry loose federal officials' grip on absolute immunity from civil damages.¹¹⁵ By asserting violations of constitutional rights as the basis for their suits, litigants stripped the absolute immunity defense from executive officials as high as cabinet rank¹¹⁶ and, briefly, from the President himself.¹¹⁷ In its place, a doctrine of qualified immunity developed, under which officials remained immune from damages for

¹¹¹ 347 F. Supp. at 316-17.

¹¹² *Id.* at 315.

¹¹³ *Id.* at 316-17. Other courts, however, have evaded the *Mississippi v. Johnson* Court's seemingly sweeping holding by either distinguishing the case or permitting suit against a presidential proxy. See Ray, *supra* note 103, at 758-59. In 1974, for example, the United States Court of Appeals for the District of Columbia Circuit compelled President Nixon to implement a federal pay increase mandated by the Federal Pay Comparability Act. National Treasury Employees Union v. Nixon, 492 F.2d 587, 591-92, 616 (D.C. Cir. 1974). The court determined that simply implementing an approved pay increase counted only as a ministerial and not a discretionary act. *Id.* at 607-08. The court subsequently found *Mississippi v. Johnson* inapplicable, concluding that it only enjoined interference with a President's discretionary duties. *Id.* at 607. With *Mississippi v. Johnson* safely distinguished, the court compelled the President to act. *Id.* at 616.

Moreover, in *Youngstown Sheet and Tube v. Sawyer*, steel executives persuaded the 1952 Supreme Court to overturn President Truman's seizure of the nation's steel mills—an unarguably discretionary act. 347 U.S. 579, 583, 589 (1951). The *Youngstown* plaintiffs, however, targeted Commerce Secretary Charles Sawyer as the defendant, not the President. *Id.* at 583. As a result, the issue of Truman's amenability to suit under *Mississippi v. Johnson* never surfaced in any of the Justices' seven separate opinions, even though the Court viewed the case as a question of the scope of presidential authority. See *id.* at 584, 582-710; Ray, *supra* note 103, at 762.

¹¹⁴ *Reese*, 347 F. Supp. at 316-19 (the court also dismissed the other defendants on various grounds); see *Atlee v. Nixon*, 336 F. Supp. 790, 791-92 (E.D. Pa. 1972) (taxpayer suit dismissed against President Nixon challenging constitutionality of Vietnam War expenditures); see also *Meyers v. Nixon*, 339 F. Supp. 1388, 1389-91 (S.D.N.Y. 1972) (class action suit to enjoin Vietnam War expenditures dismissed against President Nixon).

¹¹⁵ See Ricigliano, *supra* note 1, at 379-83 (1983).

¹¹⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (government officials receive no immunity if they violate clearly established constitutional or statutory rights of which reasonable person would have known); *Butz v. Economou*, 438 U.S. 478, 500 (1978) (Secretary of Agriculture entitled to only qualified immunity from civil suit based on constitutional grounds).

¹¹⁷ *Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (defendants, including Presi-

official actions within the scope of their responsibility.¹¹⁸ Immunity only attached, however, if the officials did not violate a clearly established constitutional or statutory right of which a reasonable person would have known.¹¹⁹

The United States Supreme Court set the stage for the unraveling of executive officials' absolute immunity protection in 1971 by allowing violations of Fourth Amendment rights to serve as a basis to sue federal officers.¹²⁰ In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court held that plaintiffs could recover money damages from federal officials who violated their constitutional rights.¹²¹ Plaintiff Bivens claimed that federal agents violated his Fourth Amendment rights by arresting him without probable cause or a warrant.¹²² The Justices noted that when fundamental rights were violated, courts historically could award any remedy to make good the wrong, including money damages.¹²³ Accordingly, the Court held that Bivens had a cause of action for damages against the agents who violated his constitutional rights.¹²⁴ The Court did not rule on whether the agents possessed immunity protection, however, remanding that question to the lower courts instead.¹²⁵

In deciding the immunity question, the United States Court of Appeals for the Second Circuit did nothing to modify prevailing absolute immunity doctrine: it simply declined to extend absolute immunity to the agents based on the facts of the case.¹²⁶ The court found it settled law that "certain officers of the federal government" were absolutely immune from lawsuits while acting in their official capacities, even when charged with malice.¹²⁷ The court further noted, however,

dent Richard Nixon, entitled to only qualified immunity from suit alleging constitutional and statutory violations). Three years later, in another case, the Supreme Court re-established absolute immunity for Nixon, holding that the President was absolutely immune from civil suits for official actions taken within the "outer perimeter" of his authority. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

¹¹⁸ *Harlow*, 457 U.S. at 813.

¹¹⁹ *Id.* at 818-19.

¹²⁰ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) [hereinafter *Bivens I*].

¹²¹ *Id.*

¹²² *Id.* at 389.

¹²³ *Id.* at 396.

¹²⁴ *Id.* at 397.

¹²⁵ *Bivens I*, 403 U.S. at 397-98. Eager litigants did not wait for the immunity issue to work its way back through the appeals process and filed a flurry of suits seeking damages against President Nixon on constitutional grounds. See *supra* notes 104-14 and accompanying text.

¹²⁶ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1342-47 (1972) [hereinafter *Bivens II*].

¹²⁷ *Id.* at 1342.

that this immunity extended only to discretionary functions.¹²⁸ Concluding that making an arrest was only a ministerial and not a discretionary act, the court held that the officers merited no absolute immunity protection.¹²⁹

The Supreme Court's doctrine of qualified immunity for federal officials actually developed in the context of Constitution-based suits against state¹³⁰ and local¹³¹ officials. In 1974, in *Scheuer v. Rhodes*, the United States Supreme Court refused to dismiss a damages claim against Ohio Governor James Rhodes, holding that he possessed no absolute immunity from suits alleging violations of federal constitutional rights.¹³² Representatives of students killed in the 1971 Kent State University shootings invoked 42 U.S.C. §§ 1983 and 1985¹³³ to charge that Rhodes had violated the students' constitutional right to due process by recklessly and unnecessarily deploying the National Guard.¹³⁴ Seizing upon the basis of the plaintiff's claim, the Court explained that constitutional rights served as the paramount limit on any official's authority.¹³⁵ The Court further reasoned that providing state officials absolute immunity from suits based on §§ 1983 and 1985 would gut the laws' intent to afford injured citizens a private cause of action for violations of their constitutional rights.¹³⁶ Accordingly, the Court concluded that state officials received only qualified immunity from civil damages suits alleging constitutional violations.¹³⁷ Officials could claim immunity only if they reasonably believed that their actions were within the scope of their authority and not against the law.¹³⁸

¹²⁸ *Id.* at 1342-43.

¹²⁹ *Id.* at 1346. The Second Circuit did grant the agents qualified immunity, however, allowing them to offer a "good faith" defense. *Id.* at 1347-48. To prevail, the agent need show that he believed that his conduct was lawful and that his belief was reasonable. *Id.* at 1348.

¹³⁰ *Scheuer v. Rhodes*, 416 U.S. 232, 234 (1974) (suit against Governor of Ohio and other state officials).

¹³¹ *Wood v. Strickland*, 420 U.S. 308, 309 (1975) (suit against school board members and school administrators).

¹³² *Scheuer*, 416 U.S. at 247.

¹³³ See *supra* note 25.

¹³⁴ *Scheuer*, 416 U.S. at 235.

¹³⁵ *Id.* at 248-49 (citing *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932)).

¹³⁶ *Scheuer*, 416 U.S. at 248.

¹³⁷ *Id.* at 247. Citing *Barr v. Matteo*, the Court noted that governors and other high officers would receive far broader immunity than their subordinates, due to their broader scope of discretionary authority. *Id.*

¹³⁸ *Id.* at 247-48. In 1975, in *Wood v. Strickland*, the Court modified the *Scheuer* guidelines for qualified immunity by adding the third criteria that an official would also forfeit immunity if he or she acted with malicious intent. 420 U.S. 308, 322 (1975). In 1982, in *Harlow v. Fitzgerald*, the Court subsequently dropped the malicious intent prong and other subjective considerations

The Supreme Court applied its reasoning in *Scheuer* to federal officials in 1978.¹³⁹ In *Butz v. Economou*, the Court held that executive branch officials, including those of Cabinet rank, received no greater immunity from civil damages than state officials when sued on constitutional grounds.¹⁴⁰ *Economou*, a commodities trader, sued Secretary of Agriculture Earl Butz for allegedly trying to revoke his trading registration in retaliation for criticism of Butz's department.¹⁴¹ In reaching its conclusion, the Court distinguished the earlier holdings in *Spalding* and *Barr*, noting that neither case involved violations of constitutional rights.¹⁴² Once officials violate the Constitution, the Court reiterated, they exceed the scope of their authority and no longer qualify for absolute immunity protection.¹⁴³ Thus, the Court held that federal officials receive only qualified immunity from damages based on constitutional grounds.¹⁴⁴ The *Butz* Court left intact, however, absolute immunity protection for federal officials performing special functions, specifically judges, prosecutors and other officials performing adjudicative functions.¹⁴⁵ The Court also left open the question of whether other federal officials could show that public policy demanded absolute immunity protection for them as well.¹⁴⁶

In 1979, in *Halperin v. Kissinger*, the United States Court of Appeals for the District of Columbia Circuit carried the Supreme Court's evolving qualified immunity doctrine to the doorstep of the President himself.¹⁴⁷ The court held that President Nixon possessed no immunity protection if he lacked reasonable grounds to believe his actions were within the law.¹⁴⁸ Plaintiff Halperin, a National Security Council staff member, alleged that Nixon and National Security Advisor Henry Kissinger violated his constitutional rights by wiretapping his telephone.¹⁴⁹ The court reasoned that granting the President absolute immunity from constitutional claims, when other executive branch

from its qualified immunity test. 457 U.S. 800, 817-18 (1982). The streamlined *Harlow* test shields executive officials performing discretionary functions from liability when their conduct does not violate constitutional or statutory rights of which a reasonable person would have known. *Id.* at 818.

¹³⁹ *Butz v. Economou*, 438 U.S. 478, 503, 504 (1978).

¹⁴⁰ *Id.* at 500.

¹⁴¹ *Id.* at 481-82.

¹⁴² *Id.* at 495.

¹⁴³ *Id.*

¹⁴⁴ *Butz*, 438 U.S. at 500.

