December 1997

Clinton v. Jones: The King Has No Clothes (Nor Absolute Immunity to Boot)

Christopher James Sears
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr
Part of the Common Law Commons, Constitutional Law Commons, and the United States History Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol100/iss2/10

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
CLINTON v. JONES: THE KING HAS NO CLOTHES (NOR ABSOLUTE IMMUNITY TO BOOT)

I. INTRODUCTION ........................................... 494

II. BACKGROUND OF THE LAW .............................. 497
    A. Common Law Foundation and Framers' Intent .......... 497
    B. The Supreme Court's Exercise of Authority Over the
        Executive Branch .................................. 498
    C. The Doctrine of Executive Immunity ...................
       1. Absolute Immunity .......................... 506
       2. Qualified Immunity .......................... 508
    D. Absolute Immunity for the President: Nixon v. Fitzgerald .. 510

III. STATEMENT OF THE CASE .................................. 511

IV. THE DECISION ........................................... 515
    A. Question One: Can A King Run Naked? ................ 515
       1. The King Cannot Use Precedent As A Corset ..... 516
       2. The Historical Record Lacks A Common Thread .. 517
       3. The Judiciary Has the Authority to Rain
          on the King's Parade ............................ 519
    B. Question Two: Can the Court Establish a Clothing-Free
       Area? ........................................... 523
    C. Disposition of the Case: Hanging the King Out to Dry .... 525
    D. The Concurrence: Reviving the King's Constitutional
       Tailors .......................................... 525

V. ANALYSIS .............................................. 527
    A. Presumptive Amenability ................................ 527
    B. Defining the Scope of the Outer-perimeter of Presidential
       Duty ............................................ 529
    C. The Moral Imperative of Presidential Accountability .. 531

VI. CONCLUSION ............................................ 534
“No man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.”

I. INTRODUCTION

In the classic children’s tale, The Emperor’s New Clothes, Hans Christian Andersen tells the story of a King whose presumed inviolability is desecrated by a village boy when the boy cries out, “The King has no clothes!” Taken in view of the rights of an English monarch as early as the thirteenth century, the boy’s statement in Andersen’s story could well have been tantamount to a treasonous attack on the King’s sovereignty. Although, by the seventeenth century, the development of the rights and liberties of the English people were conclusive in determining the end of “the divine right of Kings,” the maxim that “the King can


3 The original Danish quote was as follows: >>Men han har jo ikke noget på<< HANS CHRISTIAN ANDERSON, EVENTYR OG HISTORIER 100 (1955).

4 By the early 13th Century, the English King, the lord and sovereign, “was not subject to the enforcement of the law or the judicial process.” R. Brent Walton, Comment, We’re No Angels: Paula Corbin Jones v. William Jefferson Clinton, 71 Tul. L. Rev. 897, 902 (1997) (citing Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 5-6 n.15 (1963)). Furthermore, the notion that “‘the King can do no wrong’” was rooted in “‘the divine right of Kings.’” Jones v. Clinton, 869 F. Supp. 690, 693 n.1 (E.D. Ark. 1994), aff’d in part, rev’d in part, 72 F.3d 1354 (8th Cir. 1996), cert. granted, 116 S. Ct. 2545 (1996), aff’d and rem’d 117 S. Ct. 1636 (1997), 974 F. Supp. 712 (1997). Moreover, deeply imbedded in the aphorism that “the King can do no wrong” was the belief that the King was incapable of doing or thinking wrong: “[H]e can never mean to do an improper thing; in him is no folly or weakness.” Id. at 693 n.1 (citing William Blackstone, Commentaries on the Laws of England 246 (Chitty ed., 1855)).

5 See Jones 869 F. Supp. at 693 n.1.
do no wrong" survived. In fact, this concept of kingship persists to the present day and grants the Queen of England an absolute immunity from personal civil suits.

The United States inherited the rights and liberties of the English people when the nation's Founding Fathers adopted certain concepts embodied in the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights. However, no sovereign monarch reigns over the citizens of the United States; rather, the nation is governed by a tripartite government with the executive power vested in a president who is subject to election at fixed terms. Moreover, the United States Constitution is silent on the issue of presidential immunity and the Framers of the Constitution did not provide consistent authority on the matter. Thus, the question arises: Does the President of the United States possess an "official inviolability" that grants him absolute immunity from being sued for personal torts in the civil courts? Alternatively, the question may be posed using a literary allusion: Can a mere citizen cry out, "The President has no clothes!"

In a decision that reinforces the principle of judicial review and tests the limits of the separation of powers, the United States Supreme Court addresses the

---

6 This adage represents two fundamental principles: (1) any exceptionable conduct that occurs during the course of public affairs is not to be imputed to the King; and (2) by the very nature of the crown, the prerogative of the King cannot be exerted to do any injury to the people. See Jones, 869 F. Supp. at 693 n.1 (citing William Blackstone, Commentaries on the Laws of England 246 (Chitty ed., 1855)).

7 See Jones, 869 F. Supp. at 693 n.1 (citing R.J. Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303, 307 (1959)). The Queen's immunity is guaranteed by the Crown Proceedings Act of 1947. See Laurie W. Beaupre, Note, Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity From Trial, 36 B.C. L. Rev. 725,729 (1995). Although the Queen enjoys immunity, the Royal Monarchs of Great Britain have traditionally made themselves amenable to suit through a Petition of Right. In this way, royal amenability to suit in England is similar to the doctrine of sovereign immunity in the United States. See id.

8 See Jones, 869 F. Supp. at 693 n.1.


11 See id. at 694 (noting that the Constitution does not address the immunity question).

12 The Supreme Court noted that the historical evidence proffered by Mr. Clinton shed little light on the issue under consideration and was largely canceled by conflicting evidence also consistent with the underlying principles of presidential immunity. See Clinton v. Jones, 117 S. Ct. 1636, 1638 (1997).
issue of presidential inviolability in *Clinton v. Jones*. Decided in the form of a response to questions presented in a *certiorari* petition, *Clinton* stands for three propositions that will have a profound effect on the “official inviolability” of the President of the United States: (1) in all but the most exceptional circumstances, the United States Constitution does not grant the President temporary immunity from personal civil suits that arise out of events preceding the President’s term in office; (2) under the doctrine of separation of powers, the federal courts are not required to suspend private civil actions against the Chief Executive until he leaves the presidency; and (3) it is an abuse of a district court’s discretion to defer trial of a private action until after the President leaves office.

The Supreme Court’s holding in *Clinton* places a significant limitation on the presumed inviolability of the President. The President may no longer attempt to avoid accountability for unofficial conduct by hiding behind the constitutional cloak of the Presidency. The Court’s decision in *Clinton* is not only a victory for the plaintiff, but it is a triumph for the Republic as well: citizens who have been injured by the private acts of public servants are guaranteed the right to resort to the laws of the land for a remedy.

The purpose of this Comment is to explore why the President, along with other public servants, must be subject to the laws of the land. First, this Comment examines the derivation and scope of executive immunity. Second, it recounts the facts and procedural history of the underlying case. Third, it explains the rationale used by the Supreme Court in reaching its conclusion. Fourth, it discusses the ramifications of the Court’s decision and argues that the Court properly decided the case. Finally, it concludes that in a just and ordered society, no one should be above the law.

---


14 See *Clinton*, 117 S. Ct. at 1636.

15 See *id.* at 1659 (Breyer, J., concurring) (“I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed.”).

16 See *id.*

17 See *id.* at 1652 (“Like every other citizen who properly invokes that jurisdiction, [Mrs. Jones] has a right to an orderly disposition of her claims.”).
II. BACKGROUND OF THE LAW

A. Common Law Foundation and Framers' Intent

A proper treatment of the presidential immunity at issue in Clinton must begin with an analysis of the derivation and scope of the principle. The theoretical underpinnings of executive immunity originate from English common law and arise out of the sovereignty of the monarch.\(^\text{18}\) Although the principle of the divine right of kings had been the rule of the land for most of England’s history, the inviolability of the King implicit in that doctrine began to erode with the signing of the Magna Carta.\(^\text{19}\) What followed in English history was a long and bloody struggle in which the rights and liberties of the citizenry were defined and the powers and privileges of the throne were limited.\(^\text{20}\) Ultimately, the precepts rooted in the divine right of Kings gave way to the conviction expressed by Lord Coke that “[t]he King ought to be under no man, but under God and the law.”\(^\text{21}\)

Wary of a centralized executive wielding a tyrannical hand, the Framers of the United States Constitution hotly debated the issue of the appropriate powers and limits of the President.\(^\text{22}\) Despite their intense disagreements, the Framers were still unified in a single proposition: the President would not be King.\(^\text{23}\) Accordingly, the underlying presumption guiding the creation of the office of the president was that

\(^{18}\) See generally Walton, supra note 4, at 901-04.

\(^{19}\) See Jones, 869 F. Supp. at 692 (citing WILLIAM SINDLER, MAGNA CARTA: LEGEND AND LEGACY 172 (1965)).

\(^{20}\) See id. at 692-93 (citing SINDLER, supra note 19, at 169-176).

\(^{21}\) Id. at 693 (quoting SINDLER, supra note 19, at 172).

\(^{22}\) See Walton, supra note 4, at 905-06 (citing THE FEDERALIST No. 67, at 389 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than [the office of the president]; and there is, perhaps, none which has been enveighed against with less candor or criticized with less judgment.”)). Some Framers, such as Delegate Roger Sherman of Connecticut, viewed the proper role of the President as being “nothing more than an instrument for carrying the will of the Legislature into effect.” See Jones, 869 F. Supp. at 694 (quoting ARTHUR SCHLESINGER, JR., THE CONSTITUTION: ARTICLE II, in AN AMERICAN PRIMER 121-22 (Daniel J. Boorstin ed., 1968)). Others, such as Gouvernor Morris of Pennsylvania, believed that the President should be “the guardian of the people, even of the lower classes, against Legislative tyranny.” Id.

