

Fall 1995

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Recommended Citation

Jennifer L. Long, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 Val. U. L. Rev. 283 (1995).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss1/6>

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How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity

The President must be greater than anyone else, but not better than anyone else. . . . A Presidential 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.¹

I. INTRODUCTION

The common law maxim of “the King can do no wrong”² has had, at best, a limited reception in the United States.³ As they debated the benefits and burdens of a strong executive, the Framers of the Constitution were wary of allowing the President too many powers,⁴ and thus provided a means of

1. JOHN STEINBECK, *AMERICA AND AMERICANS* 46 (1966). The use of masculine gender pronouns throughout this note is not intended to convey the masculine gender alone, particularly when referring to the presidential or vice-presidential office. The masculine pronouns are used generically to avoid awkward grammatical situations which would likely occur due to the limitations of the English language. The masculine pronouns may appear to take on special significance in light of the historical fact that no woman has been elected President or Vice President to date. However, the use of masculine pronouns should in no way be interpreted as an expression of the author's failure to recognize that a woman may be elected to the Nation's highest office at any time in the very near and certainly conceivable future.

2. The maxim of “the King can do no wrong” is the foundation of the doctrine of sovereign immunity. R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 305 (1959); see WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 78 (William Browne ed., 1897) [hereinafter *COMMENTARIES*]. “The king can do nothing wrong. This means, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to the people.” *Id.* The basis for the rule that the King cannot be sued was “the wider principle that the King cannot against his will be made to submit to the jurisdiction of the King's courts.” ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 527 (1945).

3. The more accepted proposition in the United States, as in most of the common law world today, is that all governmental officials are personally responsible for all unjustified actions, just as any other citizen would be. Gray, *supra* note 2, at 305.

4. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 64-70 (Max Farrand ed., 1966) [hereinafter *RECORDS*] (following the Framers' debates of the advantages and disadvantages of a constitutional Impeachment Clause); see also *infra* notes 209-15 and accompanying text.

impeaching the President, if necessary.⁵ Although no President has actually been impeached, several civil suits have been filed against the President while in office.⁶ Most recently, the conflict over the extent of the President's powers has culminated in what is perhaps the most infamous of any suit filed against a sitting President, *Jones v. Clinton*.⁷ Stripped to its essence, the suit by Paula Jones against President Bill Clinton is simply the most recent action in a long line of attempts at seeking damages from a President.⁸

The first suit against a President for damages arising out of actions taken while in office was *Livingston v. Jefferson*.⁹ In *Jefferson*, the Virginia District Court which heard the case held that it lacked jurisdiction over the case in Virginia.¹⁰ Thus, the case against President Jefferson was dismissed without consideration of the immunity issue.¹¹

Nearly sixty years later, the President was sued for injunctive relief in *Mississippi v. Johnson*.¹² The state of Mississippi sought to enjoin President

5. The Constitution states: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4; see 2 RECORDS, *supra* note 4, at 64-70.

6. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411); *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904); see *infra* notes 9-11, 181-95 and accompanying text, and note 228.

7. 858 F. Supp. 902 (E.D. Ark. 1994). Paula Corbin Jones filed suit against President Bill Clinton on May 6, 1994, alleging violation of her constitutional rights. *Id.* at 904; see *infra* notes 20-28 and accompanying text and notes 200-01 for a complete discussion of the *Jones* case.

"This case is not about money. This case is about character and integrity. This case is about justice." Stephen Labaton, *Suit Accuses President of Advance*, N.Y. TIMES, May 7, 1994, § 1, at 9 (quoting Paula Corbin Jones, Statement to the Media). The above quotation was part of Ms. Jones' prepared statement to the media on May 6, 1994, the day she filed suit against President Clinton for damages allegedly incurred as a result of the President's alleged sexual advances towards her. See *id.* President Clinton responded by saying, "I'm not going to dignify this by commenting on it." *Id.* The President's lawyer, Robert Bennett, also responded to the *Jones* suit by calling it "tabloid trash with a legal caption on it." *Id.*

8. See *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. July 5, 1962); *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946); *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904); *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411).

9. 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411). Livingston claimed damages based on a trespass to land which he owned in New Orleans. *Id.* at 662. Livingston claimed that the President evicted him from his land. *Id.*; see also *Nixon*, 457 U.S. at 758 n.1 (1982) (discussing the dismissal of the plaintiff's case in *Livingston*).

10. *Livingston*, 15 F. Cas. at 663. Livingston's action for trespass could be brought only in New Orleans, where the land was located. Ronald E. Degnan, *Livingston v. Jefferson—A Freestanding Footnote*, 75 CAL. L. REV. 115, 121 (1987).

11. *Livingston*, 15 F. Cas. at 663.

12. 71 U.S. (4 Wall.) 475 (1868).

Andrew Johnson from carrying out two Acts of Congress.¹³ The Supreme Court held that a state could not sue the President to block the enforcement of an allegedly unconstitutional statute.¹⁴

More recently, the years surrounding the presidency of Richard Nixon provided ample opportunity for discussions of presidential immunity.¹⁵ Litigation against the President erupted even beyond those cases involving the Watergate affair.¹⁶ Five claims were filed against President Nixon concerning the legality of the Vietnam War.¹⁷ However, not until 1982, in *Nixon v. Fitzgerald*,¹⁸ did the Supreme Court definitively establish an absolute presidential immunity from damages liability for actions taken within the outer perimeter of the office of the President.¹⁹

Although Paula Corbin Jones is not the first plaintiff to sue the President, she may be the first person to be awarded damages against the President for actions arising prior to the taking of office.²⁰ Jones, a former Arkansas state employee, filed suit against President Bill Clinton on May 6, 1994.²¹ Jones claimed damages for deprivation of constitutional rights, intentional infliction of

13. *Id.* at 475. Mississippi attempted to avoid the consequences of the Reconstruction Acts of 1867, which provided that no governments would exist in the succeeded rebel states until peace, good order, and legal governments were established. *Id.*

14. *Id.* at 501. The Court based its decision more on the doctrine of separation of powers than on the amenability of the President to suit. *Id.* The Court held that it had no jurisdiction to grant an injunction over the President's performance of his official duties. *Id.*

15. See generally PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 34-52 (1978) (discussing the executive privilege to deny information to Congress); HOWARD BALL, "WE HAVE A DUTY": THE SUPREME COURT AND THE WATERGATE TAPES LITIGATION 143-52 (1990) (discussing the Court's fashioning of an inherent presidential power).

16. *United States v. Nixon*, 418 U.S. 683, 714-15 (1974) (ordering the President to deliver subpoenaed tape-recorded conversations to the district court for *in camera* review of the President's claim of executive privilege); *Nixon v. Sirica*, 487 F.2d 700, 722 (D.C. Cir. 1973) (upholding the district court's original order of *in camera* review of the tapes, noting that Nixon's claim of privilege was invalid). For further explanation of the Watergate affair, see *infra* note 182.

17. See, e.g., *Mottola v. Nixon*, 464 F.2d 178, 179 (9th Cir. 1972) (seeking to enjoin President Nixon from ordering military personnel to conduct operations in Cambodia when no war had been declared); *Drinan v. Nixon*, 364 F. Supp. 853, 853 (D. Mass. 1973) (seeking declaration that aerial combat operations in Cambodia were illegal); *Meyers v. Nixon*, 339 F. Supp. 1388, 1389 (S.D.N.Y. 1972) (seeking to enjoin expenditure of funds for war); *Suskin v. Nixon*, 304 F. Supp. 71, 72 (N.D. Ill. 1969) (seeking declaration that draft laws were unconstitutionally discriminatory towards women and clergy).

18. 457 U.S. 731 (1982).

19. *Id.* at 749; see *infra* notes 181-95 and accompanying text.