¹⁴⁵ *Id.* at 508-17.

¹⁴⁶ *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982); see *Butz*, 438 U.S. at 506.

¹⁴⁷ *Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1195. Administration officials suspected that Halperin, who had ties to anti-war

officials received only qualified immunity, would be tantamount to placing Nixon above the law.¹⁵⁰ To escape *Butz*, the court added, the President must show either an implicit constitutional exemption or sufficiently drastic public policy consequences.¹⁵¹ Concluding that Nixon had shown neither, the court denied his use of an absolute immunity defense.¹⁵² An equally divided United States Supreme Court affirmed the decision per curiam, and qualified immunity for the President stood as the law of the land.¹⁵³

D. *The President Recaptures Absolute Immunity: Nixon v. Fitzgerald*¹⁵⁴

In 1982, the United States Supreme Court by a bare 5–4 majority held that the President enjoyed absolute immunity from civil damages for official actions taken within the outer perimeter of his authority.¹⁵⁵ The plaintiff in *Nixon v. Fitzgerald*, an Air Force cost control expert, alleged that Nixon and White House aides violated his First Amendment rights by forcing him from his job in retaliation for damaging testimony he gave before Congress.¹⁵⁶ The Court reasoned that the President's unique position as chief constitutional officer demanded the absolute immunity from civil damages denied to other executive branch officials by *Butz*.¹⁵⁷ Article II grants the President unique responsibilities, such as conducting foreign affairs, serving as Commander-in-Chief of the armed forces and managing the entire executive branch, which the Court held required the utmost discretion and sensitivity.¹⁵⁸ As these responsibilities entail decisions likely to arouse intense passions, the Court worried that each presidential decision, like a judge's verdict, could prove a lightning rod for civil suits.¹⁵⁹ In sum, the Court worried that subjecting the President to civil damages

protest groups, leaked information on the secret U.S. bombing of Cambodia to the *New York Times*. *Id.* at 1196. The administration tapped Halperin's telephone for 21 months, continuing the tap even after Halperin had been cleared of leaking information, had resigned from the National Security Council and had ceased having access to classified data. *See id.* at 1195–98.

¹⁵⁰ *See id.* at 1211–13; *see also* Ray, *supra* note 103, at 788.

¹⁵¹ *Halperin*, 606 F.2d at 1210–11.

¹⁵² *Id.* at 1211.

¹⁵³ *Kissinger v. Halperin*, 452 U.S. 713 (1981) (per curiam) (Justice Rehnquist took no part in deciding the case).

¹⁵⁴ 457 U.S. 731 (1982).

¹⁵⁵ *Id.* at 756.

¹⁵⁶ *See id.* at 733–40.

¹⁵⁷ *See id.* at 749–51; *see also* *Butz v. Economou*, 438 U.S. 478, 500 (1978). Because of the President's unique position, the *Fitzgerald* court explicitly dismissed *Butz* as inapplicable. *Fitzgerald*, 457 U.S. at 750.

¹⁵⁸ *Fitzgerald*, 457 U.S. at 750.

¹⁵⁹ *Id.* at 751–52.

liability based on his actions would hamstring his ability to make the difficult decisions the Republic required him to make.¹⁶⁰ This prospect outweighed the losses to just one person that civil damages could compensate.¹⁶¹ The Court accordingly upheld President Nixon's absolute immunity defense on public policy grounds and dismissed Fitzgerald's claim.¹⁶²

Writing in concurrence, Chief Justice Burger noted that *Fitzgerald's* holding was a narrow one, granting absolute immunity only for civil damages claims and only for official acts within the President's authority.¹⁶³ Moreover, the *Fitzgerald* Court's grant of absolute immunity did not come without vigorous dissent.¹⁶⁴ Justice White, joined by Justices Brennan, Marshall and Blackmun, stated that the majority's holding placed the President above the law and directly contradicted *Butz*.¹⁶⁵ Justice White also pointed out that the *Butz* Court sanctioned absolute immunity only when officials performed particularly sensitive functions, such as adjudicating a dispute.¹⁶⁶ Therefore, Justice White reasoned, the President likewise deserved an absolute cloak only when engaged in particularly sensitive functions, which did not include terminating an unwanted employee.¹⁶⁷

E. *Presidential Amenability to Criminal Process as Opposed to Civil Suit*

Although President Nixon narrowly succeeded in capturing absolute immunity from civil damages suits, Presidents have enjoyed less luck holding the courts at bay in the context of criminal trials.¹⁶⁸ In 1807, in *United States v. Burr*, Chief Justice Marshall, sitting as a trial court judge in the treason trial of Aaron Burr, enforced a subpoena duces tecum issued to President Jefferson by the defense.¹⁶⁹ Marshall

¹⁶⁰ *Id.* at 752-53.

¹⁶¹ *Id.* at 754. Writing in concurrence, Chief Justice Burger also cited the separation of powers doctrine as requiring judicial restraint in questioning presidential decisions. *See id.* at 760-64 (Burger, C.J., concurring). Exposing the President to civil damage suits, Burger reasoned, would subject presidential actions to improper judicial scrutiny. *Id.* at 762 (Burger, C.J., concurring).

¹⁶² *Id.* at 756.

¹⁶³ *Fitzgerald*, 457 U.S. at 759 (Burger, C.J., concurring) ("[A] President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties.").

¹⁶⁴ *See id.* at 764-99 (White, J. dissenting).

¹⁶⁵ *Id.* at 764-65 (White, J. dissenting).

¹⁶⁶ *Id.* at 765 (White, J., dissenting); *see supra* notes 145-46 and accompanying text.

¹⁶⁷ *Fitzgerald*, 457 U.S. at 788 (White, J., dissenting).

¹⁶⁸ *United States v. Nixon*, 418 U.S. 683, 713 (1982); *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

¹⁶⁹ 25 F. Cas. at 192.

held that "the President of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession."¹⁷⁰ He did note that a President could in some cases assert reasons compelling enough to restrain a court from demanding documents.¹⁷¹ But upon finding that Jefferson offered no such reasons in this case, Marshall enforced the subpoena.¹⁷²

In 1972, in *United States v. Nixon*, the United States Supreme Court similarly refused to quash a subpoena duces tecum compelling President Nixon to turn over the Watergate tapes, a decision that preceded his resignation by just a few days.¹⁷³ Special Prosecutor Leon Jaworski wanted to use the taped conversations between Nixon and top aides as evidence in the aides' trial for conspiracy and obstruction of justice.¹⁷⁴ The President moved to quash the subpoena, claiming that a general executive privilege immunized him from obeying the court's order.¹⁷⁵ Citing Marshall's reasoning in *Burr*, the *Nixon* Court recognized a presumptive executive privilege flowing from the separation of powers.¹⁷⁶ The Court subsequently held, however, that neither the separation of powers nor confidentiality concerns rendered that right absolute.¹⁷⁷ Courts must maintain the most rigorous legal standards in a criminal trial, the Court reasoned, lest they risk punishing the innocent or acquitting the guilty.¹⁷⁸ Thus, a merely general claim of privilege must yield to the greater need to develop all relevant facts in a criminal trial.¹⁷⁹ As the President had not offered any specific reasons why the tapes must remain secret,¹⁸⁰ the Court enforced the subpoena.¹⁸¹ In sum, after *United States v. Nixon*, the President can still

¹⁷⁰ *Id.* at 191.

¹⁷¹ *Id.*

¹⁷² *Id.* at 192. For Jefferson's rhetorical reply to Marshall's ruling see *supra* note 78.

¹⁷³ *United States v. Nixon*, 418 U.S. at 713.

¹⁷⁴ *Id.* at 687-88. The defendants included former Attorney General John Mitchell and Nixon aides H.R. Haldeman, John Ehrlichman and Charles Colson. *Id.* at 687 n.3.

¹⁷⁵ *Id.* at 688.

¹⁷⁶ *Id.* at 705-06, 708.

¹⁷⁷ *Id.* at 706.

¹⁷⁸ *United States v. Nixon*, 418 U.S. at 709.

¹⁷⁹ *Id.* at 711-12.

¹⁸⁰ *Id.* at 710. In dictum, the Court suggested that when executive privilege claims alleged a need to protect military or diplomatic secrets, the judiciary would "show[] the utmost deference to Presidential responsibilities." *Id.*

¹⁸¹ *Id.* at 713. The Court did permit the tapes to be examined in camera before being turned over to the special prosecutor to determine positively if they contained privileged information. *Id.* at 714-16.

theoretically invoke immunity from criminal process.¹⁸² He must, however, state specifically why his duties demand it.¹⁸³

II. THE ARGUMENTS IN *JONES V. CLINTON*¹⁸⁴

At the outset, President Clinton acknowledged that case law, although granting him absolute immunity from damages based on official acts, offered no settled protection from damages based on events that occurred before he took office.¹⁸⁵ Clinton further acknowledged that a key rationale behind the *Fitzgerald* holding—fear that potential liability would render Presidents timid in making official decisions—also would not apply in the *Jones* case.¹⁸⁶ For these reasons, the President declined to request the absolute permanent immunity awarded in *Fitzgerald*.¹⁸⁷ Instead, Clinton sought a new solution: absolute *temporary* immunity, lasting only until he left office.¹⁸⁸ This immunity would consist of dismissal without prejudice with leave to refile after he returned to private life.¹⁸⁹

Clinton's arguments, as well as those in rebuttal, focused on two broad themes: (1) the necessity of shielding the President from the distractions defending a suit would cause, and (2) the separation of powers' mandate restricting judicial interference with the executive branch.¹⁹⁰ In addition, Clinton contended that Jones possessed no compelling need for immediate relief that would outweigh his inter-

¹⁸² See *United States v. Nixon*, 418 U.S. at 710.

¹⁸³ See *id.* at 710, 713.

¹⁸⁴ *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) [hereinafter *Jones II*].

¹⁸⁵ Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 2, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *Clinton Brief*].

¹⁸⁶ *Id.* at 6.

¹⁸⁷ *Id.* at 2.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* In the alternative, Bennett requested that the court stay the proceedings in their entirety until Clinton leaves office. *Id.* at 59-65; see *infra* notes 284-88 and accompanying text.