\(^{23}\) See Walton, supra note 4, at 904-905 (citing EDWIN S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 3-16 (4th ed. 1957)).
the Chief Executive would not be above "justice." Eventually, the Framers succeeded in creating a president who was later described as being "but a man, though among the first of men; he is but a citizen, though among the first of citizens[,] . . . he ought to pay obedience to the laws of his country, and obey the commands of its courts of justice." The Framers were also cognizant, though, of the importance and necessity of unimpeded, independent branches of government. This nexus between the doctrine of separation of powers and the principle of presidential immunity has led many scholars to comment that immunity is a matter of judicial concern, rather than constitutional inquiry. Thus, framed properly, presidential immunity implicitly begs the question: to what extent may the judiciary exert authority over the "first of citizens?"

B. The Supreme Court's Exercise of Authority Over the Executive Branch

The legal development of presidential immunity in the United States is analogous to the evolution of the monarch's sovereignty in England. Despite the Framers' repudiation of a monarchical form of government, some, such as Sir Henry Maine, have been cited for the proposition that "the office of the [p]resident really is the office of a King — the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." However,

24 See id. at 907 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 65 (Max Farrand ed., 1927) (remarks of George Mason)).

25 1 DAVID ROBERTSON, TRIAL OF AARON BURR FOR TREASON 137 (James Cockcroft & Co. 1875) (quoting United States Attorney George Hay, responding to the Supreme Court on behalf of President Thomas Jefferson regarding a motion to produce papers during the Aaron Burr treason trial) quoted in Walton, supra note 4, at 905.


27 See Walton, supra note 4, at 932 (citing GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 318-19 (1957)).

28 See id. at 905.

29 See Jones, 869 F. Supp. at 696.

30 Id. at 694 n.2 (quoting RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 427-428 (1974)).
the United States Supreme Court, in *Marbury v. Madison*,\(^{31}\) announced its prerogative, under the doctrine of judicial review, to review and set aside the unlawful acts of the legislative and executive branches.\(^{32}\)

In *Marbury*, the Senate had approved President John Adams’s nomination of William Marbury as a justice of the peace.\(^{33}\) Accordingly, the commission was signed by the President and the official seal was affixed by the Secretary of State.\(^{34}\) Before the commission was delivered, however, President Adams left office and the new Secretary of State, James Madison, refused to deliver the commission.\(^{35}\) Consequently, Marbury sought a writ of *mandamus* from the Supreme Court compelling the Secretary to deliver the commission.\(^{36}\) Chief Justice Marshall held that Marbury had a constitutional right to receive his commission and stated that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury[;] one of the first duties of government is to afford that protection.”\(^{37}\) Although the Court in *Marbury* did not specifically address the issue of presidential immunity, the decision of that case was pivotal in establishing that the executive branch was not immune from the actions of the judicial branch in enforcing the supreme law of the land.\(^{38}\)

In *United States v. Burr*,\(^{39}\) however, the Supreme Court stated in dicta that the President may be immune to judicial authority if the exercise of that authority

\(^{31}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{32}\) *See* Walton, *supra* note 4, at 924-25 (“In one fell swoop Chief Justice Marshall exerted the Court’s total authority over the President whenever his acts interfere with the legal rights of others.”) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

\(^{33}\) *See* *Marbury*, 5 U.S. (1 Cranch) at 155.

\(^{34}\) *See id.*

\(^{35}\) *See id.*

\(^{36}\) *See id.* at 153-54.

\(^{37}\) *Id.* at 163. The Court went on to note that “[i]n Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.” *Id.* *See also supra* note 5.


\(^{39}\) 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).
interfered with the performance of the President’s duties.\textsuperscript{40} Burr arose out of the criminal prosecution of Aaron Burr for treason.\textsuperscript{41} At issue was whether a court could serve process on the President.\textsuperscript{42} The court had issued a \textit{subpoena duces tecum} directing President Jefferson to turn over certain letters deemed to be material to Burr’s defense.\textsuperscript{43} President Jefferson refused, claiming that any exercise of judicial authority over the President impinged on the independence of the office of the president, thereby violating the separation of powers doctrine:\textsuperscript{44}

The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive 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?\textsuperscript{45}

The Court in \textit{Burr} held that even though the President, as a citizen, is subject to judicial authority, he is a unique citizen who is singly responsible to the general public.\textsuperscript{46} Writing for the court, Chief Justice Marshall stated that “[i]f, upon any principle, the [P]resident could be construed to stand exempt from the general provisions of the [C]onstitution, it would be, because his duties as chief magistrate

\begin{footnotes}
\item[{41}] See generally Burr, 25 F. Cas. 30.
\item[{42}] See id.
\item[{43}] See id. at 31.
\item[{44}] Jeffery, supra note 40, at 853 (citing WILLIAM M. GOLDSMITH, \textit{The Growth of Presidential Power: A Documented History} 542 (1974)).
\item[{45}] Id. at 853-54 (quoting Thomas Jefferson in WILLIAM M. GOLDSMITH, \textit{The Growth of Presidential Power: A Documented History} 542 (1974)).
\end{footnotes}
demand his whole time from national objects." Therefore, the President may present sufficient motives in refusing to comply with a judicial order.

The Court examined the nature of such motives in Mississippi v. Johnson. In Johnson, the state of Mississippi sued to enjoin President Andrew Johnson from enforcing the Congressional enactments collectively known as the Reconstruction Acts. Arguing in support of President Johnson, Attorney General Stanbery urged that the President is completely immune from the jurisdiction of any court:

There is only one court or quasi court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

---


49 71 U.S. (4 Wall) 475 (1866). The Supreme Court's first opportunity to address presidential immunity occurred in Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411). Although the action was subsequently dismissed because of a lack of jurisdiction, the decision is deemed to be significant in that "Chief Justice Marshall failed to address or mention any problem in suing a president for actions taken while in office." Walton, supra note 4, at 927 (citing Livingston v. Jefferson, 15 F. Cas. at 663-665 (C.C.D. Va. 1811) (No. 8,411)).

50 See Johnson, 71 U.S. (4 Wall) at 475.

51 Id. at 484-85 quoted in Glenn T. Williams, Note and Comment, Temporary Immunity: Distinguishing Case Law Opinions on Executive Immunity and Privilege as the Supreme Court Tackles an Oxymoron, 21 NOVA L. REV. 969, 974 (1997).
The Court in *Johnson* did not decide the case in favor of either party. Instead, the *Johnson* Court held that the judiciary, under the separation of powers doctrine, could not enjoin the President from faithfully executing his constitutional duties without encroaching upon the independence of the executive branch. Accordingly, the Court dismissed the action on non-justiciability grounds.

In reaching its decision, the Court in *Johnson* made a distinction between a ministerial and an executive act; the former involves legal duties, and hence, no discretion, while the latter involves political functions with broad discretion. Chief Justice Chase concluded that “the duty of the President in the exercise of the power to see that the laws are faithfully executed . . . is in no just sense ministerial[;] [i]t is purely executive and political.” (Consequently, many commentators feel that *Johnson* stands for the proposition that “the President is immune from legal process when performing what he deems to be his constitutional duties.”) The significance of this distinction was demonstrated just one year later, in *Gaines v. Thompson*. The Court in *Gaines* found that it was impermissible for any court to issue an order preventing or compelling the exercise of executive discretion. In reaching its conclusion, the Court in *Gaines* relied upon the holding in *Marbury*:

---

52 See id. at 500. The *Johnson* Court was operating under precarious circumstances – a “penultimate catch-22”: “[I]f the Court enjoined the President from enforcing the allegedly illegal Reconstruction Amendments, the President might refuse to obey the Court, but if the President complied with an injunction, popular and congressional will would be unilaterally usurped by a counter-majoritarian Court.” Walton, supra note 4, at 929-30.

53 See *Johnson*, 71 U.S. (4 Wall) at 500-01 cited in Walton, supra note 4, at 929.

54 See id. at 501 (“[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.”).


56 *Johnson*, 71 U.S. at 499. See also Williams, supra note 51, at 974.

57 Williams, supra note 51, at 974-75 (quoting JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 7.1, at 235 (5th ed. 1995)).

58 74 U.S. (7 Wall) 347 (1868).

59 Walton, supra note 4, at 931-32 (citing *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347; 349-50 (1868)).
[T]he President is invested with certain political powers, in the exercise of which he is to use his own discretion, and for which he is accountable only to his country and his conscience . . . . [H]owever, that where an officer is required by law to perform an act, not of this political or executive character, which affects the private rights of individuals, he is to that extent amenable to the courts.60

This truism, announced in Marbury and relied upon in Gaines, found its proper place in United States v. Lee.61 Lee involved the transfer of a significant amount of land known as Arlington estate from George Lee to his daughter, the wife of General Robert E. Lee, for life.62 The land came into the possession of the United States after purchasing the land at a tax sale.63 The tax commissioners charged with the disposition of the land were under orders from the Secretary of War to set aside part of the land as a national cemetery for military personnel (Arlington National Cemetery).64 The Attorney General relied upon the principle of executive immunity in arguing that the courts lacked jurisdiction in the matter.65 Supreme Court Justice Samuel F. Miller rejected the Attorney General’s claim of immunity stating as follows:

[N]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. . . . [A court’s] power and influence rest[s] solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land. . . .66

60 Gaines, 74 U.S. at 349-50.
61 106 U.S. 196 (1882).
62 See id. at 197-99.
63 See id.
64 See id. at 198.
65 See id.
66 Id. at 220, 223 cited in Williams, supra note 51, at 975-76.
Perhaps the most significant exercise of judicial authority over the executive branch occurred in *Youngstown Sheet & Tube Co. v. Sawyer*. At issue in *Youngstown* was whether the judiciary could issue a preliminary injunction against a cabinet official, thereby preventing him from implementing an executive order. *Youngstown* arose out of the events surrounding the military build-up during the Korean War. On April 4, 1952, after negotiations over wage increases failed, the United Steelworkers of America gave notice that a labor strike of the nation’s steelworkers was imminent. President Harry S Truman viewed the pending strike as a threat to the national defense because steel was an indispensable component in the manufacture of weapons.

Within hours of the scheduled strike, President Truman issued an executive order directing the Secretary of Commerce to seize control of the nation’s steel mills in order to “assure the continued availability of steel.” *Youngstown Sheet & Tube Co.*, one of the mills seized by Commerce Secretary Charles Sawyer, sued to enjoin the secretary from carrying out the President’s order. The district court issued the injunction thereby restraining the secretary from “continuing the seizure and possession of the plant . . . and from acting under the purported authority of Executive Order 10340.” On the same day, the court of appeals stayed the district court order.