20. No damages in suits against a current President have been awarded, although a suit against President John F. Kennedy for actions arising prior to office was ultimately settled out of court. *Hills v. Kennedy*, No. 757,200 (Cal. Super. Ct. July 5, 1962). The issue of presidential immunity was neither raised nor addressed. *Id.*; see *infra* note 228.

21. *Jones v. Clinton*, 858 F. Supp. 902, 904 (E.D. Ark. 1994).

emotional distress, and defamation.²² President Clinton responded by requesting permission to file a motion to dismiss, prior to the filing of any other pleadings, on grounds of presidential immunity.²³

The district court granted the President's motion on July 21, 1994.²⁴ The court held that the issue of presidential immunity deserved threshold consideration,²⁵ and the President subsequently filed his motion to dismiss on grounds of presidential immunity.²⁶ On December 28, 1994, the district court ruled that, although President Clinton would not be allowed to avoid the suit completely on grounds of presidential immunity, the trial would wait until Clinton's term of office was complete.²⁷

22. *Id.* In Counts I and II, Jones alleged that then Governor Clinton violated her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments by discriminating against her because of her gender and by imposing a hostile work environment through sexual harassment. *Id.* In Count III, Jones asserted a claim of intentional infliction of emotional distress based on Clinton's odious, perverse, and outrageous conduct of allegedly revealing his erect penis to her. Plaintiff's Complaint ¶¶ 71-72, *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994)(No. LR-C-94-290). Finally, in Count IV, Jones claimed that the President and his agents defamed her by wilfully making false statements when denying the allegations of the lawsuit, including characterizing Jones as a pathetic liar. *Jones*, 858 F. Supp. at 904; Complaint ¶ 77. Jones claimed damages in the amount of \$700,000. Complaint at 18-19.

23. *Jones*, 858 F. Supp. at 903. The President filed a Motion to Set Briefing Schedule on June 27, 1994, with the federal district court. President Clinton's Motion to Set Briefing Schedule at 1, *Jones* (No. LR-C-94-290).

24. *Jones*, 858 F. Supp. at 906-07.

25. *Id.* at 905.

26. The motion was filed on August 10, 1994. President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 2, *Jones* (No. LR-C-94-290).

27. *Jones v. Clinton*, 869 F. Supp. 690, 698 (E.D. Ark. 1994). Relying primarily on the precedential value of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), see *infra* notes 181-95 and accompanying text, Judge Susan Webber Wright rejected President Clinton's absolute immunity argument, but granted him a temporary immunity from proceeding with the case until January 20, 1997 or January 20, 2001, when his term of office would expire. *Jones*, 869 F. Supp. at 698. In addition, the court ordered that the discovery process, including deposing the President, should go forward in order to preserve evidence. *Id.* at 699.

President Clinton's attorneys immediately stated that they would appeal the portion of the court's order which allows the discovery process to proceed during Clinton's presidential term. See, e.g., Ruth Marcus, *Harassment Trial Delayed While Clinton Is in Office; Questioning of President Allowed to Proceed*, WASH. POST, Dec. 29, 1994, at A1 (quoting President Clinton's attorney, Carl Rauh). President Clinton filed his Notice of Appeal of the court's denial of his motion to dismiss on grounds of presidential immunity on January 9, 1995. Notice of Appeal, *Jones* (No. LR-C-94-290).

On February 24, 1995, the court granted the President's motion to stay discovery pending resolution of his appeal. *Jones v. Clinton*, 879 F. Supp. 86, 87 (E.D. Ark. 1995). The court found that an appeal from a denial of presidential immunity requires a stay of all proceedings pending resolution of the appeal. *Id.* In addition, the court found that discovery should also be stayed against the non-immune defendant in Jones' action, Arkansas State Trooper Danny Ferguson. *Id.* at 88. The court found such a stay to be necessary to protect the President to the full extent that his claim of immunity would provide, since any testimony by Ferguson would necessarily implicate the

The President, in his brief, essentially argued that he was immune from defending such a civil suit while in office, and that he should not be required to file his answer until after his term(s) of office.²⁸ This Note proposes legislation which would eliminate the need for the courts to address the immunity issue in suits against the President for actions arising prior to taking office. The legislation suggested by this Note will concretely establish that suits against the President for actions arising outside of office will be allowed to go forward, but will be stayed until the end of the presidential term.²⁹ The model solution provided by this Note will also explore the practical considerations present in the conflict between the plaintiff's right to a fair trial and the national interest in an undistracted President.³⁰

Section II of this Note will trace the constitutional role of the executive branch by describing the functions of the President and the Vice President.³¹ Section III will follow the general development of immunity law in the United States, which forms the foundation for the doctrine of executive immunity.³² Section IV will then explore in detail the current state of executive immunity law.³³ Section V will describe the conflict between the rights of plaintiffs and the concern for the protection of the Presidential office, as demonstrated by the current *Jones v. Clinton* case.³⁴ Finally, Section VI suggests model legislation which will definitively establish a damages action against the President and provide both potential plaintiffs and the President a sense of security about the bringing of such claims.³⁵

II. THE CONSTITUTIONAL ROLE OF THE EXECUTIVE BRANCH

A. *The Presidency*

Granting the President protection from civil suits while in office acknowledges the importance of the chief executive branch officials to the system of federal government. The history of the power of the presidential

alleged actions of President Clinton. *Id.* On January 9, 1996, the Eighth Circuit affirmed the court's denial of President Clinton's motion to dismiss and to allow discovery to go forward, but reversed its order granting a stay of the trial for the duration of his presidency. *Jones v. Clinton*, Nos. 95-1050, 95-1167, 1996 WL 5658, at *7 (8th Cir. Jan. 9, 1996).

28. Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 2, *Jones* (No. LR-C-94-290).

29. *See infra* section VI.

30. For a discussion of this conflict, *see infra* section V.

31. *See infra* notes 36-58 and accompanying text.

32. *See infra* notes 59-155 and accompanying text.

33. *See infra* notes 156-95 and accompanying text.

34. *See infra* notes 196-248 and accompanying text.

35. *See infra* notes 249-96 and accompanying text.

office within the United States government can be traced from the adoption of the English common law.³⁶ Those portions of the Magna Carta³⁷ relating to the basic rights and liberties of citizens and the limitations which the Magna Carta imposed on the King's authority are part of the foundation for understanding the power of the President, even though those parts of the common law regarding the monarchy were abandoned in the United States.³⁸ Consequently, the limitations placed on the monarch by the Magna Carta had a substantial effect on the powers ultimately granted to the President.³⁹

The office of the President carries a wide variety of roles and responsibilities.⁴⁰ The President is the representative of the executive branch and the Constitution vests the executive power in the President alone.⁴¹ In addition, the powers granted to the President are unique in relationship to the powers of the other two branches.⁴² The primary responsibility of preserving

36. Most states adopted "reception statutes" early in their legislative histories, which received into state law the English common law and all acts of Parliament existing as of a specified date, except those which were contrary to federal or state constitutions or statutes or contrary to a republican form of government. See generally JOSEPH H. SMITH, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 469-506 (1965) (discussing the history surrounding state reception statutes).

37. The Magna Carta, or the Great Charter, was written in 1215 and is a legal enactment of the English common law. J.C. HOLT, *MAGNA CARTA* 1 (2d ed. 1992). The Magna Carta is considered the "greatest single formative document in English history." *Id.* at 267. It included a comprehensive grant of legal parity to all free men of the English empire. *Id.* at 276. The supporters of the Magna Carta considered it to be restorative: it restored and revived existing laws and confirmed existing privileges and liberties. *Id.* at 297.

38. *Id.* at 17-18. The Due Process and Equal Protection Clauses of the Bill of Rights generally follow the language of the Magna Carta. *Id.* at 18.

39. See generally Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 747-49 (1992) (discussing the various proposals considered by the Framers as methods of restraints on the President's powers). The Framers were greatly concerned with preventing the formation of a monarchy in the office of the President. 1 RECORDS, *supra* note 4, at 66, 83.