¹⁹⁰ See *Clinton Brief* at 3-13, *Jones II* (No. LR-C-94-290); Memorandum in Support of Paula Jones Response in Opposition to President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 5-8, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *Jones Brief*]; Statement of Interest of the United States at 1-4, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *U.S. Brief*]; Memorandum of Amicus Curiae of Law Professors at 3-6, *Jones v. Clinton*, 869 F. Supp. 690, (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *Professors Brief*]; Memorandum of Law of Amicus Curiae the American Civil Liberties Union (ACLU) at 2-8, *Jones v. Clinton*, 869 F. Supp. 690, (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *ACLU Brief*].

ests.¹⁹¹ Finally, Clinton buttressed the reasonableness of his request by pointing out that temporary immunity did not deny Jones eventual satisfaction.¹⁹² Rather, it merely compelled her to wait the same way other plaintiffs must wait to seek damages against active duty military personnel.¹⁹³

A. *Civil Suits and Impermissible Distraction of the President*

Despite conceding that its holding was not on point, Clinton nonetheless relied on the *Fitzgerald* Court's concern that defending against civil suits would unacceptably divert a President's attention from vital duties.¹⁹⁴ Article II of the United States Constitution, Clinton pointed out, vests the entire executive power in just one person, who is ultimately responsible for enforcing the laws, commanding the armed forces and managing the entire executive branch.¹⁹⁵ As the one ultimately responsible, the President is thus indispensable to the execution of this power.¹⁹⁶ This unique responsibility, Clinton contended, led the *Fitzgerald* Court to conclude "[b]ecause of the singular importance of the President's duties, diversion of his energies by concerns with private lawsuits would raise unique risks to the effective functioning of government."¹⁹⁷ When or why the cause of action arose is irrelevant, the President argued; the disruptive effect would remain the same.¹⁹⁸ The President would spend weeks in depositions and conferences with his lawyers, rather than attending to the duties of his office.¹⁹⁹ As the defendant, Clinton argued, he could not delegate trial preparation to subordinates because his personal conduct was the entire basis of the suit.²⁰⁰

Clinton further argued that one successful suit would undoubtedly spawn others, many frivolous, which would multiply the demands on

¹⁹¹ *Clinton Brief* at 35-40, *Jones II* (No. LR-C-94-290).

¹⁹² *Id.* at 11.

¹⁹³ *Id.* at 11-12; see Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988) ("Act"). The Act provides that suits against active duty armed forces personnel must be stayed if they would interfere with the performance of their military duties. 50 U.S.C. app. § 510. Any statutes of limitations are tolled indefinitely during the defendant's period of service. *Id.* at § 525.

¹⁹⁴ *Clinton Brief* at 19-20, *Jones II* (No. LR-C-94-290).

¹⁹⁵ *Id.* at 21-22.

¹⁹⁶ *Id.* at 21.

¹⁹⁷ *Id.* (citing *Nixon v. Fitzgerald*, 457 U.S. 733, 751 (1982)).

¹⁹⁸ *Id.* at 34.

¹⁹⁹ *Clinton Brief* at 28, *Jones II* (No. LR-C-94-290).

²⁰⁰ *U.S. Brief* at 5, *Jones II* (No. LR-C-94-290).

his time.²⁰¹ Moreover, denying immunity only would encourage political enemies to postpone filing until after he took office, thereby inflicting the maximum political damage.²⁰² By encouraging such "strike suits," Clinton contended, the courts not only would prevent him from doing his job, but also would become pawns in the game of politics.²⁰³ Thus, the President concluded, the same balancing rationale the Court applied in *Fitzgerald* must apply here: one individual's damages claim must temporarily give way to the greater public interest vested in a Chief Executive wholly focused on his duties.²⁰⁴

The Solicitor General, opining as *amicus curiae*, concurred with Clinton's argument that generalized concerns about the value of the President's time helped guide the *Fitzgerald* Court's holding.²⁰⁵ When mere private citizens are sued, the Solicitor General added, the demands on their time are merely a private concern.²⁰⁶ But when the President is sued, such a distraction concerns the entire nation, and therefore outweighs one plaintiff's desire for immediate relief.²⁰⁷

In contrast, Jones and a consortium of law professors opining as *amicus curiae* contested the President's interpretation of *Fitzgerald*.²⁰⁸ They argued that the *Fitzgerald* Court's concerns focused solely on enabling the President to make difficult official decisions without fearing liability.²⁰⁹ In other words, Jones and her allies contended that the Court never deemed the President simply too busy to defend against lawsuits.²¹⁰ Thus, shielding the President from suits based on just any action, they concluded, would place the President above the law.²¹¹

²⁰¹ *Clinton Brief* at 28-29, *Jones II* (No. LR-C-94-290).

²⁰² *Id.* at 42-43.

²⁰³ *Id.* at 43.

²⁰⁴ *Id.* at 40.

²⁰⁵ *U.S. Brief* at 8, *Jones II* (No. LR-C-94-290).

²⁰⁶ *Id.* at 5.

²⁰⁷ *Id.* at 5, 8.

²⁰⁸ *Jones Brief* at 19, *Jones II* (No. LR-C-94-290); *Professors Brief* at 12, *Jones II* (No. LR-C-94-290).

²⁰⁹ *Jones Brief* at 19, *Jones II* (No. LR-C-94-290); *Professors Brief* at 13, *Jones II* (No. LR-C-94-290). Like Clinton, they chose words from *Fitzgerald* to illustrate their interpretation:

[A] President must concern himself with matters likely to "arouse the most intense feelings." Yet, as our decisions have recognized, *it is in precisely such cases* that there exists the greatest public interest in providing an official the "maximum ability to deal fearlessly and impartially with" the duties of his office.

Professors Brief at 14, *Jones II* (No. LR-C-94-290) (citing *Nixon v. Fitzgerald*, 457 U.S. 733, 752-53 (1982) (citations omitted)) (emphasis added).

²¹⁰ *Professors Brief* at 12, *Jones II* (No. LR-C-94-290).

²¹¹ *Id.*

Had the Court generally been concerned with demands on the President's time, they implied, it would not have crafted *Fitzgerald's* holding as narrowly as it did.²¹² *Fitzgerald*, they contended, limits the President's absolute immunity protection to damages suits based on official acts "within the outer perimeter of his authority."²¹³ Moreover, they argued, this limitation exists in all the immunity case law preceding the *Fitzgerald* decision.²¹⁴ No other official granted absolute immunity can extend his cloak to unofficial conduct.²¹⁵ Based on Chief Justice Burger's *Fitzgerald* concurrence, they concluded, neither can the Chief Executive.²¹⁶

The professors further argued that ridding himself of meritless suits would not unduly burden the President's time.²¹⁷ The courts have ample tools, such as rule 12(b)(6) motions,²¹⁸ summary judgement²¹⁹ and rule 11 sanctions,²²⁰ both to dispense with frivolous suits quickly and to discourage litigants from bringing them in the first place.²²¹ Even if a meritorious suit were to proceed, they contended, the courts still could accommodate the President's special needs with in-camera inspection of documents or videotaped testimony.²²²

Also opining as amicus curiae, the American Civil Liberties Union ("ACLU") bolstered Jones's case by arguing that absolute immunity would prove ineffective at shielding the President from distraction.²²³ Even if the President escaped trial in a court of law, he still would face trial in "the court of public opinion," for which he would need to mount a publicity defense every bit as time-consuming as a legal one.²²⁴ Moreover, a plaintiff still could file a complaint, the ACLU contended,

²¹² *Id.* at 9; *Jones Brief* at 19-20, *Jones II* (No. LR-C-94-290).

²¹³ *Professors Brief* at 9, *Jones II* (No. LR-C-94-290); *Jones Brief* at 19-20 (quoting *Fitzgerald*, 457 U.S. at 756), *Jones II* (No. LR-C-94-290).

²¹⁴ See *Jones Brief* at 17-36, *Jones II* (No. LR-C-94-290).

²¹⁵ *Id.* at 22.

²¹⁶ *Id.* (citing *Fitzgerald*, 457 U.S. at 758 (Burger, C.J., concurring)); see *supra* note 163.

²¹⁷ *Professors Brief* at 7-8, *Jones II* (No. LR-C-94-290).

²¹⁸ FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) enables a defendant to move for dismissal of a claim before discovery for "failure to state a claim upon which relief can be granted." *Id.*

²¹⁹ Summary judgement is a procedural device used to dismiss an action before trial if there are no questions of material fact and one party is entitled to prevail as a matter of law. BLACK'S LAW DICTIONARY 1435 (6th ed. 1990).

²²⁰ FED. R. CIV. P. 11. Under rule 11, a court may impose sanctions on a party who has filed a claim for an improper purpose, such as to harass an opponent, or filed a claim lacking factual support, unwarranted by existing law or lacking a good-faith argument for the extension, modification or reversal of existing law. *Id.*

²²¹ *Professors Brief* at 27-30, *Jones II* (No. LR-C-94-290).

²²² *Id.* at 29-30.

²²³ *ACLU Brief* at 17, *Jones II* (No. LR-C-94-290).

²²⁴ *Id.*

then claim the President was hiding from the merits behind an immunity defense.²²⁵

B. *Civil Damages Suits and the Separation of Powers Doctrine*

The separation of powers doctrine provided the second principal thrust of the President's argument.²²⁶ Under this doctrine, one branch of the federal government may not encroach on the domain or exercise the powers of another.²²⁷ With respect to this doctrine, Clinton and the Solicitor General noted, courts traditionally avoid intruding upon presidential decision-making and must balance the interests at stake before they do.²²⁸ In *Fitzgerald*, the Supreme Court held that the dangers of encroaching on executive branch prerogative outweighed one litigant's need for redress.²²⁹ Therefore, Clinton and the Solicitor General concluded, executive branch prerogative outweighs Jones's claim as well.²³⁰

The President bolstered his arguments with specific examples of the judicial deference Presidents have enjoyed, even when called to produce evidence in criminal trials.²³¹ In *United States v. Nixon*, Clinton noted, the Supreme Court declared presidential communications presumptively privileged, finding such a privilege necessary to the effective discharge of the President's duties.²³² Although the Court compelled President Nixon to divulge the Watergate tapes, he added, it still granted in-camera inspection to ensure they contained no privileged material.²³³

Moreover, Clinton contended that the founding fathers intended the separation of powers doctrine to preclude civil suits against the President.²³⁴ According to the diary of Pennsylvania Senator William

²²⁵ *Id.* at 18.