---


68 See id.

69 See Daniel A. Farber, *Constitutional Law: Themes for the Constitution’s Third Century* 927 (1993). After North Korea’s attack on South Korea in June 1950, the United States Congress joined the United Nations-sanctioned peacekeeping force with a build up of American troops in excess of 3,500,000 people along with appropriating an unprecedented sum of money for national defense. Id.

70 See *Youngstown*, 343 U.S. at 583.

71 See id.

72 Id.

73 Id.

74 Id. at 584 (citing Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.D.C 1952)).
court's injunction and the Supreme Court promptly granted *certiorari* to decide the matter.

In support of the President, the government relied upon the Supreme Court's holding in *Mississippi v. Johnson* for the proposition that the judiciary lacked the authority to exert control over the executive branch. In fact, the government went so far as to suggest that there are only two checks on executive conduct: the ballot box and impeachment. Finding that the President lacked both congressional and constitutional authority to seize the nation's steel mills, the Court held that """officers of the Executive Branch . . . may be enjoined when[ever] their conduct by statute, exceeds the scope of constitutional authority, or is pursuant to an unconstitutional enactment."" The Court's decision in *Youngstown* is significant in demonstrating that the judiciary may exert extraordinary authority over the President in reviewing executive conduct that is potentially violative of the Constitution.

---

75 See Sawyer v. Youngstown Sheet & Tube Co., 197 F.2d. 582 (D.C. Cir. 1952).


77 See supra notes 49-57 and accompanying text.


80 Id. at 377 (1952) cited in Walton, *supra* note 4, at 933.

81 See Walton, *supra* note 4, at 933-34. *Youngstown* leaves little doubt that one may challenge a President's act in a court of law even though that order is purely executive in nature. Even the *Youngstown* dissenter found that Sawyer, a member of the President's cabinet and the President's actor and """alter ego,"""" was not immune from judicial oversight. In so determining, the Court effectively ruled that the President is constrained by the supreme law of the land embodied in the Constitution. Thus, even seemingly discretionary acts of the President that were once thought unreviewable under *Mississippi v. Johnson* might be subject to substantive judicial oversight if the act is in violation of the Constitution.

*Id.*
C. The Doctrine of Executive Immunity

The political power struggles that occurred in the early English system between Parliament and the Crown were fresh and well entrenched in the minds of the Framers of the United States Constitution. As a result, the Founding Fathers afforded the legislative branch immunity in order to "prevent intimidation by the executive and accountability before a possibly hostile judiciary. . . ." However, the Framers did not provide immunity for either the judicial or executive branches; rather, the evolution of the principles of judicial and executive immunity were left to common-law development.

1. Absolute Immunity

The United States Supreme Court first granted absolute immunity to the judiciary in 1871. Justification for such immunity was grounded in the belief that a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption; [i]mposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." This rationale formed the basis for extending immunity to the executive branch and was embodied in two public policy principles: (1) It is unjust, particularly in the absence of bad faith, to subject an executive officer to liability where he is legally obligated to exercise discretion; and (2) Subjecting an executive officer to liability where he is legally obligated to exercise discretion; and (2) Subjecting an executive officer to liability

---

83 Id. (quoting United States v. Johnson, 383 U.S. 169, 181 (1966)). Article I, Section Six of the United States Constitution sets forth the Speech and Debate Clause and the Arrest Clause:

The Senators and Representatives . . . in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. I, § 6, cl. 1. Legislative immunity was later extended to include legislative aides. See United States v. Gravel, 408 U.S. 606 (1972).
84 See Matraia supra note 82, at 203. Executive immunity is not supported by "positive law." Id. at 203 n.44 (citing GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 318 (1957)).
85 See Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (holding that judges must have absolute immunity to prevent their offices from being "degraded" and their "usefulness destroyed").
officer threatens to deter the official’s willingness to "execute his office with the decisiveness and the judgment required by the public good." 87

In 1896, the Supreme Court extended the cloak of absolute immunity to high-ranking, cabinet officials in the executive branch in order to ensure the "effective functioning of government." 88 In so doing, the Court noted that executive officials “should not be under an apprehension that the motives that control [their] official conduct may at any time become the subject of inquiry in a civil suit for damages;” to hold otherwise would “seriously cripple the proper and effective administration of public affairs as [e]ntrusted to the executive branch of the government[.].” 89 Accordingly, cabinet members enjoyed absolute immunity for

87 Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Serving as a backdrop to the first public policy statement is the notion that “without such protection qualified persons will not seek public office for fear of civil liability.” Jeffery, supra note 40, at 839.

88 See Spalding v. Vilas, 161 U.S. 483 (1896). In Spalding, Justice Harlan recognized the need to afford to the executive branch the same level of immunity enjoyed by the judiciary:

We are of [the] opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply, to a large extent, to official communication made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.

Id. at 498.

89 Id. Judge Learned Hand elaborated on this theme:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it 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.

conduct within the scope of their discretion," acts which were "manifestly or palpably" beyond the officials' authority were exempt from protection. This level of immunity was later extended to protect the discretionary acts of lower level executive officials as well.

Over the years, the federal courts have liberally construed the doctrine of absolute immunity to include protection for "malicious actions... deemed to be within the 'outer perimeter' of the federal duty." Consequently, absolute immunity operated to "permanently bar a plaintiff's civil damages claim regardless of the official's underlying motive." However, despite the Supreme Court's broad application of executive immunity, the Court has unequivocally maintained that immunity is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. It is not the title of [the] office but the duties with which the particular officer... is entrusted... which provide the guide in delineating the scope of the rule which clothes official acts of the executive officer with immunity.

2. Qualified Immunity

During the civil rights movement of the 1960s, the absolute immunity enjoyed by executive officials began to erode under a deluge of cases alleging

---


91 See Spalding, 161 U.S. at 498.

92 See Barr v. Matteo, 360 U.S. 564 (1959). In extending absolute immunity to executive officials generally, the court recognized a third public policy goal: the fear that damage suits would "consume time and energies which would otherwise be devoted to government service." Id. at 571. Mr. Clinton relied on this policy argument to justify the extension of immunity to protect the unofficial acts of the President. See Williams, supra note 51, at 979.

93 See KEETON, supra note 90, at 1060.

94 Id.

violations of constitutional rights.\textsuperscript{96} In an attempt to limit the harsh consequences of granting absolute immunity, the United States Supreme Court developed the doctrine of qualified immunity.\textsuperscript{97} Holding that the judiciary must provide a legal remedy for the violation of constitutional rights, the Supreme Court first stripped low-level, federal executive officials of absolute immunity in 1971.\textsuperscript{98} Three years later, in \textit{Scheuer v. Rhodes},\textsuperscript{99} the Court used the new doctrine to divest Ohio’s governor of absolute immunity for violating constitutional rights when he allegedly recklessly deployed the National Guard to quell an anti-war protest at Kent State University.\textsuperscript{100} Writing for the Court, Chief Justice Burger stated:

[W]hen a state officer acts under a state law in a manner violative of the Federal Constitution, he “comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.”\textsuperscript{101}

Under \textit{Scheuer}, qualified immunity was available only if the executive official had a good faith belief that he was acting “within the outer perimeter” of his duty and if he reasonably believed that his actions were lawful.\textsuperscript{102} The Court’s

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{96} See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (holding that absolute immunity extends only to a prosecutor’s official functions); Pierson v. Ray, 386 U.S. 547, 555 (1967) (holding that, because “[t]he common law has never granted police officers an absolute and unqualified immunity,” police officers are afforded only a qualified immunity in lawsuits alleging constitutional violations).
\item \textsuperscript{98} See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that federal executive officials could be held accountable for violating constitutional rights).
\item \textsuperscript{99} 416 U.S. 232 (1974).
\item \textsuperscript{100} See \textit{Scheuer}, 416 U.S. at 232.
\item \textsuperscript{101} Id. at 237 (citations omitted).
\item \textsuperscript{102} See id. at 247. Because this test caused much confusion in the lower courts, the Supreme Court later modified the qualified immunity analysis to include both an objective and subjective element: (1) the official must have acted without malice, and (2) the official must have had a reasonable belief the he acted within the law. See Wood v. Strickland, 420 U.S. 308 (1975). However,
\end{itemize}
\end{footnotesize}
reasoning in *Scheuer* was extended to high-ranking, cabinet members in *Butz v. Economou*\(^{103}\) and finally to the President himself in *Halperin v. Kissinger*.\(^{104}\) In justifying this extension, Justice White argued that “[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head . . .”\(^{105}\) By 1982, qualified immunity analysis had been improved to ascertain simply whether the executive official seeking immunity violated clearly established statutory or constitutional rights and whether a reasonable official would have known that the rights existed.\(^{106}\) The Supreme Court’s creation and subsequent development of the doctrine of qualified immunity “illustrates its desire to balance the needs of government officials with the constitutional rights of the people they govern.”\(^{107}\)

**D. Absolute Immunity for the President: Nixon v. Fitzgerald**

Although the Supreme Court had generally recognized the President’s immunity from lawsuits arising out of his official conduct, the Court did not expressly grant the President absolute immunity for such conduct until its 1982 decision in *Nixon v. Fitzgerald*.\(^{108}\) The facts of *Fitzgerald* are that the plaintiff, A. Ernest Fitzgerald, was fired from his governmental position for allegedly

---

\(^{103}\) 438 U.S. 478 (1978) (holding, as a general rule, that executive officials charged with constitutional violations are liable for their conduct).

\(^{104}\) 452 U.S. 713 (1981) (affirming, *per curiam*, that the President of the United States could incur civil liability for constitutional violations).

\(^{105}\) *Butz v. Economou*, 438 U.S. 478, 504-05 (1978). In *Butz*, the Supreme Court recognized a “second tier” for certain officials “whose special functions require a full exemption from liability.” *Id.* at 508. This exemption would confer absolute immunity on those executive officials who could demonstrate that “public policy requires an exemption of [a] scope” that includes constitutional violations. *Id.* at 506.

\(^{106}\) *See Matraia, supra* note 82, at 212.