40. See generally EDWARD S. CORWIN & LOUIS W. KOENIG, *THE PRESIDENCY TODAY* 62-99 (1956) (describing the many leadership roles taken by the President).

41. Article II of the Constitution provides: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. Once a law is enacted, the President does not share the power to execute the laws with Congress. See James L. Sundquist, *Needed: A Workable Check on the Presidency*, in *THE PRESIDENT AND THE CONSTITUTION* 76 (George A. Nikolaieff ed., 1974). The Constitution grants the authority of the executive branch to the President alone. Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1373 (1983). "Other officials exercise only as much of [the executive authority] as the President permits, and they are always subject to his direction." *Id.*

42. CORWIN & KOENIG, *supra* note 40, at 3. The authors argue that by virtue of his veto power, the President participates in the legislative power, and yet he maintains specifically granted executive powers (power to pardon, power as commander-in-chief) which are theoretically autonomous. *Id.* The concentration of power and prestige in the office of the President is

the Constitution belongs to the President.⁴³ Furthermore, the President is guaranteed his powers by a specific constitutional grant, thereby insulating him from the reach of congressional legislation.⁴⁴ The responsibility of seeing "that the [l]aws be faithfully executed" rests with the President.⁴⁵ In order to see that the President maintains the power necessary to promote the strength and unity of the Nation in foreign affairs, the President is also singularly granted the power to command the military.⁴⁶

The roles and responsibilities of the President and his office have led scholars to describe the office itself as a "separate branch."⁴⁷ In addition, the President has historically been granted other incidental powers which are deemed necessary for the President to properly perform his duties.⁴⁸ The President

historically unique and has been one of the decisive forces in the shaping of American democracy. Clinton Rossiter, *The Presidency—Focus of Leadership*, in *THE PRESIDENCY* 44 (Aaron Wildavsky ed., 1969). Furthermore, of all the elected federal representatives, "the President alone is accountable to a national constituency." CORWIN & KOENIG, *supra* note 40, at 62.

43. Article II, Section 1, Clause 8 of the Constitution provides that the President will take the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8.

44. CORWIN & KOENIG, *supra* note 40, at 11; Rossiter, *supra* note 42, at 46.

45. U.S. CONST. art. II, § 3. The President is provided the various means which are necessary for him to fulfill the obligation and duties arising under the Constitution. In *Re Neagle*, 135 U.S. 1, 63-64 (1890).

46. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . ."). Although Congress alone has the power to declare war, the President has been granted considerable discretion in implementing the plans for the national military. GLENDON A. SCHUBERT, JR., *THE PRESIDENCY IN THE COURTS* 173 (1957).

47. *THE PRESIDENCY*, *supra* note 42, at 514. Richard Neustadt explains:

[C]onstitutional prescription, political tradition, governmental practice, and democratic theory all unite to make [the presidential office a separate branch]. . . . The man in the White House is constitutional commander of our military forces, conductor of foreign relations, selector of department heads, custodian of the "take care clause" and of the veto power. No other person in our system has so massive a responsibility for the national security.

Id.

Furthermore, the President acts as the active agent of the Nation, not of Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 690 (1952) (Vinson, C.J., dissenting). The unique position of the President's office provides that he obey and execute the laws of Congress because the Constitution requires it, not because of any directive by Congress. *Id.* at 691.

48. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1569 (5th ed. 1891). Historically, other incidental powers have been exercised by the President based on the necessary implications of the powers expressly granted to the executive. *Id.* The power to perform specific duties of the office without obstruction has been considered necessary to the office. *Id.* Joseph Story explains:

The President cannot, therefore, be liable to arrest, imprisonment, or

may also enlist the aid of the Vice President in the performance of these duties, and thus, any discussion of the chief officer of the executive branch must also examine the role of the Vice President as successor to the President.

B. *The Vice President*

The Constitution places the previously described powers of the presidency in the hands of the person elected Vice President in the event that the President is unable to perform his duties.⁴⁹ Nine Vice Presidents have succeeded to the presidency, five during the twentieth century.⁵⁰ Thus, the selection of the Vice President is a matter of great national importance.⁵¹

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. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country and to his own conscience.

Id.

The Constitution both directs and restrains the power of the President. Joseph M. Bessette & Jeffrey Tulis, *The Constitution, Politics, and the Presidency*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 17 (Joseph M. Bessette & Jeffrey Tulis eds., 1981). The Constitution assigns broad responsibilities to the President and puts them in the hands of one individual so that they are directly and forcefully exercised. *Id.*

Alexander Hamilton went so far as to consider the general grant of executive power to the President provided in Article II to be a broad, comprehensive grant of power. LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 21 (1985). With the exception of the specific restrictions and limitations on the President's power provided to Congress under the Constitution, Hamilton considered all other executive powers to belong solely to the President. *Id.*

49. Article II of the Constitution provides: "In case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . ." U.S. CONST. art. II, § 1, cl. 6.

50. Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703 (1988). The nine Vice Presidents succeeding to the presidency (with their predecessors in parentheses) are: John Tyler (President William Henry Harrison died in office); Millard Fillmore (President Zachary Taylor died in office); Andrew Johnson (President Abraham Lincoln was assassinated in office); Chester Arthur (President James Garfield was assassinated in office); Theodore Roosevelt (President William McKinley was assassinated in office); Calvin Coolidge (President Warren Harding died in office); Harry S. Truman (President Franklin D. Roosevelt died in office); Lyndon B. Johnson (President John F. Kennedy was assassinated in office); and Gerald Ford (President Richard Nixon resigned from office). *Id.* at 1703 n.2; *THE WORLD ALMANAC AND BOOK OF FACTS* 1993, at 471-72 (1992).

51. While Friedman admits that at least two of the nine Vice Presidents who succeeded to the presidency, Theodore Roosevelt and Harry Truman, ultimately were considered among the Nation's "best" Presidents, he fears that the frequent mediocrity of the vice-presidential office holder may lead to a national disaster upon their succession to the presidency. Friedman, *supra* note 50, at 1704-05. The vice-presidency is also an "incubator" of presidential nominees. PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* 3 (1984). As of 1984, six of the past twelve presidential candidates were former Vice Presidents. *Id.*

Under the Constitution, all of the powers and duties of the presidential office will devolve on the Vice President if the President cannot discharge the duties of office.⁵² The Vice President is also the President of the Senate, and will vote when necessary to break a tie.⁵³ The person holding the office of Vice President is of presumed presidential quality.⁵⁴

The office of the vice-presidency has been traditionally maligned,⁵⁵ in part because the Vice President is peculiarly dependent upon the President for his role and participation in government.⁵⁶ In recent years, the role of the Vice President has evolved into a type of advisor and assistant who takes an active part in certain duties of the President.⁵⁷ President Woodrow Wilson once wrote that the Vice President's importance "consists in the fact that he may

52. U.S. CONST. art. II, § 1, cl. 6. The language of the Constitution had been subjected to conflicting interpretations in the event of a President's disability, as opposed to the President's death or resignation. JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 204 (1982). The Twenty-Fifth Amendment to the Constitution was ratified in 1967 as an attempt to eliminate any confusion regarding the succession of the Vice President as a result of the President's disability. *See id.* at 205. The Twenty-Fifth Amendment provides that the Vice President will become the President in case of the President's removal from office, death, or resignation. U.S. CONST. amend. XXV, § 1. If however, the President or a majority of chief executive officers declares the President disabled, the Vice President will merely act as President until the President can once again discharge the duties of the office. *Id.* §§ 3-4.

53. "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless [the members] be equally divided." U.S. CONST. art. I, § 3, cl. 4.