²²⁶ See *Clinton Brief* at 2-3, *Jones II* (No. LR-C-94-290).

²²⁷ BLACK'S LAW DICTIONARY 1365 (6th ed. 1990).

²²⁸ *Clinton Brief* at 35, *Jones II* (No. LR-C-94-290) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 753, 754 (1982)); Statement of Interest of the United States at 13, *Jones v. Clinton*, 869 F. Supp. 690, (E.D. Ark. 1994) (No. LR-C-94-290) [hereinafter *U.S. Brief*].

²²⁹ *Clinton Brief* at 35, *Jones II* (No. LR-C-94-290) (citing *Fitzgerald*, 457 U.S. at 754 & n.37).

²³⁰ *Id.*; *U.S. Brief* at 11, *Jones II* (No. LR-C-94-290).

²³¹ *Clinton Brief* at 24-25, 36-37, *Jones II* (No. LR-C-94-290); see *supra* notes 168-83 and accompanying text.

²³² *Clinton Brief* at 24, *Jones II* (No. LR-C-94-290) (citing 418 U.S. 683, 705 (1974)); see *supra* notes 173-83 and accompanying text.

²³³ *Clinton Brief* at 36-37, *Jones II* (No. LR-C-94-290) (citing *United States v. Nixon*, 418 U.S. at 711-15).

²³⁴ *Clinton Brief* at 23-24, *Jones II* (No. LR-C-94-290); Appendix to Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 1-13, *Jones II*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290).

Maclay, such luminaries as Adams, Jefferson and Ellsworth believed that "the President personally was not subject to any process whatever, for to permit otherwise would 'put it in the power of a common Justice to exercise any [a]uthority over him and Stop the Whole Machine of Government.'"²³⁵ Clinton further noted that some founders even opposed the Impeachment Clause,²³⁶ albeit unsuccessfully, as a dangerous intrusion on presidential independence.²³⁷ Gouverneur Morris, for example, protested that "impeachment will . . . render the Executive dependent on those who are to impeach."²³⁸

Gouverneur Morris's objections notwithstanding, Clinton cited the Impeachment Clause as further illustrating the Constitution's attempt to disentangle the judiciary from presidential affairs.²³⁹ Most of the framers and modern scholars believe, Clinton contended, that the President must be removed from office before he is indicted.²⁴⁰ Alexander Hamilton wrote in *The Federalist* that "[t]he President . . . would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law."²⁴¹ Just twenty-two years ago, Solicitor General Robert Bork echoed Hamilton's view, Clinton added.²⁴² Opining on whether the Vice President could be indicted before impeachment, Bork concluded that only the President himself must be impeached first.²⁴³ Therefore, Clinton reasoned, if criminal prosecutions must wait until the President leaves office, civil damages actions must wait as well.²⁴⁴

²³⁵ *Clinton Brief* at 4, *Jones II* (No. LR-C-94-290) (quoting THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling & Helen E. Veit, eds. 1988)); see *supra* notes 75-78 and accompanying text.

²³⁶ U.S. CONST., art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

²³⁷ *Clinton Brief* at 26 n.16, *Jones II* (No. LR-C-94-290).

²³⁸ *Id.* (citing 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64-65 (rev. ed. 1937)).

²³⁹ See *id.* at 45-51.

²⁴⁰ *Id.* at 45-46.

²⁴¹ *Id.* at 46-47 (citing THE FEDERALIST NO. 69, at 446 (Alexander Hamilton) (Modern Library ed. 1937)) (emphasis added).

²⁴² *Clinton Brief* at 48-49, *Jones II* (No. LR-C-94-290).

²⁴³ *Id.* (citing Attachment 10, Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 17, *In re* Proceedings of The Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. filed Oct. 5, 1973)).

²⁴⁴ *Clinton Brief* at 46, *Jones II* (No. LR-C-94-290).

For her part, Jones interpreted the scope of the separation of powers doctrine very differently.²⁴⁵ She contended that the doctrine exists solely to protect presidential decision-making from judicial interference and does not apply in cases of purely private presidential conduct.²⁴⁶ *Fitzgerald* and other immunity cases illustrate her point, she contended, because they permit immunity from damages suits to extend only to official duties.²⁴⁷ As Clinton's alleged conduct had nothing to do with his official duties, Jones concluded, separation of powers concerns prove no obstacle to her suit.²⁴⁸

Expounding on Jones's argument, the law professors and ACLU argued that the President can claim shelter from the separation of powers only when he can show specifically how judicial process would hamstring his ability to govern.²⁴⁹ Merely generalized concerns are not enough, they contended.²⁵⁰ The professors pointed to *United States v. Nixon* as support, claiming that Nixon failed to prevail because he could not identify any specific threat to his ability to govern, such as the revelation of military or diplomatic secrets.²⁵¹ They quoted a subsequent Supreme Court analysis of *United States v. Nixon* to underscore their argument:

[I]n determining whether a [challenged act] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified

...²⁵²

Noting that Clinton had identified only general threats to his effectiveness, the professors concluded that the separation of powers doctrine should not bar Jones from pressing her case.²⁵³

²⁴⁵ See *Jones Brief* at 28–32, *Jones II* (No. LR-C-94–290).

²⁴⁶ *Id.* at 32.

²⁴⁷ See *id.* at 28–32.

²⁴⁸ *Id.* at 32–33.

²⁴⁹ *Professors Brief* at 6, *Jones II* (No. LR-C-94–290); *ACLU Brief* at 12, *Jones II* (No. LR-C-94–290).

²⁵⁰ *Professors Brief* at 22, *Jones II* (No. LR-C-94–290); *ACLU Brief* at 12, *Jones II* (No. LR-C-94–290).

²⁵¹ *Professors Brief* at 21, *Jones II* (No. LR-C-94–290); see *supra* notes 173–83 and accompanying text.

²⁵² *Professors Brief* at 21, *Jones II* (No. LR-C-94–290) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977) (citations omitted)).

²⁵³ *Professors Brief* at 21–22, *Jones II* (No. LR-C-94–290).

All parties opposing Clinton also noted that the separation of powers doctrine may have proved a hurdle, but never a total bar to judicial proceedings aimed at the President.²⁵⁴ This doctrine has been settled law, they claimed, since Chief Justice Marshall in *Marbury v. Madison* declared that it was the judiciary's role "to say what the law is."²⁵⁵ Marshall reinforced his *Marbury* precedent in *United States v. Burr*, Jones contended, when he ruled that a subpoena decus tecum could be directed at the President.²⁵⁶ In *United States v. Nixon*, the Court similarly compelled the President to comply with a subpoena, she added, despite its recognition of a presumptive executive privilege to keep official communications confidential.²⁵⁷ Thus, Jones argued, the separation of powers doctrine provided no automatic bar to her claim.²⁵⁸

In sum, Jones and her allies concluded that *Burr* and *United States v. Nixon* teach a different lesson than that learned by the President.²⁵⁹ In their interpretation, separation of powers concerns, although relevant, cannot alone justify absolute immunity from judicial oversight.²⁶⁰ If the courts can compel a President to respond to criminal process, they concluded, they likewise can to compel him to answer for his unofficial conduct.²⁶¹

Jones also drew a different lesson from the founding fathers,²⁶² claiming that their greatest achievement lay in creating a republic in which everyone, even the President, exists under the law.²⁶³ Citing Charles Pinckney, Jones claimed that the framers sharply defined the President's Article II powers to avoid the executive tyranny experienced under British rule.²⁶⁴ To shield the President from civil damages based on his private conduct, she concluded, would defeat the founders' overriding purpose by placing him beyond legal accountability.²⁶⁵

²⁵⁴ See *Jones Brief* at 37-42, *Jones II* (No. LR-C-94-290); *Professors Brief* at 20-24; *ACLU Brief* at 15, *Jones II* (No. LR-C-94-290); see *supra* notes 168-183 and accompanying text.

²⁵⁵ *ACLU Brief* at 18, *Jones II* (No. LR-C-94-290); see 5 U.S. (1 Cranch.) 137, 176 (1803).

²⁵⁶ *Jones Brief* at 37, *Jones II* (No. LR-C-94-290); see *supra* notes 169-72 and accompanying text.

²⁵⁷ *Jones Brief* at 42, *Jones II* (No. LR-C-94-290); see *supra* notes 173-83 and accompanying text.

²⁵⁸ *Jones Brief* at 32-33, *Jones II* (No. LR-C-94-290).

²⁵⁹ *Id.* at 37.

²⁶⁰ See *id.* at 37-42.

²⁶¹ *ACLU Brief* at 19, *Jones II* (No. LR-C-94-290).

²⁶² See *Jones Brief* at 12-15, *Jones II* (No. LR-C-94-290).

²⁶³ *Id.* at 12.

²⁶⁴ *Id.* at 15.

²⁶⁵ *Id.* at 12-13. In a subsequent footnote, Jones also sought to cast doubt on Adams's and Jefferson's credibility as authorities on constitutional intent. *Id.* at 14 n.5. Neither actually

Finally, Jones attacked the President's Impeachment Clause analogy, claiming it irrelevant to a civil damages claim.²⁶⁶ The main rationale underlying impeachment before indictment, she contended, is to avoid the untenable prospect of a President imprisoned while in office.²⁶⁷ As President Clinton would not face incarceration as the loser in a civil suit, Jones concluded that his impeachment analogy lacked any logical basis.²⁶⁸

C. Jones's Need for Immediate Relief

President Clinton and the Solicitor General contended that Jones's claim lacked any urgency sufficient to outweigh the public's need for a Chief Executive wholly focused on his duties.²⁶⁹ They pointed out that Jones waited three years to file, and they claimed that her evidence would not become any more stale if she must wait a few years more.²⁷⁰ Clinton further noted that Jones could be compensated for her delay by interest paid on any damages she eventually might receive.²⁷¹

In addition, Clinton contended that Jones filed her suit merely to achieve notoriety, rather than to satisfy an urgent need for redress.²⁷² As evidence, he cited Jones's frequent media appearances since filing her case.²⁷³ Accordingly, Clinton concluded that Jones's claim contained no justifications that would outweigh the need to preserve both the President's concentration and the proper separation of powers.²⁷⁴

In rebuttal, Jones explained that a defamatory article in *The American Spectator* magazine, which did not appear until January, 1994, finally compelled her to go public.²⁷⁵ Jones further noted that women who have been sexually harassed face significant emotional obstacles

attended the Constitutional Convention nor participated in drafting the document. *Id.* Moreover, she contended that Adams possessed an unusually expansive view of presidential power, almost to the point of being a monarchist. *Id.* (citing W. PAGE SMITH, JOHN ADAMS 755 (1962)).