\(^{107}\) *Id.* at 213.

embarrassing both President Nixon and the Pentagon by giving congressional testimony on cost overruns. Mr. Fitzgerald filed a civil lawsuit for damages against the President. In turn, President Nixon moved for summary judgment asserting that he was immune from such action.

Prior to the Court’s decision in Fitzgerald, it had been theoretically possible to sue the President for civil damages arising out of his official conduct. In Fitzgerald, however, the Supreme Court made it abundantly clear that in light of the unique constitutional nature of the office and function of the President, absolute immunity exists from liability for acts within the “outer perimeter” of the President’s official responsibility. The Court viewed this extraordinary level of immunity as being manifestly rooted in the doctrine of separation of powers and serving as a functional mandate “incident [to] the President’s unique office.” The Court reasoned that because the President “occupies a unique position in the constitutional scheme[,] . . . diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.” The Court did not, however, define the contours of the “outer limits” of Presidential authority; rather, the Court left this issue to be addressed on a case-by-case basis.

III. STATEMENT OF THE CASE

William Jefferson Clinton, then Governor of Arkansas, the petitioner in the Clinton decision and a co-defendant in the underlying lawsuit, delivered a speech at an official conference held on May 8, 1991, at the Excelsior Hotel in Little Rock.

109 See Fitzgerald, 457 U.S. at 734.

110 See id. at 740.

111 See id. The district court originally rejected President Nixon’s grant of immunity and the court of appeals affirmed the decision; however, the Supreme Court, on a writ of certiorari, reversed the lower court’s decision. Id.

112 See Walton, supra note 4, at 935.

113 See Fitzgerald, 457 U.S. at 731.

114 Id. at 749. See also Walton, supra note 4, at 935-36.

115 Fitzgerald, 457 U.S. at 749-51.

116 See id. at 756-57. See also Walton, supra note 4, at 935.
Arkansas. Paula Corbin Jones, the respondent in *Clinton* and the plaintiff in the underlying lawsuit, was working as a state employee at the time and was assigned to staff the registration desk at the conference. State Trooper Danny Ferguson, a member of the governor’s security detail and also a co-defendant in the underlying lawsuit, allegedly persuaded Mrs. Jones to meet the Governor in a hotel suite. Once there, Mr. Clinton allegedly made an “abhorrent” sexual proposition to which Mrs. Jones vehemently rejected. Afterwards, Mrs. Jones claimed that her employers punished her and dealt with her in a “hostile and rude manner” for rejecting Mr. Clinton’s sexual overtures. In addition, Mr. Ferguson purportedly contributed to an article in *The American Spectator* that implied that a woman by the name of “Paula” had succumbed to Mr. Clinton’s sexual advances. Moreover, after Mr. Clinton had been elected president in 1992, Mrs. Jones claimed that various people, speaking on the President’s behalf, publicly branded her a liar by denying that the sexual misconduct ever occurred.

On May 6, 1994, Mrs. Jones filed a civil action for damages against President Clinton and Trooper Ferguson in the United States District Court for the Eastern District of Arkansas. The complaint alleged the following violations of

---

117 *See Clinton v. Jones, 117 S. Ct. 1636, 1640 (1997).*
118 *See id.* at 1640.
119 *See id.*
121 *See id.*
124 *See Clinton, 117 S. Ct. at 1640.* In fact, both the White House and those close to Mr. Clinton continued this strategy of denial long after Mrs. Jones filed her civil action. For instance, former presidential advisor, now political consultant, James Carville described Paula Jones’s complaint against Mr. Clinton as “tabloid trash” and stated the following: “‘Drag a hundred dollars through a trailer park and there’s no telling what you’ll find.’” Kevin Merida, *Paula Jones’s Attorney Sees Public Opinion, Coverage Shifting*, *The Wash. Post*, Jan. 12, 1997, at A20.
125 *See Clinton, 117 S. Ct. at 1639-40 n.1* (explaining that jurisdiction was based upon 28 U.S.C. §§ 1331, 1332, & 1343 (1993)).
CLINTON v. JONES

state and federal law: (1) deprivation of constitutional rights and privileges;\(^{126}\) (2) conspiracy to deprive persons of equal protection of the laws;\(^{127}\) (3) intentional infliction of emotional distress;\(^{128}\) and (4) defamation of character.\(^{129}\) Although she sought $75,000 in actual damages and $100,000 in punitive damages,\(^{130}\) Mrs. Jones stated both publicly and in her brief that the action was commenced in an attempt to clear her name of the reported sexual liaison.\(^{131}\)

While Mr. Ferguson denied any questionable conduct on his part,\(^{132}\) Mr. Clinton moved the district court to bifurcate the briefing schedule so as to permit him to file a motion to dismiss based upon presidential immunity before any other questions were presented.\(^{133}\) Consequently, the court granted Mr. Clinton’s motion for bifurcation, thereby allowing him to assert presidential immunity as a basis for dismissal.\(^{134}\) Until the question of presidential immunity was resolved, all other motions or pleadings were deferred.\(^{135}\) Mr. Clinton subsequently filed a motion to dismiss the action without prejudice and to toll the applicable statute of limitations until the completion of his term.\(^{136}\)

In Jones v. Clinton,\(^{137}\) the district court denied Mr. Clinton’s motion to dismiss stating that the President was not entitled to absolute immunity from private

\(^{126}\) See id. at 1640 (referring to violations of 42 U.S.C. § 1983 (1994)).

\(^{127}\) See id. (referring to violations of 42 U.S.C. § 1985 (1994)).

\(^{128}\) See id. (referring to a state common law claim).

\(^{129}\) See id. (referring to a state common law claim).


\(^{132}\) See id. at 691.

\(^{133}\) See id. at 692 (referring to Jones v. Clinton, 858 F. Supp. 902 (E.D. Ark. 1994)).

\(^{134}\) See id. at 691-92.

\(^{135}\) See id. at 692 (referring to Jones v. Clinton, 858 F. Supp. 902 (E.D. Ark. 1994)).

\(^{136}\) See Clinton, 117 S. Ct. at 1639-40 (noting that President Clinton’s term of office expires on January 20, 2001).

civil actions. However, the court did determine that the President was entitled to “limited or temporary immunity” from trial. The discovery process, though, was allowed to continue as to all parties, including the President. Mr. Clinton appealed the court’s denial of his motion to dismiss and its decision to allow discovery to continue.

The Eighth Circuit Court of Appeals, in Jones v. Clinton, affirmed the district court’s denial of Mr. Clinton’s motion to dismiss holding that he was not constitutionally entitled to immunity. Accordingly, the Eighth Circuit reversed the district court’s decision to postpone the trial, stating that the order was the “functional equivalent” of a grant of temporary immunity. The court further admonished that the district court was “duty bound” to protect the President’s ability to perform his constitutional duties by exercising its discretion in the scheduling of civil proceedings. Subsequently, Mr. Clinton filed a petition in the United States Supreme Court for grant of a writ of certiorari. The Solicitor

138 See id. at 699.

139 See id. at 699-700 (holding that the allegations against Ferguson were so intertwined with the allegations against Clinton that the two could not proceed piecemeal).

140 See id. at 699.

141 See Clinton, 117 S. Ct. at 1641. There were other appeals as well. After the district court denied the President’s motion to dismiss, Mr. Clinton sought to stay all proceedings pending an appeal of the district court’s order denying his motion. See id. (citing Jones v. Clinton, 72 F.3d 1354 (1996)). Consequently, the court granted Clinton’s motion to postpone the trial until the resolution of his appeal. See id. (referring to Jones v. Clinton, 879 F. Supp. 86 (1995)). At this point, the court also granted a stay of the proceedings against Trooper Ferguson. Mrs. Jones cross-appealed this determination in an effort to have the stays lifted. At the same time, Mr. Clinton challenged the jurisdiction of the court to hear Mrs. Jones’s appeal. Upon reaching the Eighth Circuit Court of Appeals, Judge Bowman dismissed as moot the district court’s post-judgment order staying discovery during the pendency of the appeal. In addition, the Eighth Circuit determined that Mr. Clinton’s challenge to the court’s authority to hear Mrs. Jones’s appeal was moot as well. Therefore, both appeals were ultimately dismissed. See id. at 1640-43.

142 72 F.3d 1354 (8th Cir. 1996), cert. granted, 116 S. Ct. 2545 (1996).

143 See Jones, 72 F.3d at 1363 (affirming the district court’s decision to allow discovery to proceed).

144 See id. at 1354.

145 See id. at 1361-62.

General of the United States supported Mr. Clinton’s petition arguing that the decision of the Eighth Circuit Court of Appeals was “fundamentally mistaken” and created “serious risks for the institution of the Presidency.” The Supreme Court granted the petition in which the following questions were presented:

1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until the President leaves office; and 2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.

IV. THE DECISION

Of the many functions with which the United States Supreme Court is charged, perhaps the most imperative to the survival of the Republic is to say what the law is. The Clinton decision concerned a matter that was properly within the Supreme Court’s province to decide cases and controversies. Justice Stevens delivered the opinion of the Court.

A. Question One: Can A King Run Naked?

In responding to the first question presented in Mr. Clinton’s petition, the Supreme Court was primarily charged with the task of determining whether a sitting president is immune from a private civil action for damages where the underlying

---

147 See Brief for United States as Amicus Curiae in Support of Petitioner at § 5, Clinton v. Jones, 117 S. Ct. 1636 (1997) (No. 95-1853) [hereinafter Brief for Petitioner]. In opposition to the President’s petition for certiorari, Ms. Jones argued that the exercise of certiorari jurisdiction would be inappropriate because it did not create any conflict among the courts of appeals, it did not pose a threat to the executive branch, and it was not supported by precedent. See Brief in Opposition §§ 8, 10, 23.