54. ALLEN P. SINDLER, *UNCHOSEN PRESIDENTS* 8-9 (1976).

55. *See SINDLER, supra* note 54, at 12. "Taken by itself, the vice-presidency has always been a most anomalous office." *Id.* Vice Presidents have spent 200 years as "errand-boys, political hitmen, professional mourners, and incidental White House commissioners." LIGHT, *supra* note 51, at 1. Although Vice President Thomas Jefferson did describe his office as being "honorable and easy," he did so while comparing it to the presidential office which he called a "splendid misery." Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), in 7 *THE WRITINGS OF THOMAS JEFFERSON* 120 (Paul L. Ford ed., 1896); *see also* Friedman, *supra* note 50, at 1708 (noting that the Vice President has not traditionally fulfilled many governmental functions).

But cf. LIGHT, *supra* note 51, at 1. An aide of President Ronald Reagan is quoted as saying, "Twenty years ago, I wouldn't have advised my worst enemy to take the Vice-Presidency. It was God's way of punishing bad campaigners, a sort of political purgatory Now, you'd be crazy not to take the job." *Id.*

56. IRVING G. WILLIAMS, *THE AMERICAN VICE-PRESIDENCY: NEW LOOK* 13 (1954).

57. GOLDSTEIN, *supra* note 52, at 151. Goldstein asserts:

The increased role of the presidential candidate in choosing a running mate and the heightened visibility of his subordinate have created incentives for the Chief Executive to involve him; the new importance of the President in foreign and domestic affairs since the New Deal has provided opportunities for vice-presidential activity. Presidents have appointed Vice Presidents to chair commissions, sent them on trips abroad, and used them as advisors.

Id.

cease to be Vice-President."⁵⁸ The vice-presidency provides a solution to the problem of a presidential vacancy while also providing an everyday support-system for the President. Although the importance of these top executive figures to the functioning of the government is well-recognized, the issue of what immunity should be granted to the President for civil actions requires a balancing of the policies behind the doctrine of immunity and the office of the President.

III. HISTORICAL OVERVIEW OF THE IMMUNITY DOCTRINE IN THE UNITED STATES

Understanding the importance of the immunity doctrine as applied to the President requires an analysis of currently existing immunity law and its historical foundations. An immunity is a freedom from suit or liability⁵⁹ which is based on either the status or position of the defendant or his or her relationship to others.⁶⁰ Immunity doctrines are based upon the belief that, although the defendant may have committed tortious conduct, social values of great importance require the defendant to escape liability.⁶¹ The logical basis for governmental immunity was originally founded upon the idea that "the King can do no wrong."⁶² In addition, sovereign immunity was based on the concern that governmental officials, because of their special duties, should be as free as possible from fears of any adverse consequences of their actions.⁶³

In the United States, traditional governmental or sovereign immunity bars all suits against the government unless the government consents to being sued.⁶⁴ This was the general status of tort claims against the United States

58. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 162 (1973).

59. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 131, at 1032 (5th ed. 1984). A true immunity means that all vexatious suits are avoided by the defendant and are summarily dismissed. RESTATEMENT (SECOND) OF TORTS § 895D cmt. e (1979) [hereinafter RESTATEMENT 2D TORTS].

60. RESTATEMENT 2D TORTS, *supra* note 59, § 895A introductory note, at 392. Immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

61. KEETON ET AL., *supra* note 59, § 131, at 1032.

62. *Id.* at 1033. The origin of sovereign immunity dates to ancient times, when it was believed that allowing the King to be sued in his courts was a contradiction to the sovereignty of the King. RESTATEMENT 2D TORTS, *supra* note 59, § 895A introductory note, at 394; *see supra* note 2.

63. RESTATEMENT 2D TORTS, *supra* note 59, § 585, at 243; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 459 (2d ed. 1994) ("[I]t is widely believed that some degree of immunity for individual [government] officers is imperative.").

64. KEETON ET AL., *supra* note 59, § 131, at 1033; *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (noting that a sovereign is exempt from suit based on the theory that there can be no action against the authority which makes the law).

until 1946, when Congress enacted the Federal Tort Claims Act.⁶⁵ This Act provided for a scheme of federal tort liability by giving the general consent of the government to be sued.⁶⁶ Furthermore, government employees will generally be held personally liable for their torts, regardless of whether their government unit operates under an immunity, unless their actions arose out of the employees' official duties.⁶⁷ Either absolute or qualified immunity has been granted to government officials, such as legislators,⁶⁸ judges,⁶⁹ and prosecutors,⁷⁰ based on both constitutional provisions and public policy grounds.⁷¹ In addition, although not an actual immunity, Congress has provided a stay for actions against members of the military while serving the government.⁷²

65. 28 U.S.C. § 2674 (1988).

66. *KEETON ET AL.*, *supra* note 59, § 131, at 1034. However, state governments generally cannot be sued in the federal courts because of the limitations of the Eleventh Amendment. U.S. CONST. amend. XI; *CHEMERINSKY*, *supra* note 63, at 459. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. An expansive reading of the Eleventh Amendment could effectively immunize state actions from federal court review, even if unconstitutional. *PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 881 (3d ed. 1994).

To avoid this drastic application, the Supreme Court has fashioned three means of circumventing the Eleventh Amendment. *CHEMERINSKY*, *supra* note 63, at 369. First, the Court allows suits against state officials for unconstitutional conduct by only precluding suits against a state when the state is actually named as a defendant. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824). Secondly, if the state waives immunity and consents to being sued, then the Eleventh Amendment will not bar the action against the state. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Finally, the Court has held that Congress can expressly override the Eleventh Amendment by means of legislation which creates state liability in federal courts. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989).

67. *KEETON ET AL.*, *supra* note 59, § 132, at 1056; *RESTATEMENT (2D) TORTS*, *supra* note 59, § 895D cmt. b.

68. Legislators are granted absolute immunity in suits arising from their speech or debate in the legislature. For a discussion of the immunity granted to legislators, see *infra* notes 85-92 and accompanying text.

69. Judges are absolutely immune against the award of monetary damages in suits involving their judicial actions. For a discussion of the immunity granted to the judiciary, see *infra* notes 93-108 and accompanying text.

70. Prosecutors receive absolute immunity in suits for damages arising from their prosecutorial tasks. For a discussion of the immunity granted to prosecutors, see *infra* notes 109-16 and accompanying text.

71. Legislative immunity is constitutionally based. U.S. CONST. art. I, § 6, cl. 1. The other immunities result from the necessity of having public officers perform their duties without fear of retaliation. *CHEMERINSKY*, *supra* note 63, at 464.

72. The Soldiers' and Sailors' Civil Relief Act of 1940 provides a stay of civil actions against members of the military while they are on active duty. 50 U.S.C. app. § 521 (1988 & Supp. V 1993). See *infra* notes 133-50 and accompanying text.

A. Absolute Immunity Doctrine

The main purpose of any grant of official immunity is to ensure that the fear of liability does not deter government officials from completion of their duties.⁷³ Thus, the immunity granted must be adequate to encourage government employees to perform their required duties.⁷⁴ To determine what immunity to grant to a particular governmental official, the Supreme Court has repeatedly used a historical approach.⁷⁵ The question of immunity most often appears in claims brought under § 1983 of the Civil Rights Act,⁷⁶ and in such

73. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). The Court in *Scheuer* determined that it would be unjust to subject an official acting in good faith under the obligations of his position to liability for his discretionary actions. *Id.*; see *infra* notes 118-22 and accompanying text. Furthermore, the threat of liability may chill the official's exercise of discretion. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 462 (1978).

74. CHEMERINSKY, *supra* note 63, at 459.

75. *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

76. 42 U.S.C. § 1983 (1988). Section 1983 of the Civil Rights Act provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

The Civil Rights Act provides for a tort-like remedy for persons deprived of federally-protected rights under color of state law. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Sources of Law*, 42 STAN. L. REV. 51, 51 (1989). Section 1983 serves as the basic vehicle for federal court review of alleged state violations of federal law. CHEMERINSKY, *supra* note 63, at 423.