²⁶⁶ *Id.* at 49.

²⁶⁷ *Jones Brief* at 48, *Jones II* (No. LR-C-94-290).

²⁶⁸ *See id.*

²⁶⁹ *Clinton Brief* at 39-49, *Jones II* (No. LR-C-94-290); *U.S. Brief* at 19, *Jones II* (No. LR-C-94-290).

²⁷⁰ *Clinton Brief* at 40, *Jones II* (No. LR-C-94-290); *U.S. Brief* at 19, *Jones II* (No. LR-C-94-290).

²⁷¹ *Clinton Brief* at 40, *Jones II* (No. LR-C-94-290).

²⁷² *Id.* at 62.

²⁷³ *Id.* at 64. In one four-day period in June, 1994, for example, Jones conducted interviews with the ABC, CBS and CNN television networks, *Time* and *Newsweek* magazines, plus *USA Today* and *The Wall Street Journal*. Howard Kurtz, *Paula Jones Speaks to National Media About Clinton Suit*, WASH. POST, June 17, 1994, at A11.

²⁷⁴ *Clinton Brief* at 65-66, *Jones II* (No. LR-C-94-290).

²⁷⁵ *Jones Brief* at 51, *Jones II* (No. LR-C-94-290); *see supra* note 16.

to leveling their charges.²⁷⁶ To support her claim, Jones quoted a 1992 speech by Hillary Rodham Clinton, in which the First Lady characterized sexual harassment victims as frequently unsure of where to turn for help.²⁷⁷

Jones further contended that because President Clinton could remain in office for up to six more years, she does face a substantial risk of evidence going stale.²⁷⁸ Moreover, she noted that no precedent exists for penalizing litigants who file at the end of a statute of limitations instead of on the first day.²⁷⁹

Supporting Jones, the ACLU argued that although a delay in money damages could be offset by paying interest, plaintiffs who have been defamed suffer mounting injury to their good names every day.²⁸⁰ As Jones alleged defamation, the ACLU concluded, her claim must be heard by the court at once.²⁸¹ Also supporting Jones, the professors pointed out that there is no way to know what Jones's motives really are.²⁸² They further argued that a plaintiff's motives are irrelevant and if Jones's claim has merit, she deserves the same right to a speedy trial afforded to everyone else.²⁸³

D. *Alternatives to Absolute Temporary Immunity*

As an alternative to dismissing Jones's claim on immunity grounds, Clinton suggested that the court simply stay her suit until he leaves office.²⁸⁴ Only a complete stay adequately would protect the presidency, Clinton added, claiming that ongoing discovery would present the

²⁷⁶ *Jones Brief* at 51-52, *Jones II* (No. LR-C-94-290).

²⁷⁷ *Id.* at 52 (quoting Hillary Rodham Clinton, speech to the American Bar Assoc. (Aug. 9, 1992)). The First Lady contended that sexual harassment victims confront "verbal and physical abuse, from their colleagues, their clients, in the courtrooms, in the workplaces, and they [are], like so many of us, just not sure what to make of it." *Id.*

²⁷⁸ *Jones Brief* at 50, *Jones II* (No. LR-C-94-290).

²⁷⁹ *Id.* at 51.

²⁸⁰ *ACLU Brief* at 23, *Jones II* (No. LR-C-94-290).

²⁸¹ *Id.*

²⁸² *Professors Brief* at 25, *Jones II* (No. LR-C-94-290).

²⁸³ *Id.* at 26.

²⁸⁴ See *Clinton Brief* at 59-66, *Jones II* (No. LR-C-94-290). A stay, or Writ of Supersedeas, suspends an entire case or some designated proceeding within it. BLACK'S LAW DICTIONARY 1413 (6th ed. 1990). A stay does not undo already completed court rulings or proceedings, but it suspends the tolling of any statutes of limitations. *Id.* "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

same distractions as an actual trial.²⁸⁵ He noted that the United States Supreme Court has deemed stays appropriate when the public welfare or convenience demanded them.²⁸⁶ Clinton further acknowledged the Supreme Court's admonition that to prevail, a party requesting a stay must make out a clear case of hardship or inequity.²⁸⁷ Due to the threat posed to his ability to govern, the President concluded, his request amply satisfied the Supreme Court's requirements.²⁸⁸

The Solicitor General concurred with the President's alternative request, arguing that a presumptive stay would protect the Presidency while also protecting the plaintiff.²⁸⁹ A claimant could rebut the presumptive stay by showing that delay would seriously prejudice her interests and the case would not seriously hamper the President's ability to govern, he continued.²⁹⁰ Moreover, he noted that a stay precludes the possibility that a statute of limitations would expire before the litigant could refile.²⁹¹ Arguing that Jones had failed to show that delay would seriously prejudice her rights, the Solicitor General deemed a stay to be the correct course in the current case.²⁹²

On behalf of Jones, the law professors advocated an opposite approach from that of the Solicitor General: a rebuttable presumption that a civil suit *will* go forward.²⁹³ Drawing on their analysis of the separation of powers cases, they asserted that a President must show specifically how a suit would imperil his ability to function as Chief Executive.²⁹⁴ If he did so, they agreed that the unique demands of the

²⁸⁵ *Clinton Brief* at 61, *Jones II* (No. LR-C-94-290).

²⁸⁶ *Id.* at 59-60 (citing *Landis*, 299 U.S. at 256). In 1936, in *Landis v. North American Co.*, the U.S. Supreme Court upheld a court's prerogative to stay proceedings as its best judgement dictates, provided a stay does not last an unreasonably long time. 299 U.S. at 254-56. The Attorney General sought to stay 47 separate suits challenging the constitutionality of the Public Utility Holding Company Act of 1935 until one test case had reached the Supreme Court. *See id.* at 250-52. As the suits raised complex issues of national importance, the Court found a stay appropriate to prevent an excess of lengthy litigation and conflicting results. *Id.* at 256. The Justices also noted, however, that litigating one test case through the Supreme Court could take years, which they found an unreasonably long time to deny the other litigants their days in court. *Id.* at 256-57. Accordingly, the Court granted a stay lasting only until the first appeals court decision on the test case. *Id.*

²⁸⁷ *Clinton Brief* at 60, *Jones II* (No. LR-C-94-290) (quoting *Landis*, 299 U.S. at 255).

²⁸⁸ *Id.*

²⁸⁹ *U.S. Brief* at 9-10, *Jones II* (No. LR-C-94-290).

²⁹⁰ *Id.* at 12.

²⁹¹ *Id.* at 16.

²⁹² *Id.* at 3.

²⁹³ *Professors Brief* at 6-9, *Jones II* (No. LR-C-94-290).

²⁹⁴ *Id.* at 8-9; *see supra* notes 249-53 and accompanying text.

Presidency could compel a court to grant him relief.²⁹⁵ The professors concluded, however, that Clinton had failed to show specifically why the *Jones* case would affect his ability to function.²⁹⁶

III. THE DISTRICT COURT'S DECISION

On December 28, 1994, the United States District Court for the Eastern District of Arkansas granted President Clinton "temporary immunity from trial."²⁹⁷ In doing so, the court denied Clinton's motion for dismissal on absolute immunity grounds with leave to refile, choosing instead to stay actual trial until he leaves office.²⁹⁸ Nonetheless, the court allowed discovery and depositions to proceed without delay, including depositions of the President himself.²⁹⁹ In so deciding, the court not only culled arguments from almost 300 pages of memoranda, but also pursued its own line of research.³⁰⁰

A. "[E]ven the sovereign is subject to God and the Law."³⁰¹

In denying absolute immunity, the court agreed that *Nixon v. Fitzgerald's* holding could not serve as controlling precedent.³⁰² *Fitzgerald* involved a sitting President acting in his official capacity, the court observed, while Jones's allegations arose before Clinton ever assumed office.³⁰³ In the absence of controlling precedent, the court turned primarily to independent historical analysis upon which to premise a conclusion.³⁰⁴

Specifically, the court discussed at length the historical struggle of the English people to wrest legal rights from the Crown.³⁰⁵ The court cited the Magna Carta,³⁰⁶ the Petition of Right³⁰⁷ and the 1689 Parlia-

²⁹⁵ *Professors Brief* at 89, *Jones II* (No. LR-C-94-290).

²⁹⁶ *Id.* at 3.

²⁹⁷ *Jones II*, 869 F. Supp. 690, 699 (E.D. Ark. 1994).

²⁹⁸ *Id.* at 698-99. The court also stayed trial proceedings against trooper Danny Ferguson, concluding that the two cases were too interdependent to proceed piecemeal. *Id.* at 699.

²⁹⁹ *Id.*

³⁰⁰ *See id.* at 692-93.

³⁰¹ *Id.* at 698.

³⁰² *Jones II*, 869 F. Supp. at 697; *see supra* notes 154-67 and accompanying text.

³⁰³ *Jones II*, 869 F. Supp. at 697.

³⁰⁴ *See id.* at 692-93.

³⁰⁵ *Id.* at 692-93 & n.1.

³⁰⁶ The Magna Carta, or "Great Charter," was granted by King John at Runnymede in 1215. BLACK'S LAW DICTIONARY 951-52 (6th ed. 1990). Among its 38 chapters are provisions regulating the jurisdiction of the courts, securing the citizen's rights to property and personal liberty, and preserving the independence and privileges of the church. *Id.* Scholars hail the Magna Carta as the foundation of English constitutional liberties. *Id.*

³⁰⁷ *See supra* notes 49-54 and accompanying text.

mentary Bill of Rights³⁰⁸ as exemplifying how the English citizenry secured for themselves rights hitherto reserved for the Sovereign.³⁰⁹ Quoting Lord Coke, the court concluded that these victories established the principle that "[t]he King ought to be under no man, but under God and the law."³¹⁰ Thus, the English people in practice relegated "the King can do no wrong"³¹¹ to the theoretical rubbish heap reserved for theories that outlive their relevance.³¹²

Just as England steered away from the divine right of kings, the court asserted, so did America turn from eighteenth-century views holding the President absolutely immune from civil process.³¹³ The court accepted Clinton's view that many influential framers envisioned a President immune from judicial process.³¹⁴ But it subsequently concluded that the executive branch lost its hold on complete independence when *Marbury v. Madison* established judicial review just a few years later in 1803.³¹⁵ The court further noted, as did Jones, that Marshall enforced a subpoena duces tecum against President Jefferson³¹⁶ just four years after that.³¹⁷ Thus, according to the court, the Chief Executive's amenability to judicial process took root in America just as it had in England.³¹⁸

In sum, the court concluded that the founders' greatest legacy consists of placing no one above the law.³¹⁹ The court conceded that the *Fitzgerald* decision unequivocally awarded the President absolute immunity from damages suits based on official acts.³²⁰ The court, how-

³⁰⁸ See *supra* notes 68-71 and accompanying text.