148 Clinton, 117 S. Ct. at 1642 n.12 (internal quotations omitted).


150 U.S. CONST. art. III, § 2. See also Clinton, 117 S. Ct. at 1648 (“[Ms. Jones] is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies[,] [w]hatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch.”).
conduct occurred before the President was elected and assumed office.\textsuperscript{151} Mr. Clinton asserted that "in all but the most exceptional case[s]," the Constitution grants the President temporary immunity from such actions.\textsuperscript{152}

1. The King Cannot Use Precedent As A Corset

The Court in \textit{Clinton} began by dismissing the possibility that the corpus of Mr. Clinton's contention was supported by precedent.\textsuperscript{153} Essentially, Mr. Clinton had asserted that immunity was manifest in the very nature of the presidency.\textsuperscript{154} Justice Stevens prefaced his analysis by noting that in the entire history of the United States, only three Presidents had been named as defendants in civil suits that involved their private actions which occurred before taking office.\textsuperscript{155} However, because all of the cases were either dismissed or settled before the issue of presidential immunity could be addressed, these cases were not instructive on the constitutional issues before the Court.\textsuperscript{156} Therefore, to determine whether precedent supported Mr. Clinton's argument, the Court examined the following cases to ascertain the purpose and proper application of the principle of executive immunity: \textit{Ferri v. Ackerman,}\textsuperscript{157} \textit{Nixon v. Fitzgerald,}\textsuperscript{158} and \textit{Forrester v. White.}\textsuperscript{159}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{151}] See \textit{Clinton,} 117 S. Ct. at 1643.
\item[\textsuperscript{152}] See Brief for Petitioner at i.
\item[\textsuperscript{153}] See \textit{Clinton,} 117 S. Ct. at 1643.
\item[\textsuperscript{154}] See id.
\item[\textsuperscript{155}] See id.
\item[\textsuperscript{156}] See id. The Court explained that actions against Presidents Theodore Roosevelt and Harry Truman were dismissed before they took office but affirmed after their inaugurations. Moreover, in two companion actions arising out of an automobile accident before he assumed office, President John Kennedy sought temporary immunity based upon his status as Commander in Chief. However, shortly after the district court denied stay based upon immunity, the two parties settled out of court. \textit{Id.} (citing DeVault v. Truman, 194 S.W.2d 29 (Mo. 1946); People \textit{ex rel. Hurley v. Roosevelt,} 71 N.E. 1137 (N.Y. 1904); Hills \textit{v. Kennedy,} No. 757,201 (Cal. Super. Ct 1960); Bailey \textit{v. Kennedy,} No. 757,200 (Cal. Super. Ct. 1960)).
\item[\textsuperscript{157}] 444 U.S. 193 (1979).
\item[\textsuperscript{158}] 457 U.S. 731 (1982).
\item[\textsuperscript{159}] 484 U.S. 219 (1988).
\end{enumerate}
\end{footnotesize}
According to Ferri, immunity is designed to serve the common interest by enabling public officials to effectively execute their duties without fear of personal liability.\textsuperscript{160} Indeed, it was this rationale upon which the Court based its decision in \textit{Fitzgerald}.\textsuperscript{161} Moreover, the Court in \textit{Fitzgerald} explained that the protected actions must closely relate to the immunity's justifying purpose.\textsuperscript{162} In \textit{Fitzgerald}, the Court recognized that, because the President has such broad responsibilities, immunity must extend to the "outer perimeter" of the President's authority.\textsuperscript{163} Furthermore, the Court explained that it has traditionally performed a functional analysis to ensure that immunity extends only to acts performed in accordance with an official function.\textsuperscript{164} The Court in \textit{Forrester} illustrated this truism by noting that the absolute immunity of a judge would not extend to his actions performed in a purely administrative capacity.\textsuperscript{165} Hence, it is axiomatic that executive immunity is grounded in "the nature of the function performed, not the identity of the actor who performed it."\textsuperscript{166} Accordingly, Justice Stevens concluded that "[the President's] effort to construct an immunity for unofficial acts grounded purely in the identity of his office is unsupported by precedent."\textsuperscript{167}

2. The Historical Record Lacks A Common Thread

Justice Stevens continued his analysis by categorically rejecting Mr. Clinton's reliance on the historical record to support his argument, noting that the

\begin{footnotesize}
\begin{enumerate}
  \item \textit{See Clinton}, 117 S. Ct. at 1643 (citing Ferri, 444 U.S. at 202-204).
  \item \textit{See id.} at 1644 ("Our central concern [in \textit{Fitzgerald}] was to avoid rendering the President 'unduly cautious in the discharge of his official duties.' [\textit{Fitzgerald},] 457 U.S. at 752, n. 32."). Mr. Clinton argued that certain \textit{dicta} in \textit{Fitzgerald} indicated that the Court was equally concerned with the effect that the President's personal vulnerability to litigation would have on his decision making responsibilities. However, the Court rejected Mr. Clinton's argument by reiterating the underlying rationale of the principle: "[O]ur concern was with the diversion of the President's attention during the decision making process caused by needless worry as to the possibility of damages actions stemming from any particular official decision." \textit{Id.} at 1643-44 n.19.
  \item \textit{See Clinton}, 117 S. Ct. at 1644 (citing \textit{Fitzgerald}, 457 U.S. at 755).
  \item \textit{See id.} (citing \textit{Fitzgerald}, 457 U.S. at 757).
  \item \textit{See id.} (citing \textit{Fitzgerald}, 457 U.S. at 755).
  \item \textit{See id.} at 1644 (quoting \textit{Forrester v. White}, 484 U.S. 219, 229-30 (1988)).
  \item \textit{Id.} (quoting \textit{Forrester}, 484 U.S. at 229).
  \item \textit{Clinton}, 117 S. Ct. at 1644.
\end{enumerate}
\end{footnotesize}
use of such authority was unpersuasive. Specifically, the Court considered the writings of Thomas Jefferson, William Maclay, and Justice Story. First, Mr. Clinton had offered the writings of Jefferson to propound the idea that a court order subjecting the President to the judiciary’s authority would jeopardize the separation of powers. However, Justice Stevens was quick to point out that the Supreme Court explicitly rebuked Jefferson’s argument in *Marbury v. Madison*; the Court’s holding in *Marbury* was subsequently reaffirmed in *United States v. Nixon*.

Second, Mr. Clinton referred to the diary of Maclay in which John Adams and Oliver Ellsworth reportedly stated that "‘the President personally [is] not . . . subject to any process whatever,’ lest it be ‘put . . . in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government . . . ‘." But this too was rejected by Justice Stevens on the grounds that the authority did not provide adequate insight into the “unequivocal common understanding” of the times. Finally, Justice Story’s comments regarding the President’s official inviolability were deficient in that they failed to define the scope of the immunity.

Responding to Mr. Clinton’s proffered historical evidence, Mrs. Jones called the Court’s attention to a speech given by James Wilson that directly contradicted the proposition that the President was inviolable: “Although the President ‘is placed [on] high,’ ‘not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a

---

168 *See id.*

169 *See id.* at 1644-45.

170 *See id.* at n.20 (referring to 10 WORKS OF THOMAS JEFFERSON 404 (P. Ford ed., 1905)).

171 5 U.S. (1 Cranch) 137 (1803).


173 *Id.* at 1644-45 (quoting 9 DOCUMENTARY HISTORY OF FIRST FEDERAL CONGRESS OF THE UNITED STATES 168 (K. Bowling & H. Veit eds., 1988)).

174 *Id.* at 1645 n.23.

175 *See id.* (referring to 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, 418-19 (1833) (‘*[B]ecause the President’s ‘incidental powers must include the power to perform [his duties], without any obstruction,’ he ‘cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.’’)).
citizen, and in his public character by impeachment." In all, the Court concluded that the writings offered by both sides "largely cancel each other," and, therefore, did not serve to inform the discussion before the court.

3. The Judiciary Has the Authority to Rain on the King’s Parade

Finally, the Court turned to what it considered Mr. Clinton’s strongest argument supporting his claim of immunity. Essentially, Mr. Clinton argued that, given the unique character of his office, the public interest demands that the President devote an extraordinarily large amount of his time and attention to the execution of his duties. Accordingly, the doctrine of separation of powers serves to restrict the federal judiciary from exerting any authority over the President that may interfere with his public duties. In addition, Mr. Clinton asserted that the litigation arising from the present case would impose so many burdens upon the presidency that he would not be able to perform his duties effectively. Furthermore, if the present action were to proceed, then the President would be inundated with a myriad of civil cases; this too would erode the President’s ability to perform his duties. Thus, Mr. Clinton contended that the doctrine of separation of powers had to be enforced to prevent an aggrandizement of judicial power and a narrowing of executive power. Mr. Clinton claimed that the authority for his argument could be derived from Article II of the Constitution and the nation’s founding principles.

176 Id. at 1645 (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863)).

177 See id. ("A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side . . . . They largely cancel each other.") (Breyer, J., concurring) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952)).

178 See Clinton, 117 S. Ct. at 1645-46.

179 See id. at 1646.

180 See id. at 1648.

181 See id.

182 See id.

183 See id. at 1645-46.
As it had in *Fitzgerald*, the Supreme Court recognized the validity of Mr. Clinton's contention that great demands are placed on the presidency because it occupies a "unique position in the constitutional scheme." However, Justice Stevens was not convinced that the Court would violate the separation of powers by permitting the action against Mr. Clinton to proceed. The Court explained that the purpose of the separation of powers doctrine is to place certain limits on each branch of government to ensure that one branch does not perform the duties of the other. Although the Court admitted that the lines between each branch are sometimes blurred, it plainly stated that the judiciary was not being asked to perform an executive function. Rather, the Court was merely being asked to exercise its constitutional authority to decide cases and controversies. Hence, the Court concluded that the litigation of matters that relate entirely to the "unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power."

The Court also sharply rebuffed Mr. Clinton's claim that greater burdens would be placed on the President by allowing a case to proceed against him. Justice Stevens began by reiterating that in the entire history of the United States only three sitting Presidents had been subjected to civil process for their unofficial conduct. However, because the amount of civil actions against the President have not dramatically increased since those original actions, the Court deemed Mr. Clinton's predictive judgment to be quite poor. Justice Stevens found an increase in civil action against the President to be highly unlikely given the small pool of potential

---

184 *Id.*, at 1647 (quoting *Nixon v. Fitzgerald*, 457 U.S. 732, 749 (1982)).

185 See *id.*

186 See *id.* After citing several cases in which limits had been imposed on each branch, the court quoted an excerpt from The Federalist: "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others[.]" *Id.* at 1647 n.30 (quoting THE FEDERALIST NO. 51, at 349 (Alexander Hamilton) (J. Cooke ed., 1961)).