The purpose of § 1983 was to enforce the provisions of the Fourteenth Amendment. *Id.* at 426. The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1. Section 1983 has three main aims: (1) to prohibit any invidious state laws; (2) to provide a remedy to those whose constitutional rights were violated when state laws were inadequate; and (3) to further provide a federal remedy to those persons where, although an adequate state law remedy existed in theory, in practice, no real remedy existed. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

Section 1983 liability against state officials exists for all actions taken in their official capacity, regardless of whether authorized by state law or not. CHEMERINSKY, *supra* note 63, at 433. Since § 1983 created a cause of action against state officials, the issue of what immunities from suit were available became one of immediate importance. *Id.* at 458-59.

Although the broad language of § 1983 provides a remedy for violations of constitutional rights, the statute provides little or no guidance for its practical application, including the area of what immunities are available from suit. Beermann, *supra*, at 51. Thus, the Court, as in many other areas of the statute, has been forced to make its own determination as to the scope of immunity which should be granted to various state officials charged with constitutional violations. The Court has repeatedly looked to the "immunity historically accorded the relevant official at common law"

cases, the Court looks at the immunities available in 1871 when Congress enacted § 1983 to determine what immunities are available to state officials.⁷⁷ Although the Supreme Court has recognized both a qualified and an absolute immunity for certain government officials,⁷⁸ a discussion of presidential immunity will focus on whether the President warrants absolute immunity.⁷⁹

Certain functions performed by government officials require a grant of absolute immunity to assure the proper discharge of the officials' duties.⁸⁰ Thus, the Court bases its decision of whether an official warrants absolute immunity on the function performed by the official, not just on the title of the office held.⁸¹ The Court first adopted the concept of a functional approach to absolute immunity for state officials in § 1983 actions in *Imbler v. Pachtman*,⁸² and later extended the doctrine to suits against federal officials in *Butz v.*

to determine what immunities exist. *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). Thus, the Court continues to analyze the immunity issue under § 1983 from the perspective of the common law as of 1871. CHEMERINSKY, *supra* note 63, at 459.

77. *Id.* at 459. The Court's use of the historical approach assumes that the 42d Congress was familiar with the immunities under the common law and intended them to remain available to defendants in § 1983 claims. *Pierson*, 386 U.S. at 554.

78. The Supreme Court has recognized two basic types of immunities: absolute and qualified. LOW & JEFFRIES, *supra* note 66, at 983-84. In addition to this discussion of absolute immunity, see *infra* notes 156-95 and accompanying text for a discussion of the absolute immunity granted to the President. For a discussion of qualified immunity, see *infra* notes 117-30 and accompanying text.

79. The Supreme Court granted the President absolute immunity from civil suits arising out of actions within the outer perimeter of his official duties. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); see *infra* notes 181-95 and accompanying text.

80. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 89 (1983).

81. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Thus, in *Imbler*, the Court did not consider a blanket grant of immunity for the actions of prosecutors, but rather limited the immunity to those prosecutorial actions closely associated with the judicial process. *Id.*

82. 424 U.S. 409 (1976). *Imbler* involved a suit against a prosecutor by a man convicted of murder during an armed robbery. *Id.* at 410-11. Richard Pachtman, the prosecutor, turned new evidence over to the state governor prior to *Imbler's* execution which corroborated *Imbler's* alibi. *Id.* at 412. *Imbler's* conviction was ultimately overturned based on misconduct by the state. *Id.* at 414-15. *Imbler* then filed a civil rights claim under § 1983 against Pachtman and others for \$2.7 million in damages. *Id.* at 415-16.

In *Imbler*, the Supreme Court extended judicial immunity to court personnel whose actions were "intimately associated with the judicial phase of the criminal process . . ." *Id.* at 430. Thus, prosecutors enjoy absolute immunity from civil suits for damages based on actions taken within the scope of prosecutorial duties. *Id.* at 420; Joseph Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941, 964 (1977). The Court looked to the functional approach as a means of preserving the purpose of § 1983, since an open grant of immunity based on the official's office would bar many claims for which § 1983 sought to create a remedy. *Imbler*, 424 U.S. at 427-29.

Economou.⁸³ Generally, the functional approach confers absolute immunity to government officials based on whether the type of government function implicit in their particular acts or decisions is legislative, judicial, or prosecutorial in nature.⁸⁴

1. Legislative Immunity

Legislative immunity has the strongest foundation of any of the governmental immunities because it is constitutionally-based.⁸⁵ The Speech or Debate Clause specifically exempts Members of Congress from being arrested during sessions of Congress, and also provides that Members are immune in their speech and debate during congressional sessions.⁸⁶ Although the courts have given the text of the Speech or Debate Clause varying interpretations, they have generally found that the Clause protects more than just the pure words spoken by Members of Congress during sessions or committee meetings.⁸⁷

83. 438 U.S. 478 (1978). *Butz* involved a suit for damages by a commodity futures commission merchant against officials of the Department of Agriculture, alleging that the Department had instituted an investigation against the plaintiff in retaliation for his criticism of the agency. *Id.* at 480. The Department issued an administrative complaint against the plaintiff which alleged that he "had willfully failed to maintain the minimum financial requirements prescribed by the Department." *Id.* at 481. The defendants in the suit included various Agricultural Department officials, including the Secretary and officials in the Commodity Exchange Authority. *Id.* at 482. The defendants moved to dismiss on grounds of official immunity. *Id.* at 483.

The Court found that absolute immunity would be granted only if the official performed functions essential to the government's operations. *Id.* at 507. In *Butz*, the Court found that the Department of Agriculture officials performed functions similar to those of prosecuting attorneys in making the decision to go forward with the complaints against the plaintiffs. *Id.* at 516-17. They were therefore entitled to the absolute immunity which prosecutors are granted. *Id.* at 517; *see infra* notes 109-16 and accompanying text.

84. SCHUCK, *supra* note 80, at 89.

85. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 401 (1987).

86. The Speech or Debate Clause is found in Article I, Section 6, Clause 1 of the Constitution and specifically sets out the immunity granted to legislators:

They shall 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.

87. *See generally* Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L. J. 366, 384-89 (1967) (discussing the Supreme Court's broad interpretation of the Speech or Debate Clause). *Compare* *Kilbourn v. Thompson*, 103 U.S. 168, 177-79 (1881) (limiting the immunity of the Speech or Debate Clause to Members of Congress) *with* *Gravel v. United States*, 408 U.S. 606, 616-25 (1972) (finding that congressional aides are granted the same immunity as Members of Congress under the Speech or Debate Clause, but finding that the public distribution of committee materials by a congressman was not immunized under the Speech or Debate Clause).

The Speech or Debate Clause has been construed quite broadly, and generally protects federal legislators and their aides from prosecution or punishment in relation to any official acts.⁸⁸ The Supreme Court held in *Dombroski v. Eastland*⁸⁹ that the purpose of the Speech or Debate Clause was to provide immunity for actions within the sphere of legislative activity.⁹⁰ Therefore, legislators engaged in legitimate legislative activities are entirely protected from any suit based on their speech or debate.⁹¹ Following the functional approach, however, legislators have absolute immunity only from suits based on their legislative functions.⁹² Although the judiciary does not have the same strong constitutional foundation for a grant of immunity, the Court has nonetheless established the doctrine of absolute immunity for judges and prosecutors involved in the judicial process as well.

2. Judicial and Prosecutorial Immunity

Although judicial immunity was long recognized under the common law,⁹³ the history of judicial immunity in the United States is relatively young. The Supreme Court did not address the issue of judicial immunity until 1868, when it decided *Randall v. Brigham*.⁹⁴ The Court in *Randall* concluded that judges were not civilly liable for their judicial acts unless they acted maliciously or corruptly.⁹⁵ Later, in *Bradley v. Fisher*,⁹⁶ the Court clarified the extent of

88. LOW & JEFFRIES, *supra* note 66, at 996. The Court has also extended this absolute immunity to state and local legislators. See *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

89. 387 U.S. 82 (1967). In *Dombroski*, the plaintiffs accused Senator Eastland, Chairman of the Internal Security Subcommittee of the Senate Judiciary Committee, of conspiring to seize the plaintiffs' property in violation of the Fourth Amendment. *Id.* at 83. The Court found that Senator Eastland's activities in the issuance of subpoenas were within the sphere of legislative activities and therefore, within the immunity of the Speech or Debate Clause. *Id.* at 84-85.