³⁰⁹ *Jones II*, 869 F. Supp. at 692-93.

³¹⁰ *Id.* at 693.

³¹¹ See *supra* notes 44-48 and accompanying text.

³¹² See *Jones II*, 869 F. Supp. at 693.

³¹³ *Id.* at 696.

³¹⁴ *Id.* at 695-96; see *supra* notes 234-35 and accompanying text. The court considered Clinton's analogy to the Impeachment Clause irrelevant, however, as the Impeachment Clause relates solely to criminal conduct. *Jones II*, 869 F. Supp. at 695; see *supra* notes 236-38 and accompanying text.

³¹⁵ *Jones II*, 869 F. Supp. at 696; see *supra* notes 254-55 and accompanying text.

³¹⁶ See *supra* note 256 and accompanying text.

³¹⁷ *Jones II*, 869 F. Supp. at 696.

³¹⁸ *Id.* Although Justice Story ventured his opinion on the President's inviolability to civil process in 1833, after the *Marbury v. Madison* and *United States v. Burr* decisions, the court dismissed his observations as made by someone who was only a boy at the time of the Constitutional Convention. *Id.*; see *supra* note 76 and accompanying text. The court also paused briefly to acknowledge the Supreme Court's broad separation of powers mandate in *Mississippi v. Johnson*, but quickly distinguished the case as applicable only to a President's official discretionary actions, not to his conduct as a private citizen. *Jones II*, 869 F. Supp. at 697.

³¹⁹ *Id.* at 698; see *supra* notes 262-65 and accompanying text.

³²⁰ *Jones II*, 869 F. Supp. at 697-98.

ever, interpreted the broader swath of English and American legal history as teaching that not even the Chief Executive can escape judicial oversight on a broader scale.³²¹ To believe otherwise, it asserted, would be "contrary to our form of government, which asserts as did the English . . . that even the sovereign is subject to God and the law."³²² Accordingly, the court denied the President's motion to dismiss on absolute immunity grounds.³²³

B. "*Unique risks to the effective functioning of government*"³²⁴

Although Clinton's arguments failed to secure him immunity, they nonetheless persuaded the court to stay actual trial until he leaves office.³²⁵ In fact, the court left Clinton's interpretation of *Fitzgerald's* reasoning virtually unchallenged.³²⁶

First, the court concurred that the *Fitzgerald* majority branded *any* suit against the President a threat to the "effective functioning of government."³²⁷ In doing so, it rejected the professors' analysis that only a President's ability to make difficult official decisions concerned the *Fitzgerald* Court.³²⁸ The court further agreed that civil litigation similarly would imperil the President's ability to govern regardless of when the claim arose.³²⁹ Finally, it accepted Clinton's conclusion that one suit would spawn others, thereby multiplying the demands on his time.³³⁰ Thus, the court held the Supreme Court's concerns equally applicable to Paula Jones's claims based on private conduct as to *Fitzgerald's* claims based on official acts.³³¹

Clinton also persuaded the court that Jones possessed no need for immediate relief.³³² The court characterized Jones's three-year delay in coming forward as evidence she "was in no rush to get her case to court."³³³ Although it accepted Jones's explanation that the January,

³²¹ *Id.* at 698.

³²² *Id.*

³²³ *Id.*

³²⁴ *Jones II*, 869 F. Supp. at 698 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982)).

³²⁵ *Id.* at 698-99. The court also stayed the trial of Trooper Ferguson, concluding that he could not be tried without testimony from the President. *Id.* at 699.

³²⁶ See *id.* at 698-99; *supra* notes 194-204 and accompanying text.

³²⁷ *Jones II*, 869 F. Supp. at 698 (citing *Fitzgerald*, 457 U.S. at 751); see *supra* notes 194-200 and accompanying text.

³²⁸ See *Jones II*, 869 F. Supp. at 698; *supra* notes 208-16 and accompanying text.

³²⁹ *Jones II*, 869 F. Supp. at 698; see *supra* notes 198-200 and accompanying text.

³³⁰ *Jones II*, 869 F. Supp. at 698; see *supra* notes 201-04 and accompanying text.

³³¹ *Jones II*, 869 F. Supp. at 698.

³³² *Id.* at 698-99; see *supra* notes 272-74 and accompanying text.

³³³ *Jones II*, 869 F. Supp. at 699.

1994, *American Spectator* article finally compelled her to come forward, this explanation failed to have a mitigating effect.³³⁴ The court concluded that Clinton's alleged sexual improprieties could not have caused Jones immediate harm if she needed this additional compulsion to demand relief.³³⁵

After analyzing both Clinton's interest in delaying the trial and Jones's interest in proceeding quickly, the court balanced the two to reach its result: the public's need for an undistracted Chief Executive outweighed Jones's desire for quick vindication.³³⁶ Accordingly, the court stayed trial proceedings until President Clinton leaves office.³³⁷

Specifically, the court held a stay to be within "the equity powers of the Court."³³⁸ In so doing, it accepted Clinton's argument that the facts of the case satisfied the United States Supreme Court's standards for granting a stay.³³⁹ The court did not discuss, however, the professors' contrary assertion that the President must set forth specific grounds of how defending against Jones's claims would disrupt his ability to govern.³⁴⁰ Thus, it implicitly concluded such a showing to be unnecessary.³⁴¹

C. "This does not mean, however, that the case is put on the shelf"³⁴²

Despite granting Clinton a stay from actual trial, the court nonetheless held that discovery could proceed.³⁴³ The court rejected the President's assertion that discovery posed the same threat to his effectiveness as would an actual trial.³⁴⁴ While stating no reasons for disregarding the President's claim, the court explicitly concurred with Jones's concern that a stay would render her evidence stale or even

³³⁴ *Id.*; see *supra* notes 275-77 and accompanying text.

³³⁵ See *Jones II*, 869 F. Supp. at 699.

³³⁶ *Id.*

³³⁷ *Id.* Adopting the Solicitor General's argument, the court noted that granting a stay avoids any tolling of the statute of limitation problems, which might arise if the case were dismissed without prejudice. *Id.*; see *supra* notes 289-92 and accompanying text.

³³⁸ *Jones II*, 869 F. Supp. at 699. The court further considered a stay permissible under rule 40 of the Federal Rules of Civil Procedure, which allows district courts to "place matters upon the trial calendar 'as the courts deem expedient.'" *Id.*

³³⁹ See *id.*; see *supra* notes 286-88 and accompanying text.

³⁴⁰ See *Jones II*, 869 F. Supp. at 698-99; *supra* notes 249-53 and accompanying text.

³⁴¹ See *Jones II*, 869 F. Supp. at 698-99.

³⁴² *Id.* at 699.

³⁴³ *Id.*

³⁴⁴ See *id.*; *supra* notes 284-85 and accompanying text.

inaccessible.³⁴⁵ Accordingly, the court allowed discovery, even depositions of the President, to proceed.³⁴⁶

Thus, temporary immunity from trial emerged into judicial existence.³⁴⁷ In sum, this new doctrine consists of three components. First, the President receives no immunity for suits based on private conduct.³⁴⁸ Second, the court will stay actual trial until the President leaves office when the plaintiff fails to make a compelling case for immediate relief.³⁴⁹ Finally, the court will allow discovery to proceed while the actual trial is on hold.³⁵⁰ With the District Court's decision in *Jones v. Clinton* a matter of record, the focus now shifts to the parties' appeals to the Eighth Circuit.³⁵¹

IV. THE CHALLENGE FOR THE EIGHTH CIRCUIT

Temporary immunity from trial inadequately resolves the issue of whether the President is amenable to civil suits based on his private conduct. The court opted for a carefully crafted compromise, but in doing so created a doctrine that is self-contradictory. Because of its contradictions, temporary immunity from trial fails to vindicate either of the competing interests advanced in *Jones v. Clinton* and therefore should be substantively revised on appeal.

A. *Temporary Immunity from Trial as a Contradictory Doctrine*

In sum, each of the three elements comprising temporary immunity from trial effectively undercuts the element that preceded it. In denying the President's immunity request, the court declared that not even the Chief Executive stands above the law.³⁵² But by subsequently granting the President a presumptive stay, the court accomplishes de facto what it refused to do explicitly.

³⁴⁵ *Jones II*, 869 F. Supp. at 699; see *supra* note 278 and accompanying text.

³⁴⁶ *Jones II*, 869 F. Supp. at 699.

³⁴⁷ See *id.* at 699-700.

³⁴⁸ *Id.* at 698.

³⁴⁹ See *id.* at 699.

³⁵⁰ *Id.*

³⁵¹ See *supra* notes 39-40. On February 24, 1995, Judge Susan Webber Wright granted President Clinton's request to halt discovery while the case is on appeal. *Jones v. Clinton*, 879 F. Supp. 86, 88 (E.D. Ark. 1995). As the Eighth Circuit will not hear oral arguments until the fall of 1995 or winter of 1995-1996, the court's ruling probably will shelter Clinton and other witnesses from questioning before the 1996 election. Ruth Marcus, *Clinton Wins Ruling Delaying Harassment Suit*, WASH. POST, Feb. 25, 1995, at A8.

³⁵² *Jones II*, 869 F. Supp. at 699.