187 See *id.* at 1647-48.

188 See *id.* at 1648.

189 See *id.*

190 See *id.* at 1648. See also supra note 156.

191 See *Clinton*, 177 S. Ct. at 1648.
plaintiffs to which the President is exposed in his private, unofficial capacity.\textsuperscript{192} Besides, any current or future action could be sufficiently managed by the trial court so as to occupy very little of the President’s time.\textsuperscript{193}

The Court further criticized Mr. Clinton’s argument by demonstrating that any burdens that are imposed on the presidency would not be violative of the separation of powers doctrine. The Court began by attacking the underlying presumption of Mr. Clinton’s contention.\textsuperscript{194} Justice Stevens urged that not all burdensome interactions between the federal judiciary and the executive branch raise separation of powers concerns.\textsuperscript{195} Indeed, the Court has long held that the federal system of government """"imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which """"would preclude the establishment of a Nation capable of governing itself effectively.""""\textsuperscript{196} Therefore, to state that the federal judiciary does not have an agency in nor control over the acts of the executive branch is, at best, fallacious.\textsuperscript{197}

The Court continued in its disapproval of Mr. Clinton’s argument by explaining that the prerogative of the Court to encumber the President is well established by precedent.\textsuperscript{198} In this regard, Justice Stevens primarily relied upon the Court’s holding in \textit{Youngstown Sheet & Tube Co. v. Sawyer}\textsuperscript{199} to demonstrate the extent to which the federal judiciary may interfere with the executive branch.\textsuperscript{200} In \textit{Youngstown}, the Court struck down an order issued by President Truman directing the Secretary of Commerce to seize numerous steel mills throughout the country in

\textsuperscript{192} See id. at n.36.
\textsuperscript{193} See id. at 1648.
\textsuperscript{194} See id. ("[Mr. Clinton] errs by presuming that interactions between the Judicial Branch and the Executive . . . necessarily rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions.").
\textsuperscript{195} See id.
\textsuperscript{196} \textit{Id.} (quoting Mistretta v. United States, 488 U.S. 361, 381 (1989)).
\textsuperscript{197} See id. Once again, the Court relied on an excerpt from \textit{The Federalist} for the proposition that the principle of separation of powers is not intended to mean that the branches """"ought to have no partial agency in, or no control over the acts of each other."""" \textit{Id.} (quoting \textit{THE FEDERALIST} NO. 47, at 325-326 (J. Cooke ed., 1961)).
\textsuperscript{198} \textit{Id.} at 1649.
\textsuperscript{199} 343 U.S. 579 (1952).
\textsuperscript{200} See \textit{Clinton}, 117 S. Ct. at 1649.
order to avert a national catastrophe. Justice Stevens confirmed that the Court in *Youngstown* properly exercised its Article III jurisdiction in reviewing and striking down President Truman's actions despite the fact that the inquiry compromised the President's mission and required him to devote an exorbitant amount of time and attention to the matter. Thus, the federal judiciary may substantially interfere with the executive branch without violating the separation of powers principles.

Justice Stevens further undermined Mr. Clinton's argument by describing numerous instances in which the President had been subject to judicial process. For instance, in *United States v. Burr*, Chief Justice Marshall directed President Jefferson to comply with a *subpoena duces tecum*. Similarly, in *United States v. Nixon*, the Supreme Court commanded President Nixon to produce the now infamous Nixon tapes. Furthermore, Presidents Monroe, Grant, Ford, and Carter have all responded to judicial orders. Even President Clinton himself has testified in criminal proceedings on two different occasions. Therefore, given the steady frequency with which sitting Presidents have been subjected to judicial process, such an occurrence could not be deemed a novelty.

Finally, the Court concluded its examination by holding that the separation of powers doctrine does not require federal courts to grant temporary stays of

201 See id. (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

202 See id.

203 See id. at 1650 ("In sum, '[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.' Fitzgerald, 457 U.S. at 753-754.").

204 See id. at 1649.


206 See Clinton, 117 U.S. at 1649.


208 See Clinton, 117 S. Ct. at 1649.

209 See id.


211 See id. at 1649.
private civil actions against the President.\textsuperscript{212} Although the court recognized that the President might become preoccupied by pending litigation,\textsuperscript{213} it reasoned that the burdens imposed by such litigation are no greater than those faced by the President everyday; certainly, they do not “ordinarily implicate constitutional separation of powers concerns.”\textsuperscript{214} Justice Stevens succinctly summarized his incisive analysis as follows:

If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President’s official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President’s time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.\textsuperscript{215}

B. Question Two: Can the Court Establish a Clothing-Free Area?

Upon addressing the second question presented in the petition, Justice Stevens urged that the same reasoning used to deny immunity should be applied to Mr. Clinton’s claim that a stay should be granted “in all but the most exceptional cases.”\textsuperscript{216} Indeed, the Supreme Court found it peculiar to assert that the Framers of the Constitution intended to protect the President from unnecessary private litigation, yet provided no implementing mandates.\textsuperscript{217} This lack of Constitutional direction convinced the Court that the determination of whether a specific case should receive exceptional treatment is a matter of judicial, rather than

\textsuperscript{212} See id. at 1650.

\textsuperscript{213} See id. at n.40 (“There is, no doubt, some truth to Learned Hand’s comment that a lawsuit should be ‘dread[ed] . . . beyond almost anything else short of sickness and death.’ 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURE ON LEGAL TOPICS 105 (1926).”).

\textsuperscript{214} Id.

\textsuperscript{215} Id. at 1650 (footnotes omitted).

\textsuperscript{216} See id. (quoting Petitioner’s Brief 1).

\textsuperscript{217} See id.
constitutional concern.\textsuperscript{218} Therefore, the Court turned to an examination of whether the district court’s decision to stay trial was an abuse of its discretion.\textsuperscript{219}

The Court began its analysis by rejecting the notion that the district court’s decision to stay trial was the “functional equivalent” of a grant of temporary immunity.\textsuperscript{220} Justice Stevens pointed out that, pursuant to its power to control its own docket, a trial court has broad discretion in the scheduling of court proceedings, including the authority to stay cases.\textsuperscript{221} In fact, the Court went so far as to say that, in the present case, potential burdens on the President resulting from the Court’s exercise of authority over the executive branch could justify a stay of trial.\textsuperscript{222} In addition, Justice Stevens advised that trial courts should manage cases involving the President in accordance with the “high respect that is owed to the office of the Chief Executive.”\textsuperscript{223} However, the Court also recognized that the onus is on the President to demonstrate a need for a stay of trial.\textsuperscript{224} Therefore, the Court concluded that the district court had not only abused its discretion by granting a stay of trial,\textsuperscript{225} but that its decision was premature in that Mr. Clinton had not established a need.\textsuperscript{226}

\textsuperscript{218} See id.

\textsuperscript{219} See id.

\textsuperscript{220} See id. (quoting Jones v. Clinton, 72 F.3d 1354, 1361 n.9 (8th Cir. 1996), cert. granted, 116 S. Ct. 2545 (1996), aff’d and rem’d, 117 S. Ct. 1636 (1997), 974 F. Supp. 112 (1997)). The Court noted that, technically speaking, the district court’s decision to stay trial was not the “functional equivalent” of a grant of temporary immunity because discovery was allowed to continue. Id.

\textsuperscript{221} See id.

\textsuperscript{222} See id.

\textsuperscript{223} Id. at 1650-51.

\textsuperscript{224} See id. at 1651. In other words, the civil proceedings must impinge upon or interfere with the President’s execution of his constitutional duties. Id.

\textsuperscript{225} See id. Justice Stevens believed that the district court had abused its discretion because it did not take into account the plaintiff’s interest in bringing the case to trial. In so holding, the Court gave no weight to the district court’s conclusion that the plaintiff was in no hurry to try her case because she had waited so long to file the complaint. Instead, the Court cautioned that a stay of trial would “increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.” Id.

\textsuperscript{226} See id. (“Other than the fact that a trial may consume some of the President’s time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded.”).
C. Disposition of the Case: Hanging the King Out to Dry

The Court ended its analysis by commenting on two issues included in Mr. Clinton's brief. First, Mr. Clinton had maintained that by allowing a civil action to proceed against him, a deluge of politically motivated, harassing, and frivolous litigation would follow. The Court dismissed Mr. Clinton's claim by stating that the judicial system was designed to eliminate such vexatious litigation, that the availability of sanctions would deter many from pursuing pesky civil actions, and that history had already proven his underlying premise wrong. Next, Mr. Clinton had urged that the national security might be threatened if he were to be subjected to civil process. To this the Court retorted that even though the judicial system had always given "the utmost deference to Presidential responsibilities," it would take an act of Congress to afford the President stronger protection. Hence, the Supreme Court affirmed the judgment of the court of appeals, thereby affording Mrs. Jones the right of all citizens — the right to an orderly disposition of her claims.

D. The Concurrence: Reviving the King's Constitutional Tailors

In his concurring opinion, Justice Breyer agreed with both the majority and the Eighth Circuit Court of Appeals in the proposition that the President cannot expect the courts to postpone private civil actions against him without demonstrating a need. However, in Justice Breyer's view, once the President has established that a conflict exists between the judicial proceedings and his official actions, then the Judiciary is constitutionally forbidden from interfering with the discharge of the President's official duties. Although Justice Breyer acknowledged that such a situation had not yet arisen in the Clinton case, the Justice

227 See id.

228 See id. The Court explained that past Presidents had been subjected to civil litigation before without incurring an increase in claims filed against them. See id.