90. *Id.* at 83-84; see also *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (granting immunity when legislators act "in a field where legislators traditionally have power to act").

91. *Dombroski*, 387 U.S. at 83-84. Legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 85.

92. *Gravel v. United States*, 408 U.S. 606, 625 (1972). The activity upon which liability is alleged "must be an integral part of the deliberative and communicative processes" in which legislators participate during the consideration of proposed legislation and associated tasks. *Id.*

93. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536-37 (1868) (tracing the history of judicial immunity throughout English and early American law).

94. 74 U.S. (7 Wall.) 523 (1868). *Randall* involved a suit for damages against a Massachusetts judge who had disbarred the plaintiff for taking advantage of a client. *Id.* at 526. The Court found that the immunity granted to judges is for the sake of the public, not merely for the protection of the judge. *Id.* at 536. The wrongful acts of judges may be guarded against by removing the judge from office through impeachment. *Id.* at 537.

95. *Id.* at 536; see J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 900.

absolute immunity available to members of the judiciary by delineating the "judicial act doctrine."⁹⁷ The doctrine provides that judges are protected from all civil liability for their "judicial acts," regardless of any malicious or corrupt nature.⁹⁸ Therefore, this grant of absolute immunity will fail only when the judge clearly had no jurisdiction over the subject matter of the suit.⁹⁹

In 1967, the Supreme Court first considered the issue of judicial immunity from civil suits arising under § 1983¹⁰⁰ in *Pierson v. Ray*.¹⁰¹ The Court concluded that the doctrine of judicial immunity was well-established at common law and that § 1983 did not abolish the doctrine.¹⁰² The Court reasoned that without the clear intention of Congress, it would not interpret the statute to abolish the well-established judicial immunity doctrine.¹⁰³

The Court has continued to follow the judicial act doctrine,¹⁰⁴ while

96. 80 U.S. (13 Wall.) 335 (1871). *Bradley* concerned a suit by John Suratt's attorney against the judge who tried Suratt for the murder of President Abraham Lincoln. *Id.* at 336. The plaintiff alleged damages against the judge resulting from the judge's order to strike the attorney's name from the roll of practicing attorneys. *Id.* at 337. The judge struck the attorney's name after the attorney claimed that the judge insulted him and then threatened the judge. *Id.* at 337-38. The Court found that the judge had acted within his power when striking the attorney's name and was therefore immune from suit. *Id.* at 355-57.

97. *Id.* at 351.

98. *Id.* The Court found that the judicial act doctrine made any reference to the malicious or corrupt nature of the acts unnecessary. *Id.*; see also *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (finding that judges should not have to fear charges of malice or corruption).

99. *Bradley*, 80 U.S. (13 Wall.) at 351-52. Where the judge clearly has no jurisdiction, any authority exercised is an usurped authority; therefore, no excuse is permissible for the judge's actions. *Id.* at 352; see also *Stump v. Sparkman*, 435 U.S. 349, 357 (1978) (holding that a judge acted in excess of his jurisdiction when he ordered *ex parte* the sterilization of a young girl without her knowledge; but his actions were not completely lacking jurisdiction since he presided over a court of general jurisdiction).

100. 42 U.S.C. § 1983 (1988). For a brief discussion and the text of § 1983, see *supra* note 76.

101. 386 U.S. 547 (1967). The plaintiffs in *Pierson* were a group of "freedom rider" ministers arrested for breaching the peace when they attempted to use segregated bus station facilities in Mississippi in 1961. *Id.* at 549. The defendant police officers arrested them and the defendant municipal police justice convicted them. *Id.* The plaintiffs filed a § 1983 claim based on false arrest and imprisonment. *Id.* at 550. With a succinct summary of the history of judicial immunity, the Court concluded that § 1983 did not abolish the common law of immunities. *Id.* at 554-55.

102. *Id.* at 554.

103. *Id.* at 555; see also *Block*, *supra* note 95, at 909-10.

104. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). The court over which the judge presides must have jurisdiction over the case and the actions must be within the scope of judicial acts. *Id.*

explicitly defining the scope of judicial acts.¹⁰⁵ Consequently, judicial immunity extends only to judicial tasks, and not to tasks that are administrative or legislative in nature.¹⁰⁶ Judicial immunity provides both a protection of judicial independence and a sense of finality.¹⁰⁷ The proper administration of justice requires that judicial officers be free to act on their convictions without fear of personal consequences.¹⁰⁸

The Court also extended the absolute immunity granted to the judiciary to those performing prosecutorial tasks in *Imbler v. Pachtman*.¹⁰⁹ The grant of immunity to prosecutors has its foundation in the same concerns which support the doctrine of absolute judicial immunity.¹¹⁰ The Court feared that the public's trust in the prosecutor's office would suffer if prosecutors were not free to make decisions without the threat of personal liability.¹¹¹ Furthermore, the sheer extent of prosecutors' potential liability to the hundreds of defendants tried each year requires the grant of absolute immunity.¹¹²

Although the prosecutorial function is granted the same absolute immunity as the judicial function, the Court has carefully emphasized that the protection

105. See *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). For example, in *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978), a judge was not granted judicial immunity in a § 1983 claim brought by a coffee vendor. *Id.* at 53. The judge ordered the coffee vendor brought before him in handcuffs for a lengthy public berating because the coffee the vendor served the judge was "putrid." *Id.* Such actions fell outside the realm of "judicial acts." *Id.*

106. *Forrester v. White*, 484 U.S. 219, 227 (1988). To determine whether an act is judicial, the Court will look to the nature of the act itself: whether the function was one normally performed by a judge and whether the parties were dealing with the judge in his judicial capacity. *Stump*, 435 U.S. at 362. However, the line between judicial actions and administrative actions is not always clear. See *Block*, *supra* note 95, at 917-18.

Personnel decisions involved in supervising court employees and overseeing the efficiency of the court are generally considered administrative in nature and not judicial. *Forrester*, 484 U.S. at 229. But see *Rheark v. Shaw*, 477 F. Supp. 897 (N.D. Tex. 1979). Similarly, issuing a code of conduct for attorneys is an act of rulemaking, not adjudication. *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731 (1980).

107. *Bradley*, 80 U.S. (13 Wall.) at 349.

108. *Stump*, 435 U.S. at 355.

109. 424 U.S. 409, 424 (1976). The immunity granted to prosecutors is seen as a derivative of that accorded to judges. *Id.* at 420. Thus, prosecutors who perform activities "intimately associated with the judicial . . . process" receive absolute immunity. *Id.* at 430. For a brief discussion of *Imbler*, see *supra* notes 81-82.

110. *Imbler*, 424 U.S. at 422-23. "These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

111. *Id.* at 424.

112. *Id.* at 425-26. In addition, denying immunity to the office of prosecutor would have a substantial effect on the criminal justice system, since determining guilt or innocence in the trial setting requires a great amount of discretion for the conduct of the trial. *Id.* at 426.

extends only to those tasks which are prosecutorial in nature.¹¹³ The Court in *Imbler* noted that absolute immunity does not apply to administrative tasks performed by the prosecutor.¹¹⁴ Since *Imbler*, the Court has continued to clarify the exact extent of absolute prosecutorial immunity.¹¹⁵ Absolute immunity extends only to traditional prosecutorial activities, not to those which are investigative or administrative in nature.¹¹⁶ However, qualified immunity may still be a defense for those government officials whose actions fall outside of the categories of absolute immunity discussed above.