The court failed to require President Clinton to present specific national priorities that Jones's suit would imperil.³⁵³ Instead, it merely accepted Clinton's generalized concern that the suit would prove impermissibly distracting.³⁵⁴ In other words, Clinton won his stay merely because he *is* the President. As he is required to show nothing more than proof of identity, the stay is thus presumptive. Although the *Jones v. Clinton* decision leaves open the possibility that a more compelling plaintiff than Paula Jones might rebut a presumptive stay, the plaintiff nonetheless bears the burden of proving the need for immediate relief.³⁵⁵

From the President's point of view, a presumptive stay has the same desired outcome as would temporary immunity. It relieves him of the intense political embarrassment that defending against the merits of a sexual harassment claim would cause. Thus, in practical terms, a presumptive stay is simply "immunity by any other name." And to the President, it would surely smell as sweet.

Finally, by allowing discovery to proceed even though the trial cannot,³⁵⁶ the court undercuts what it has just accomplished with a presumptive stay. In granting the stay, the court accepted Clinton's argument that legal entanglement would impermissibly distract him from governing.³⁵⁷ To permit discovery just a few paragraphs later, the court presumably concluded that depositions, interrogatories and document requests would not prove as burdensome a distraction as would the actual trial.³⁵⁸ The court offered no support for this conclusion.³⁵⁹ But given discovery's importance to the settlement of civil claims, this conclusion is highly questionable.³⁶⁰

Due to its internal contradictions, temporary immunity from trial fails to vindicate either of the competing interests advanced in *Jones v. Clinton*. By endorsing a presumptive stay, the court fails in practice to render the President answerable for his private conduct. By allowing discovery to proceed, it fails to adequately shield the President from the distraction as well.

³⁵³ See *id.* at 698-99.

³⁵⁴ See *id.*

³⁵⁵ See *id.*

³⁵⁶ *Id.* at 699.

³⁵⁷ *Jones II*, 869 F. Supp. at 698; see *supra* notes 325-31 and accompanying text.

³⁵⁸ See *Jones II*, 869 F. Supp. at 699.

³⁵⁹ See *id.*

³⁶⁰ See *infra* discussion in Section IV.B.3.

B. *Presumptive Amenability to Suit as an Alternative Approach*

The United States Court of Appeals for the Eighth Circuit should revamp temporary immunity from trial to accomplish effectively one objective or the other. This revision should take the form of presumptive amenability to suit. Precedent and philosophy argue persuasively that the President enjoys no immunity from civil damages suits predicated upon private acts.³⁶¹ Thus, such suits presumptively should go forward.³⁶² Courts must still reserve the power to grant a stay, however, when the President can show that specific and immediate national priorities demand his full attention.³⁶³ Moreover, a stay, when granted, should last only as long as the immediate priority does, not necessarily until the end of the President's term.³⁶⁴ Finally, to shield the president adequately, a stay must halt proceedings in their entirety.³⁶⁵

1. Supreme Court Precedent Denies Presidential Immunity from Civil Suits Based on Private Conduct

The district court's interpretation of historical precedent and the founders' legacy offers a compelling argument for denying President Clinton's absolute temporary immunity request.³⁶⁶ Furthermore, a careful interpretation of United States Supreme Court precedent also supports this result. Simply put, the Supreme Court never intended its absolute immunity cloak to cover unofficial acts as well as official ones.³⁶⁷ This intention manifests itself in the plain language of the Court's holdings,³⁶⁸ their subsequent interpretation by lower courts and counsel³⁶⁹ and in *Fitzgerald's* concurring and dissenting opinions.³⁷⁰

Each holding from *Bradley v. Fisher* to *Nixon v. Fitzgerald* specifically limits immunity to suits based on official conduct.³⁷¹ More

³⁶¹ See *infra* notes 366-95 and accompanying text.

³⁶² See *infra* notes 396-408 and accompanying text.

³⁶³ See *id.*; see also *United States v. Nixon*, 418 U.S. 683, 710 (1974); *United States v. Burr*, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (No. 14,694).

³⁶⁴ See *infra* discussion in Section IV.B.3.

³⁶⁵ See *id.*

³⁶⁶ See *supra* notes 302-23 and accompanying text.

³⁶⁷ *Nixon v. Fitzgerald*, 457 U.S. 731, 759 (1982) (Burger, C.J., concurring); see, e.g., *id.* at 756; *Barr v. Matteo*, 360 U.S. 564, 573 (1959); *Spalding v. Vilas*, 161 U.S. 483, 499 (1896); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1871).

³⁶⁸ See *infra* notes 371-76 and accompanying text.

³⁶⁹ See *infra* notes 377-89 and accompanying text.

³⁷⁰ See *infra* notes 390-95 and accompanying text.

³⁷¹ *Fitzgerald*, 457 U.S. at 756; *Bradley*, 80 U.S. (13 Wall.) at 351-52.

specifically, each holding limits immunity to actions taken "within the outer perimeter" of the official's authority, including the President's authority.³⁷² Thus, the Court not only refused to preclude suits based on private conduct, but also refused to preclude suits involving official overreaching. The Court's narrowly tailored holdings illustrate its intent to avoid a broader preclusion.

Alternatively, one could venture that the Court limited its holding to official conduct merely because of the facts before it: each plaintiff alleged wrongs based on an official act. Thus, the Court had no need to couch its holdings in broader terms. If one accepts that the *Fitzgerald* Court based its holding on the belief that civil suits place unacceptable demands on the President's time,³⁷³ however, this alternative conclusion rests on tenuous ground.

As President Clinton pointed out in his arguments, a suit based on private conduct would place the same demands on his time as a suit based on official acts.³⁷⁴ As obvious as this observation is, it is doubtful that it could have eluded the *Fitzgerald* Court. Yet in light of this inescapable observation, the *Fitzgerald* Court still crafted a narrow holding limited to official acts.³⁷⁵ Thus, the Court must have intended to limit *Fitzgerald's* scope to official acts, even in light of its general concerns regarding demands on the President's time.³⁷⁶

The lower courts recognized this limited scope for lesser officials by holding them accountable for private actions, even though they possessed absolute immunity for their official actions.³⁷⁷ In the case of judges, for example, the Court granted absolute immunity in 1871 for official acts within the scope of the judges' jurisdiction.³⁷⁸ Since then, however, litigants have repeatedly sued judges for actions taken in private life.³⁷⁹ Professor Gray cites two reported cases in which judges

³⁷² *Fitzgerald*, 457 U.S. at 756; see, e.g., *Barr v. Matteo*, 360 U.S. 564, 575 (1959); *Spalding v. Vilas*, 161 U.S. 483, 499 (1896).

³⁷³ See *supra* notes 194–200 and accompanying text.

³⁷⁴ See *supra* notes 198–200 and accompanying text.

³⁷⁵ *Fitzgerald*, 457 U.S. at 756.

³⁷⁶ This line of inquiry also calls into question the district court's interpretation of the *Fitzgerald* Court's rationale. If the Court had viewed all damages suits against the President as an impermissible threat to his ability to govern, it should have crafted a broad enough holding to preclude all suits. In light of this question, Jones's and the professors' interpretation of the *Fitzgerald* Court's rationale—that only concern over the affect of potential liability on presidential decision making shaped the Court's decision—deserves detailed consideration when *Jones v. Clinton* is heard on appeal. See *supra* notes 208–16 and accompanying text.

³⁷⁷ See *infra* notes 379–81 and accompanying text.

³⁷⁸ *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351–52 (1871).

³⁷⁹ Gray, *supra* note 44, at 309.

paid damages for malicious prosecution³⁸⁰ and a third in which a judge was held liable for flood damages caused by a leaky dam on his property.³⁸¹ Thus, the lower courts translated the theoretically limited nature of absolute immunity into practice.

Admittedly, the Supreme Court in *Nixon v. Fitzgerald* expressly distinguished the unique importance of the President's job from that of lesser officials.³⁸² Following this reasoning, President Clinton concluded that the limits placed on absolute immunity for lesser officials should not apply to the President.³⁸³ This conclusion, however, denies the purpose behind the *Fitzgerald* Court's observation.

By distinguishing the President from lesser officials, the Court sought to justify granting him absolute immunity while denying the same shield to his underlings.³⁸⁴ Just a few years earlier, in *Scheuer v. Rhodes* and *Butz v. Economou*, the Court awarded state and other federal officials only qualified immunity from suits based on their official acts.³⁸⁵ Because of the President's unique status, however, the Court held "these cases to be inapposite."³⁸⁶ Thus, the Court intended solely to distinguish *Scheuer* and *Butz*. Correspondingly, the Justices never intended to create a different grade of absolute immunity available only to the President.

Lawyers defending the other three Presidents sued for unofficial conduct implicitly acknowledged the limited scope of the Supreme Court's immunity doctrine.³⁸⁷ In none of these cases did counsel raise immunity as a defense. Yet the Court's holding in *Spalding v. Vilas*, which established absolute immunity for cabinet officers, could well have launched an argument to extend the identical protection to their boss.³⁸⁸ Nonetheless, President Kennedy's attorneys, for example, argued for dismissal of a motor vehicle tort based on the Soldiers' and Sailors' Relief Act, not on immunity grounds.³⁸⁹

Finally, the *Fitzgerald* concurrence and dissent reveal a majority opposed to extending absolute immunity to a President's unofficial

³⁸⁰ *Id.* (citing *State v. United States Fidelity & Guarantee Co.*, 217 Miss. 576 (1953) and *Stewart v. Cooley*, 23 Minn. 347 (1877)).

³⁸¹ *Id.* at 309 (citing *THE SAN FRANCISCO CHRON.*, Mar. 25, 1958, at 9).

³⁸² 457 U.S. 731, 749 (1982).

³⁸³ See *supra* notes 194-97 and accompanying text.

³⁸⁴ See *Fitzgerald*, 457 U.S. at 750.

³⁸⁵ See *supra* notes 130-46 and accompanying text.

³⁸⁶ *Fitzgerald*, 457 U.S. at 750 (emphasis added).

³⁸⁷ See *supra* note 43.

³⁸⁸ See *supra* notes 92-97 and accompanying text.

³⁸⁹ See *supra* note 43.

acts.³⁹⁰ The four Justices endorsing the plurality opinion did not address the issue.³⁹¹ But Chief Justice Burger, writing in concurrence, did so in no uncertain terms: "[A] President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties."³⁹² Thus, the Chief Justice endorsed absolute immunity only when the President acts in an official capacity.

The remaining four Justices, arguing in dissent, opposed broad absolute immunity for even a President's official acts.³⁹³ They contended that the President deserved absolute protection only when engaged in particularly sensitive functions.³⁹⁴ As in the plurality opinion, the dissenters did not discuss immunity for private conduct per se.³⁹⁵ Given their opposition to broad immunity for official acts, however, it seems highly unlikely they would reverse their convictions to support similarly broad immunity for private conduct.