229 See id.


231 See id. at 1652.

232 See id. at 1652 (Breyer, J., concurring).

233 See id.
felt compelled to announce the constitutional principle for "fear that to disregard it now may appear to deny it." 234

Apparently, Justice Breyer was persuaded by Mr. Clinton's use of historical evidence. Specifically, the Justice construed Justice Story's Commentaries to mean that Article II of the Constitution affords an "'official inviolability' to the President 'while he is in the discharge of the duties of his office,' and that this inviolability must be broad enough the permit him 'to perform' his official duties without 'obstruction or impediment.'" 235 Moreover, with regard to Maclay's conflicting views with Adams and Ellsworth, Justice Breyer dismissed the majority's conclusion (that the rhetoric largely cancel each other) by asserting that Maclay was simply "not an important political figure . . . ." 236 Furthermore, the Justice was convinced that the writings of Thomas Jefferson should serve to instruct the Court on the issue of executive immunity. 237

Turning to precedent, Justice Breyer argued that the fact that a few Presidents have voluntarily acted in accordance with court orders did not inform the discussion regarding what the Constitution commands. 238 Furthermore, the enforcement of subpoenas seeking documents from a sitting President for use in a criminal case amounted to only a simple search of documents, rather than a direct interference with the President's time. 239 Instead, the Justice urged that the logic and rationale of Fitzgerald should be extended to include absolute immunity from private suits when such actions would distract from the President's time and energy. 240 In Justice Breyer's final analysis, ordinary case-management principles are insufficient to deal with the demands a civil action would impose on the President's time; therefore, a constitutionally-based principle must be recognized to require district courts to "schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official

234 See id.

235 Id. at 1654. See supra note 175, for the full text of Justice Story's quote.

236 See id. at 1655.

237 See id.

238 See Clinton, 117 S. Ct. at 1656.

239 See id. Justice Breyer also dismissed the majority's use of Youngstown stating that the case was irrelevant because it dealt with the official conduct of the President; therefore, any judicial interference with the President simply served to define, determine, or clarify the legal scope of an official duty. See id.

240 See id.
responsibilities. Yet, because Mr. Clinton did not demonstrate significant interference, Justice Breyer agreed that the district court's decision to grant a stay was premature.

V. ANALYSIS

In *Nixon v. Fitzgerald*, the United States Supreme Court was quite adamant in holding that the President of the United States is absolutely immune from civil actions arising out of conduct that is within the "outer perimeter" of his official duties. There can be no dispute that the Court in *Fitzgerald* was correct in stating that such litigation "could distract a President from his public duties, to the detriment of not only the President and his office but also the nation that the presidency was designed to serve." However, the Court's holding in *Nixon* was limited to the official acts of the President. Therefore, the Supreme Court's decision in *Clinton v. Jones* not to extend the rationale of *Fitzgerald* was an appropriate exercise of its constitutional authority and a proper application of the separation of powers doctrine.

A. Presumptive Amenability

Perhaps the most significant aspect of the Supreme Court's decision in *Clinton* is that the Court applied a separation of powers analysis that was different from that applied by the *Fitzgerald* Court. Instead of using the "balancing test"

---

241 *Id.* at 1659.

242 *See id.*


244 *Id.* at 753.

245 This is evident from the Court's notation that "[t]hese dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until [recently]." *Id.* at 753 n.33 (1982). The Court in *Clinton* used this quote to demonstrate that the Court's holding in *Fitzgerald* was limited to the official acts of the President; there always have been numerous causes of actions available to potential plaintiffs against any defendant, including the President. *See Clinton v. Jones*, 117 S. Ct. 1636, 1648 n.36 (1997).
applied by the Court in *Fitzgerald*, the Court in *Clinton* recognized the raw authority of the judiciary to "severely burden" the Presidency. By relegating the *Fitzgerald* "balancing test" to a mere exercise of judicial discretion, and by reaffirming the Supreme Court's prerogative to review the acts of the President, the Court in *Clinton* reinforced the principle of judicial review and strengthened the power of the federal judiciary.

The Court in *Clinton* made it clear that the exercise of its constitutional authority to decide cases and controversies in no way encroaches upon the executive power of the Presidency. Thus, when considering the private acts of the President, the separation of powers structure on which presidential immunity is dependent collapses into a mere balancing of public policy interests. In fact, some commentators suggest that even *Nixon v. Fitzgerald* was lean on constitutionality and fat on policy. As explained by Judge Wright at the district court level, Rule 40 of the *Federal Rules of Civil Procedure* permits a court to schedule judicial proceedings "as the courts deem expedient." This judicial control enables federal judges to "engage in the type of public policy analysis conducted by the *Fitzgerald* majority and still deliberate on the equities of individual cases without squeezing out of the Constitution 'law where none exists.'" Therefore, the Court in *Clinton* effectively recognized that the President is presumptively amenable to civil liability for conduct taken in his private capacity. To overcome this presumption, the President must demonstrate that the interests of

246 Traditionally, before the judiciary could exercise authority over the President, the court was required to "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch." *Fitzgerald*, 457 U.S. 731, 754.

247 See *Clinton*, 117 S. Ct. at 1650 (relying on the Court's use of judicial review in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

248 See *id.* at 1647.

249 See *Allen*, supra note 95, at 585. Professor Allen goes on to point out that "[i]f the absolute immunity of the President is so firmly rooted in the separation of powers doctrine as the protector of executive functioning, it seems both bizarre and illogical that the coordinate branch of Congress could alter the balance of powers." *Id.* at 576.

250 See *id.* at 604.


252 See *Allen*, supra note 95, at 608.
the public outweigh the plaintiff’s right to a remedy. Unfortunately for Mr. Clinton, he had not shown at the district court level that the public interest outweighed Mrs. Jones’s right to a legal remedy for constitutional violations.

B. Defining the Scope of the Outer-perimeter of Presidential Duty

The Supreme Court’s decision in Clinton clearly and unequivocally demonstrates that the President and the presidency are indeed severable. Moreover, the Court’s holding in Clinton firmly establishes that the office of the president is no longer “clothe[d]... with sovereign immunity, placing it beyond the law.”

In decisions preceding Fitzgerald, the Supreme Court had demonstrated its willingness to remove the cloak of executive immunity when federal officials violated the Constitution. In Butz v. Economou, for example, the Supreme Court

To offer an example, assume the injured motorist had pressed his claim against President Kennedy during the Cuban Missile Crisis. Having the President put Premier Kruschev 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.

Allen, supra note 95, at 764.

In this case, at the stage at which the District Court made its ruling, there was no way to assess whether a stay of trial after the completion of discovery would be warranted. Other than the fact that a trial may consume some of the President’s time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded. We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court’s discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President’s duties would not occur. But no such impingement upon the President’s conduct of his office was shown here.

Id.


See, e.g., Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that governmental officials may be liable for violating the constitutional rights of individuals even though the officials were acting in their official capacity). See also Butz v. Economou, 438 U.S. 478 (1978) (stating that an official loses his executive immunity when he knowingly violates the Constitution); Scheuer v. Rhodes, 416 U.S. 232 (1974) (recognizing that state Governors do not have absolute immunity even during a perceived state of emergency); Halperin v. Kissinger, 606 F.2d 1192, 1208-09 (D.C. Cir. 1979) (holding that the President is not immune from liability for violating the Constitution unless he reasonably believes that his actions are lawful), aff’d,
stated that once an executive official violates the Constitution, he exceeds the scope of his constitutional authority and, therefore, no longer qualifies for absolute immunity protection.\footnote{See Butz, 438 U.S. at 495.} The Court in Butz did recognize, though, that “there are some officials whose special functions require a full exemption from liability.”\footnote{See id. at 508.} However, the Court later curtailed this protection for constitutional violations when it affirmed, \textit{per curiam}, the holding of \textit{Halperin v. Kissinger}.\footnote{606 F.2d 1192, 1208-09 (D.C. Cir. 1979), \textit{aff’d}, 452 U.S. 713 (1981) (plurality opinion).}

In \textit{Halperin}, the Court of Appeals for the District of Columbia held that the President could assert an absolute immunity defense for constitutional violations only if he could identify an implied constitutional exemption or demonstrate “drastically adverse” public policy consequences.\footnote{See \textit{id}. at 1210-11.} Because the President is solemnly sworn to “preserve, protect and defend the Constitution of the United States,”\footnote{U.S. CONST. art. II, § 1, cl. 8.} it is axiomatic that a constitutional violation cannot be within the “outer perimeter” of the President’s duties.\footnote{See Walton, \textit{supra} note 4, at 941.} Therefore, the Court’s holding in \textit{Halperin} provides significant precedential value.\footnote{Id.} Now, after \textit{Clinton}, with the reaffirmation of strict judicial review coupled with the Court’s functional approach to separation of powers issues, future courts are armed with the necessary analytical tools to weave the delicate contours of executive immunity so as to ensure that the “outer perimeter” of presidential authority is not construed to include egregious constitutional violations.\footnote{The impact of the Supreme Court’s decision on state courts, however, is less certain. Pursuant to the doctrine of avoidance, the court did not address whether concerns about federalism, comity, and local prejudice would present a more compelling case for immunity if the case were brought in a state tribunal. \textit{Clinton v. Jones}, 117 S. Ct. 1636, 1642 (1997). Therefore, the Court in \textit{Clinton} provided no \textit{dicta} on these issues.}
C. The Moral Imperative of Presidential Accountability

One of the most recognized and widely repeated arguments in the public debate over the President’s assertion of temporary immunity is the public’s interest in protecting the dignity of the office of the president.265 Certainly, Mr. Clinton embraced the contention that the influence and effectiveness of the Chief Executive would be greatly diminished, both domestically and abroad, by requiring the President to defend a suit for civil damages.266 However, in so arguing, supporters of Mr. Clinton unwittingly provide what is perhaps the strongest argument in support of subjecting the President to civil liability for his unofficial, private conduct.

The Supreme Court has oft repeated that the Chief Executive “occupies a unique position in the constitutional scheme ...”267 Despite the Framers’ attempt to avoid the creation of a monarch, in many respects “‘the office of the [p]resident really is the office of a King[.]”268 After all, he is the central figure in the constitutional structure; he presides over the most powerful country; and he is the leader of the free world. But much more than this, the office of the president occupies a “unique position of moral authority in the nation and in the world.”269 Therefore, there is a strong public interest in ensuring that the individual selected to occupy the Oval Office is of sufficient moral mettle to provide that moral leadership.

265 A few newspaper excerpts serve to illustrate this point: “The chief argument for settlement — especially among Clinton’s supporters — is that such a lurid trial would demean the dignity of the office of the president.” Dragging Down the Presidency, INV. BUS. DAILY, May 30, 1997, at A24. But to see the office of the president dragged through the mud like this, to watch the dignity of the presidency besmirched in such a scandalous way, is unsettling. There have been some pretty widely detested presidents in my time, but at their darkest moments, Johnson and Nixon never had to endure such intimate scrutiny of their personal behavior.