B. Qualified Immunity

In its attempts to limit the harsh consequences of granting absolute immunity to all government officials, the Supreme Court found that a grant of qualified immunity would generally be sufficient protection for most executive branch officials.¹¹⁷ The Court first attempted to define qualified immunity for state executive officials in *Scheuer v. Rhodes*.¹¹⁸ The Court relied on the doctrine of qualified immunity because granting state executive officials the same absolute immunity granted to federal officials would dramatically defeat the purposes of § 1983.¹¹⁹ The Court based the qualified immunity on the circumstances of the action upon which liability was based, and the scope of the

113. *Imbler v. Pachtman*, 424 U.S. 424, 431 n.33 (1976). Duties performed by the prosecutor in his role as an advocate for the State are granted absolute immunity. *Id.*

114. *Id.* The Court noted that this distinction might raise difficult questions, but such questions were not present in the facts of *Imbler*. *Id.*

115. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Burns v. Reed*, 500 U.S. 478 (1991); and *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993).

116. CHEMERINSKY, *supra* note 63, at 471. A prosecutor's decision to place a wiretap is investigatory. *Mitchell*, 472 U.S. at 521. Authorizing a police officer to have a suspect hypnotized to obtain evidence prior to indictment is also investigatory. *Burns*, 500 U.S. at 496. Statements to the press by a prosecutor also go beyond the prosecutorial function. *Buckley*, 113 S. Ct. at 2617. Thus, only in-court prosecutorial activities are generally granted absolute immunity. CHEMERINSKY, *supra* note 63, at 471.

117. *Buckley*, 113 S. Ct. at 2614. The immunity is qualified by the requirement that the official acted under a "good faith" belief. LOW & JEFFRIES, *supra* note 66, at 984-85. The Court refuses to extend absolute immunity any "further than its justification would warrant." *Burns*, 500 U.S. at 487 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). The Court presumes that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87.

118. 416 U.S. 232 (1974). *Scheuer* arose out of the three student deaths which occurred during the civil disorder that erupted at the state-operated Kent State University in Ohio during May of 1970. *Id.* at 234. The personal representatives of the students' estates brought § 1983 claims against the president of Kent State University and various members of the Ohio National Guard, based on the intentional and unnecessary deployment of the Ohio National Guard on the university campus. *Id.* at 234-35.

119. *Id.* at 248. Making state officials' actions unreviewable by the federal judiciary would drain § 1983 of meaning. *Id.*

state official's responsibilities and discretion.¹²⁰ The test for qualified immunity thus originally contained both an objective and subjective element: the official is liable if he knew or should have known that his actions were unconstitutional.¹²¹ The Court noted that although only legislative immunity was constitutionally-based, the tradition of judicial and executive immunity was firmly established in the common law.¹²²

In *Harlow v. Fitzgerald*,¹²³ the Court reaffirmed that executive officials are generally granted only qualified immunity from civil suit damages.¹²⁴ Qualified immunity was sufficient to protect most high officials in the exercise of their discretion.¹²⁵ The Court noted that the protection provided by official immunity was recognized at common law, and that public officials require this protection in order to shield them from undue interference with their duties.¹²⁶ However, the Court discarded the subjective portion of the qualified immunity test,¹²⁷ finding it too disruptive to the functioning of government.¹²⁸ While the Court has generally found qualified immunity sufficient to protect executive branch officials,¹²⁹ the Court has abandoned the qualified immunity test for

120. *Id.* at 247. Qualified immunity was granted to the official when discretion was exercised with reasonable grounds for the official's good faith belief. *Id.* at 247-48. The Court will also look to all the circumstances as they reasonably appeared at the time of the action. *Id.* at 247.

121. The test for qualified immunity looks to whether the official's action was reasonable and whether the official believed it was reasonable. CHEMERINSKY, *supra* note 63, at 475. See *Scheuer*, 416 U.S. at 247-48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers . . ."); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (holding official liable if "he knew or reasonably should have known that the action . . . would violate . . . constitutional rights . . . , or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.").

122. *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). The Court found that the risk of some injury as a result of an official's action is better than the risk of the official's non-action. *Id.* at 242 (citing *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959)).

123. 457 U.S. 800 (1982). *Harlow* was the companion case to *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), discussed *infra* notes 181-95 and accompanying text. See *infra* notes 186-87, for a full explanation of the events surrounding Fitzgerald's claims. *Harlow* and the other defendants were Fitzgerald's more immediate supervisors. *Harlow*, 457 U.S. at 802-03.

124. *Id.* at 807.

125. *Id.* These officials included high-ranking federal officials, members of the Cabinet, and state governors. *Id.*

126. *Id.* at 806. The Court's decisions have consistently held that government officials are entitled to some form of immunity from suits for damages. *Id.*

127. *Id.* at 815; *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective test holds officials to a standard of conduct based on "permissible intentions." *Wood*, 420 U.S. at 322. The objective test protects the "public interest in deterrence of unlawful conduct and in compensation of victims." *Harlow*, 457 U.S. at 819.

128. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Relying on the objective reasonableness of the officials' conduct "should avoid excessive disruption of government." *Id.*

129. *Burns v. Reed*, 500 U.S. 478, 486-87 (1991).

suits against the President.¹³⁰ Although the concept of immunity from suit has not been extended past certain government officials,¹³¹ Congress has also recognized that the members of the military require a similar protection, and has provided a stay of actions against them in the Soldiers' and Sailors' Civil Relief Act of 1940.¹³²

*C. Immunity under the Soldiers' and Sailors' Civil Relief Act*¹³³

As the Commander in Chief of the armed forces, the office of the President warrants protection at least equal to that provided to all other active members of the military. Although Congress did not further extend the doctrine of immunity for government officials, the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA) provides protection to the members of the military against the enforcement of civil liabilities.¹³⁴ The SSCRA prescribes extensive protections for military personnel, including provisions and procedures for protection against default judgments,¹³⁵ eviction proceedings,¹³⁶ mortgage foreclosures,¹³⁷ termination of leases,¹³⁸ and many other civil liabilities.¹³⁹ Most importantly, § 521 of the SSCRA provides a stay of any action or proceeding in any court regardless of whether the military member is the plaintiff or the defendant.¹⁴⁰ A stay may be granted for up to the length of military service

130. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). For a discussion of the Court's reasoning behind the grant of presidential immunity in *Nixon*, see *infra* section IV.B.

131. Generally, the doctrines of absolute or qualified immunity will apply only to the following classes of officials: judges, legislators, prosecutors, and executive branch officials. CHEMERINSKY, *supra* note 63, at 463, 474.

132. 50 U.S.C. app. §§ 501-590 (1988 & Supp. V 1993).

133. *Id.*

134. See generally Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 SANTA CLARA L. REV. 137 (1992) (describing in detail the accommodations granted by the SSCRA to military litigants).

135. 50 U.S.C. app. § 520 (1988 & Supp. V 1993).

136. *Id.* § 530.

137. *Id.* §§ 532-533.

138. *Id.* § 534.

139. See 50 U.S.C. app. §§ 501-590 (1988 & Supp. V 1993). The SSCRA also has provisions concerning installment contracts for the purchase of property, *id.* § 531; life insurance assignments, *id.* § 535; liens for storage of property, *id.* § 535; and tax collection and non-payment penalties, *id.* §§ 560, 573-574.

140. 50 U.S.C. app. § 521 (1988 & Supp. V 1993). The SSCRA stay provides:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

and three months thereafter.¹⁴¹

The stay in actions provided by the SSCRA is not automatic, but rather is in the discretion of the trial court.¹⁴² In *Boone v. Lightner*,¹⁴³ the only Supreme Court case to address stays under the SSCRA, the Court concluded that the "unless" clause of § 521 requires that, in order for the stay to be granted, prejudice to the military party's ability to litigate must be shown.¹⁴⁴ The Court, however, declined to place the burden of proof on the servicemember, instead leaving such placement of the burden in the discretion of the trial court.¹⁴⁵

The state courts' resolution of the issue of a § 521 stay has led to three general requirements.¹⁴⁶ First, once the military party invoking the stay provision makes a prima facie case for relief by showing current military service, the burden of proving that the servicemember is not prejudiced then lies with the party resisting the stay.¹⁴⁷ Secondly, the member of the military generally must show something more than a mere active status in the military

Id.; see also *id.* § 530(2) (granting a stay against evictions during term of service); *id.* § 531 (granting a stay against termination of installment contracts during term of service).