Thus, five out of nine justices opposed absolute immunity for damages suits based on unofficial acts. Chief Justice Burger and the four dissenters comprise the majority, with the remaining four Justices expressing no discernable opinion. This analysis of the *Fitzgerald* opinion, along with the plain language of the Court's immunity holdings and subsequent lower court interpretation, reveals a weight of precedent opposed to President Clinton's request.

2. Precedent and Pragmatism Counsel a Rebuttable Presumption that Suits Against the President Go Forward

The courts presumptively can permit suits against the President to proceed and still intervene to protect the national interest when necessary. In contrast, the presumptive stay alternative simply grants the President absolute temporary immunity by any other name.³⁹⁶ Like immunity, it shelters the President from judicial process merely because of the office he holds. Therefore, the same precedent that denies presidential immunity from civil suits based on private conduct likewise denies a presumptive stay. Simply attaching a different label to the

³⁹⁰ See 457 U.S. at 758–99 (Burger, C.J., concurring; White, J., dissenting; Blackmun, J., dissenting).

³⁹¹ See *id.* at 733–58.

³⁹² *Id.* at 759 (Burger, C.J., concurring).

³⁹³ See *id.* at 764–99 (White, J., dissenting; Blackmun, J., dissenting).

³⁹⁴ *Fitzgerald*, 457 U.S. at 788 (White, J., dissenting).

³⁹⁵ See *Fitzgerald*, 457 U.S. at 764–99 (White, J., dissenting; Blackmun, J., dissenting).

³⁹⁶ See *supra* discussion in Section IV.A.

same end result is at best judicial sleight of hand. At worst, it amounts to thinly veiled circumvention of the law.

On the other hand, a blanket refusal to stay suits against the President under any circumstances defies pragmatism. The nation sometimes does face dire emergencies requiring all the President's waking energies. As the President is the Chief Executive, no one else can fill his shoes in these times of crisis. When he must provide such leadership, the national interest demands that partisan posturing, fund raising and photo opportunities all take a back seat to the problem at hand. Likewise, the national interest demands that one litigant's plea for redress take a back seat with them.³⁹⁷

To offer an example, assume the injured motorist had pressed his claim against President Kennedy during the Cuban Missile Crisis.³⁹⁸ Having the President put Premier Krushchev on hold to testify whether the light was red or green simply makes no sense. One litigant's desire for immediate relief would take a back seat to the immediate interests of the nation at large.

Fortunately, however, Cuban Missile Crises do not happen often. More commonly, the President's workload involves day-to-day political tussles over balanced budget amendments, foreign aid and other pending legislation. Although this work may shape the nation's future, the stakes at hand are not nearly so immediate. Nor does the President play so pivotal a role. Key legislators, media pundits and the public at large all participate in shaping the outcome. Moreover, the President finds time for fund raising, stumping for candidates and photo opportunities in addition to his governmental duties.

Therefore, the courts presumptively can permit suits against the President to proceed under ordinary circumstances without impermissibly jeopardizing the national interest. To protect the national interest when circumstances turn extraordinary, however, the President must be free to rebut the presumption and speedily secure a stay. To do so, he need simply identify to the court's satisfaction the national imperative requiring his complete attention.

Such a presumptive amenability to suit doctrine would serve both competing interests at stake in the immunity debate. It remains true to precedent rendering the President answerable for his private conduct, as is every other citizen. If the President were to fall victim to meritless "strike suits," he could secure quick relief by a rule 12(b) (6) or summary judgement motion, just like every other citizen. Moreover,

³⁹⁷ See *Fitzgerald*, 457 U.S. at 754.

³⁹⁸ See *supra* note 43.

presumptive amenability leaves ample room for judicial intervention to protect compelling national interests.

As the professors pointed out in their amicus brief, presumptive amenability to suits based on private conduct stands in harmony with the President's amenability to criminal process.³⁹⁹ In *United States v. Burr*⁴⁰⁰ and *United States v. Nixon*,⁴⁰¹ Chief Justice Marshall and the United States Supreme Court, respectively, recognized that the demands of the Presidency could well require immunity from criminal process.⁴⁰² Likewise, presumptive amenability recognizes that the demands of the Presidency may require staying a litigant's claim. Both Marshall and the *United States v. Nixon* Court, however, held the President answerable absent a specific showing that compliance would threaten the national interest.⁴⁰³ Likewise, presumptive amenability would require the President to show a specific national priority that required all his waking energies. Thus, presumptive amenability to suit comports with Supreme Court reasoning.⁴⁰⁴

Empowering the courts to decide when national priorities demand a stay similarly comports with Supreme Court immunity precedent.⁴⁰⁵ In *United States v. Nixon*, for example, the Supreme Court commanded the district court to examine the Watergate tapes in-camera to ensure they contained no sensitive information.⁴⁰⁶ In other

³⁹⁹ See *supra* notes 293-96 and accompanying text.

⁴⁰⁰ 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

⁴⁰¹ 418 U.S. 683 (1982).

⁴⁰² See *supra* notes 168-83 and accompanying text.

⁴⁰³ 418 U.S. at 713; *Burr*, 25 F. Cas. at 192.

⁴⁰⁴ Granted, the *Fitzgerald* Court observed that the need to develop all facts in a criminal trial carried more weight than one litigant's plea for civil damages. Thus, criminal process could outweigh the national interest in an inviolable President although a civil suit could not. Based on this observation, one could argue that presumptive amenability may not be applicable to a civil damages claim as it was to criminal process. But to do so forgets the two-fold nature of the rationale supporting the *Fitzgerald* Court's decision.

The *Fitzgerald* Court justified its decision, at least in part, with the concern that amenability to suit based on official actions would render the President timid in making official decisions. No such rationale supports shielding the President's private conduct. Anxiety over facing a sexual harassment claim three years in his past could not influence whether the President proposes a controversial bill or commits U.S. troops to a peace-keeping mission. Thus, the rationale for protecting the President from suits based on official conduct outweighs the rationale in shielding him from suits based on purely private conduct. Only one part of the whole remains valid.

As a result, even though the plaintiff's interests are reduced, so correspondingly are the nation's interests reduced. The resulting balance between the plaintiff's desire for redress and the national interest in protecting the President facing suit for his private conduct stand in rough equivalence to the balance between the need for criminal evidence and the need to protect presidential confidentiality. Thus, the amenability to process analogy retains its validity.

⁴⁰⁵ See *United States v. Nixon*, 418 U.S. at 713.

⁴⁰⁶ *Id.* at 714.

words, the courts, not the President, were to determine whether national interests demanded some passages remain unrevealed.

Similarly, the *Fitzgerald* Court limited presidential immunity to official acts "within the 'outer perimeter' of his official responsibility."⁴⁰⁷ Implicit in the *Fitzgerald* doctrine is a mandate to the courts to decide how far the President's outer perimeter of authority extends.⁴⁰⁸ As precedent awards the courts stewardship over questions of national security and presidential authority, so would it empower the courts to decide when national priorities demand staying a civil suit.

3. When National Priorities Warrant a Stay, They Warrant a Stay in Its Entirety

If the courts determine that a national priority demands all the President's energy, the courts must stay civil suits against him completely. Staying trial but permitting discovery still subjects the President to significant distractions. The importance discovery plays in contemporary civil litigation supports this observation.

In a hotly contested case, the battle is often won or lost in discovery, an observation supported by the fact that the lion's share of civil claims are settled before ever reaching trial. Thus, a civil litigant must devote the same care to preparing the factual record in discovery as he would to preparing actual testimony. Moreover, as the temporary immunity from trial doctrine permits depositions of the President himself, he cannot delegate the discovery tasks to subordinates.⁴⁰⁹ His first-hand participation inexorably would be required.

In addition, each discovery motion and each inevitable objection could generate the same embarrassing headlines that a day of trial testimony would. The President would escape neither distraction nor political damage. Thus, staying trial while permitting discovery proves an empty gesture, devoid of practical significance to the Chief Executive.

Admittedly, staying discovery risks allowing evidence to grow stale. This could place the plaintiff at a disadvantage once the stay is lifted. But courts can mitigate this risk somewhat by limiting the stay's duration. A stay need not last until the end of the President's tenure, but only until the immediate national emergency passes.

⁴⁰⁷ *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

⁴⁰⁸ *See id.* The *Fitzgerald* Court itself concluded that the outer perimeter of President Nixon's authority extended to managing air force personnel. *Id.* at 757.

⁴⁰⁹ *See supra* notes 343-46 and accompanying text.

In cases of prolonged national crisis, however, the President could justify staying discovery for long periods of time. As time wore on, the risk of losing evidence would increase. But as more than 120 years of immunity case law teaches, one litigant's desire for redress must at times give way to the national interest.⁴¹⁰ To remain grounded in pragmatism, a presumptive amenability doctrine cannot preserve all litigant's rights all the time. It should, however, permit their forfeiture only when absolutely necessary to advance an immediate national priority.

In addition, the risk of losing evidence would cut both ways. In other words, the defendant-President runs the same risk of losing exculpatory evidence while the stay is in effect. So although the risks of stale evidence become no more desirable, both parties at least face a level playing field.

V. CONCLUSION

Paula Corbin Jones's sexual harassment suit against President Clinton raises a novel issue for the courts: is a sitting President entitled to absolute temporary immunity from civil damages suits based on actions that occurred before he took office? The United States District Court for the Eastern District of Arkansas concluded that the President enjoys a "temporary immunity from trial," consisting of a presumptive stay of trial proceedings until Clinton leaves office. The great weight of precedent and history, however, counsels that Presidents should be amenable to suits based on private conduct, unless a compelling national priority demands the Chief Executive's full and immediate attention. Thus, the United States Court of Appeals for the Eighth Circuit should replace temporary immunity from trial with a doctrine of presumptive amenability to suit. A presumptive amenability standard serves both competing interests that shape the presidential immunity debate: it preserves intact the philosophical maxim that "no man is above the law," but also preserves flexibility to protect the national interest in times of crisis. In sum, presumptive amenability to suit offers the most balanced answer to this newest immunity question.

LAURIER W. BEAUPRE

⁴¹⁰ *E.g.*, *Fitzgerald*, 457 U.S. at 754; *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).