Joe Dirck, The Presidency Mired in Mud, PLAIN DEALER (CLEV.), June 3, 1997, at 1B.

266 See Motion to Dismiss, Jones v. Clinton (Civil Action No. LR-C-94-290) (E.D. Ark. Aug. 10, 1994) cited in Allen, supra note 95, at 598.

267 Fitzgerald, 457 U.S. at 749-51.


269 Allen, supra note 95, at 598.
When the allegations against the President are as "titillating and degrading," as they are in Clinton, then the claim must be adjudicated on the merits of the case rather than granting temporary immunity. The public's interest must be satisfied especially when the allegations involve the violation of a citizen's constitutionally protected rights. If the claim against the President is without merit, then the case will be efficiently disposed of on summary judgment. On the

270 Motion to Dismiss, supra note 266.

271 Allen, supra note 95, at 597.

272 Id.

273 Ultimately, the district court did, in fact, dispose of Mrs. Jones's case on summary judgment. Upon remand, Mr. Clinton moved the district court to dispose of the case under Rule 12(c) of the Federal Rules of Civil Procedure. Jones v. Clinton, 974 F. Supp. 712 (E.D. Ark. 1997). Judge Susan Weber Wright granted Mr. Clinton's motion in part and denied it in part. Id. Pursuant to that ruling, the following claims were dismissed: (1) the defamation claim because, under Arkansas law, statements made prior to a lawsuit regarding possible litigation by either the attorney or the parties to the litigation are absolutely privileged, see id. at 730; (2) the § 1983 deprivation of substantive due process right to bodily integrity claim because Mrs. Jones's allegations did not support such a claim, see id. at 724; (3) the § 1983 deprivation of a due process property interest in employment claim because Arkansas state employees generally do not have such an interest, see id. at 725-27; (4) the § 1983 deprivation of a due process liberty interest in reputation claim because the alleged defamatory statements were not made during the course of termination of employment nor did the alleged statements foreclose any employment opportunities to Mrs. Jones, see id. at 727; (5) the § 1983 deprivation of protected liberty interest claim arising from false imprisonment because the United States Supreme Court has recognized that false imprisonment is not actionable under § 1983, see id. at 728 (citing Baker v. McCollan, 443 U.S. 137 (1979)).

On April 1, 1998, responding to yet another motion for summary judgment (this time couched in Rule 56 of the Federal Rules of Civil Procedure), Judge Wright disposed of the following remaining claims: (1) the § 1983 quid pro quo sexual harassment claim because the allegations described nothing more than "mere inconvenience" and "minor or de minimis personnel matters," and did not result in a tangible job detriment or adverse employment action, see Jones v. Clinton, No. LR-C-94-290, 1998 WL 148370, at *13 (E.D. Ark. Apr. 1, 1998); (2) the § 1983 hostile work environment sexual harassment claim because the conduct to which Mrs. Jones was subjected, although "boorish and offensive," id. at *6, was not pervasive, intimidating, or abusive enough to establish such a claim, nor were the defendant's actions sustained or non trivial, see id. at *15; (3) the § 1983 conspiracy claim because a conspiracy cannot exist where there has been no underlying violation of federal law, see id. at *16; and (4) the intentional infliction of emotional distress claim because the allegations did not satisfy the "rigorous standards" of an Arkansas claim of outrage, see id. at *19, and because the allegations described "a mere sexual proposition or encounter ... that was relatively brief in duration, did not involve any coercion or threats of reprisal, and was abandoned as soon as [Mrs. Jones] made it clear that the advance was not welcome," id. at *17.

After being convinced by his attorney that the District Court's decision to throw out Mrs. Jones's lawsuit against him was not an April Fools' joke, "an uninhibited Clinton celebrated the news in his hotel room by chewing a cigar and beating on an African drum." John F. Harris, White House Feeling Relieved, Resentful, But Clinton Drums Home His Jubilation, THE WASH. POST, Apr. 2, 1998,
other hand, if the claim is valid, then a fully-informed electorate must have sufficient opportunity to assess fully the moral authority of its President and act appropriately either at the ballot box or through impeachment.\textsuperscript{274} In a constitutional

at A16. On April 16, 1998, though, Mrs. Jones announced that she was going to appeal the District Court's decision:

As you know, two weeks ago the court in Little Rock surprisingly dismissed my case. . . . I was shocked because I believe that what Mr. Clinton did to me was wrong and that the law protects women who are subjected to that kind of abuse of power. . . . Despite the continuing personal strain on my family and me, in the end I have not come this far to see the law let men who have done such things dodge their responsibility. They should not be able to abuse their positions of power at the expense of female employees. And I do not believe, when this suit is over, that my case will merely show that people in power can get away. . . . I am confident that the [Eighth] Circuit Court will rule that my case should be heard by a jury. That is all I ever sought, and I will continue to seek that simple right.


\textsuperscript{274} In an effort to establish a pattern and practice of sexual misconduct, Mrs. Jones's attorneys deposed several women regarding their sexual relationships with Mr. Clinton. The revelations which arose out of those depositions and the subsequent behind-the-scene maneuvering gave the American public the opportunity to assess Mr. Clinton's moral character and ultimately threatened to imperil his entire presidency. See Dan Balz, \textit{The Political Implications, President Imperiled as Never Before}, \textit{THE WASH. POST}, Jan. 22, 1998, A13. For instance, after it was made public that Mr. Clinton had allegedly urged a former White House intern, Monica Lewinski, to lie to Mrs. Jones's attorneys about a sexual relationship between Ms. Lewinski and the President, independent counsel Kenneth Starr expanded the scope of his investigation of Mr. Clinton to include allegations of suborning perjury, making false statements, and obstructing justice. Susan Schmidt et al., \textit{Clinton Accused of Urging Aide to Lie, Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers}, \textit{THE WASH. POST}, Jan. 21, 1998, A1.

Although Mr. Clinton's public approval ratings soared immediately following the break of the Lewinski scandal, see, e.g., Richard Morin & Claudia Deane, \textit{President's Popularity Hits a High, Majority in Poll Say Political Enemies Are Out to Get Him}, \textit{THE WASH. POST}, Feb. 1, 1998, A1, former White House Chief of Staff Leon Panetta suggested that President Clinton should resign if the allegations were true. Peter Baker, \textit{Panetta's Candid Advice From Afar Has White House Annoyed}, \textit{THE WASH. POST}, Apr. 12, 1998, A8. Furthermore, traditional supporters, such as Patricia Ireland, president of the National Organization of Women, spoke out against the President after former White House Aide Kathleen Willey came forward with accusations that Mr. Clinton had "groped" her when she met with him concerning an employment opportunity: "This is not just sexual harassment. If it's true, it's sexual assault . . . . He put his hand on her breast, he put her hand on his erection. That is a pretty serious charge if true and it is a very big problem." Peter Baker, \textit{Willey Describes Clinton Advance, President's Denial Is Lie, Ex-Aide Says on TV}, \textit{THE WASH. POST}, Mar. 16, 1998, A1.

In March 1998, Congress allocated $1.3 million to prepare for possible impeachment proceedings against President Clinton for conduct arising out of the Paula Jones lawsuit. \textit{See Juliet Eilperin, First Skirmishes in Hill Impeachment War, Democrats Express Outrage Over $1.3 Million Allocation}, \textit{THE WASH. POST}, Mar. 26, 1998, A12. Never before had the President of the United States been subjected to such scrutiny of his personal life; and never before had the ethical, political, and social need for subjecting the President to civil liability for his unofficial conduct been so aptly demonstrated:
democracy, the power of the people over the Chief Executive is the most important check against despotism. The great American writer John Steinbeck succinctly described this unique relationship between the public and its President:

The President must be greater than anyone else, but not better than anyone else . . . . A [p]residential slip of the tongue, a slight error in judgment — social, political, or ethical — can raise a storm of protest . . . . And with all this, Americans have a love for the President that goes beyond loyalty or party nationality; he is ours, and we exercise the right to destroy him.

VI. CONCLUSION

In Clinton v. Jones, the United States Supreme Court declared that, in America, the King is dead. Not only did the Court recognize the naked violability of the President in his private, unofficial conduct, but it allowed a mere citizen to cry out, “The President has no clothes!” Long ago, the Supreme Court warned, “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.” Although the office of the president constitutes the apex of the nation’s polity and is,

275 "A prince whose character is thus marked by every act which may define a tyrant is unfit to be the ruler of a people." THE DECLARATION OF INDEPENDENCE ¶ 22 (U.S. 1776).


therefore, afforded great respect and deference, the President is a mere creature of the Constitution.278

The President of the United States may be the first of citizens, but it must be remembered that he is still just a citizen; he may be considered the first of men, but he is, nevertheless, merely a man.279 The remedies of impeachment and re-election afforded by the Constitution serve solely as “political safety valves;” they do not provide relief for individual harms.280 Certainly, the President, “‘keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.’”281 But where, as a consequence of his private, unofficial conduct, the President causes injury, the Constitution commands that the aggrieved party be granted relief and that the President be held accountable for his actions.282 In responding to the Supreme Court’s decision in United States v. Burr, President Jefferson queried: “‘[T]he Constitution enjoins [the President’s] constant agency in the concerns of millions of people[,]’... ‘is the law paramount to this, which calls on him on behalf of a single one?’”283 For Chief Justice Marshall in Marbury and now for the Court in Clinton, the answer — quite simply — is yes.284

Christopher James Sears*


279  Compare Walton, supra note 4, at 905. See also note 25 and accompanying text.


281  Fitzgerald, 457 U.S. at 745.

282  See Gaines v. Thompson, 74 U.S. (7 Wall) 347, 349-350 (1868) (“[H]owever, that where an officer is required by law to perform an act, not of this political or executive character, which affects the private rights of individuals, he is to that extent amenable to the courts.”) cited in Walton, supra note 4, at 931.


284  Id. at 1649 n.38.

* B.A. West Virginia University, 1993; M.B.A. West Virginia University School of Business and Economics, 1996; J.D. candidate, West Virginia University College of Law, 1999. The author would like to dedicate this Comment to his parents, Delmar and Deloras Sears, to whom he makes this pledge: “No bones shall ever bleach upon this plain.” Also, special thanks is given to his wife, Melissa, for her continuing love, support, and understanding.