The SSCRA defines a person in the military as including any person on active duty in the Army, Navy, Marine Corps, Coast Guard, and certain members of the Public Health Service. *Id.* § 511(1). Neither reservists who are not on active duty, nor civilian employees of the military, qualify for the protections of the Act. See *Betha v. Martin*, 188 F. Supp. 133, 134-35 (E.D. Pa. 1960) (denying plaintiff's motion to reinstate dismissed action when plaintiff failed to present evidence of his active duty status after failing to answer interrogatories); *Strong v. Potomac Leasing Co.*, 722 S.W.2d 479, 480 (Tex. Ct. App. 1986) (discussing the court's assumption that the term "employed by" signified service in the military, rather than civilian employment which would not fall under relief granted by SSCRA).

141. 50 U.S.C. app. § 524 (1988 & Supp. V 1993).

142. *Id.* § 521. The stay shall be granted "in the discretion of the court in which [the action] is pending." *Id.* See *supra* note 140 for the full text of the statute.

143. 319 U.S. 561 (1943). Boone was serving in the military as a Captain in the Office of the Under Secretary of War in Washington, D.C., when he was served with a complaint to account as trustee of his daughter's trust fund, created under his mother's will. *Id.* at 561-62. After submitting many pleadings, affidavits, depositions, and statements to the court, Boone requested the stay provided under the SSCRA. *Id.* at 563-64. The Court denied his request. *Id.* at 575.

144. *Boone*, 319 U.S. at 568-69.

145. *Id.* at 570. A rigid burden of proof on one party would defeat Congress' intention in making the stay discretionary. *Id.*

146. See Baron, *supra* note 134, at 144.

147. *Id.* See, e.g., *Kramer v. Kramer*, 668 S.W.2d 457, 458 (Tex. Ct. App. 1984) (abating divorce action against husband based on wife's failure to show that husband's ability to conduct defense was not materially affected by military service). See also *Coburn v. Coburn*, 412 So. 2d 947, 949-50 (Fla. Dist. Ct. App. 1982) (finding that in the absence of a finding of no material effect on a servicemember's ability to defend, entering judgment against the servicemember is improper); *Chaffey v. Chaffey*, 382 P.2d 365, 369 (Cal. 1963) (reversing a change in child custody order based on the trial court's failure to hear the merits of the application for a stay).

to be granted the stay; thus, the stay is not automatic.¹⁴⁸ Finally, the serviceperson must show actual unavailability, and that an absence from trial would adversely affect his or her rights.¹⁴⁹ Furthermore, the reasonableness of the requested stay has often played a key role in the trial court's decision to grant or deny a stay under the SSCRA.¹⁵⁰

Although an absolute immunity has been granted for many actions against the President,¹⁵¹ a stay similar to the SSCRA should be considered for those actions falling outside of the doctrine of absolute immunity.¹⁵² While the President would not satisfy the SSCRA's definition of a person in the military,¹⁵³ the policy reasons in support of preventing distraction of members of the military by granting stays to military personnel in suits against them should apply to their Commander in Chief equally.¹⁵⁴ A stay of suits against the President while in office is also reasonable in light of the absolute immunity already granted to the President under certain circumstances.¹⁵⁵

148. See, e.g., *Gross v. Harrell*, 477 N.E.2d 753, 754 (Ill. App. Ct. 1985) (finding that trial court could have denied the stay because defendant failed to allege "something more than merely being in the military service," and had voluntarily reenlisted for an overseas assignment when he knew the case would soon be set for trial); *Plesniak v. Wiegand*, 335 N.E.2d 131, 135 (Ill. App. Ct. 1975) ("A party must establish . . . that his military status is the proximate cause of his inability to be present for trial . . ."); see also Baron, *supra* note 134, at 144.

149. See, e.g., *Norris v. Superior Ct. of Mohave County*, 481 P.2d 553, 555 (Ariz. Ct. App. 1971) (finding that claim protection under the SSCRA, the service person "must make a showing of his actual unavailability and that his rights would be adversely affected because of his absence from the trial."); see also Baron, *supra* note 134, at 144.

150. See, e.g., *Bond v. Bond*, 547 S.W.2d 43, 45 (Tex. Civ. App. 1977) (finding that the trial court's denial of stay for two weeks until the serviceman's retirement from the military was an abuse of discretion); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (stating that "[D]iscretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use."); see also Baron, *supra* note 134, at 160.

151. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); see also *infra* notes 181-95 and accompanying text.

152. For a presidential stay proposal, see *infra* section VI.

153. See *supra* note 140. The President does not qualify as a member of the armed services since he is not on "active duty." 50 U.S.C. app. § 511(1) (1988 & Supp. V 1993).

154. The President is granted the position of Commander in Chief of the Army and Navy under the Constitution. U.S. CONST. art. II, § 2, cl. 1. "The public interest considerations that underlie the SSCRA apply with far greater force to a civil action that threatens to impair the attention to duty of the President . . ." Statement of Interest of the United States at 12 n.9, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290).

155. See *infra* notes 261-69 and accompanying text.

IV. ANALYSIS OF CURRENTLY AVAILABLE EXECUTIVE IMMUNITIES

A. *History of Presidential Immunity Law*

The debate over the concept of presidential immunity can be traced to the Constitutional Convention.¹⁵⁶ Although an impeachment provision was eventually included in the Constitution,¹⁵⁷ it was only inserted after considerable debate over the likelihood of impairing the President's capacity to perform his duties.¹⁵⁸ The two opposing concerns consisted of the interest that the Executive, like any other citizen, should not be above justice¹⁵⁹ and the interest in preserving the Executive's independence.¹⁶⁰

In 1833, Justice Joseph Story further explored the concept of a presidential immunity from civil suits in his constitutional treatise.¹⁶¹ Justice Story found that the President possessed an official inviolability from civil suit to perform the duties of office unobstructed.¹⁶² Others, such as Thomas Jefferson, viewed the separation of powers doctrine as demanding the executive's independence from the judiciary, so that the President was not subject to the judiciary's whim.¹⁶³ Early courts also found that the power and duties of the Executive

156. See generally 2 RECORDS, *supra* note 4, at 503 (describing James Madison's suggestion that the allowing of privileges to the Executive should be considered).

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

158. See 2 RECORDS, *supra* note 4, at 64-69. For example, Governor Morris contended that making the Executive subject to impeachment would render the Executive dependent on those who could call for his impeachment. *Id.* at 64-65.

159. 2 RECORDS, *supra* note 4, at 65 (quoting Colonel Mason: "Shall any man be above Justice?").

160. *Id.* at 66. Mr. Pinkney voiced his concern that if the legislature issued impeachments, it could hold this over the President and effectively destroy his independence. *Id.* Another Founder, James Wilson, argued that the President "should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 1 THE WORKS OF JAMES WILSON 399, 421 (Robert G. McCloskey ed., 1967).

161. 2 STORY, *supra* note 48, § 1569.

162. *Id.* Justice Story described the official inviolability of the President: "In the exercise of his political powers he is to use to his own discretion, and is accountable only to his country and his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive." *Id.*

163. See *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982). In a lengthy footnote, the Court noted that historical evidence does not suggest that the Framers at the Constitutional Convention intended to subject the President to the distraction of private suits while in office. *Id.* The Court quoted extensively from Thomas Jefferson, including his opinion that making the President subject to the commands of the judiciary could withdraw him entirely from his constitutional duties. *Id.*

demanded a special regard and refused to hear suits against the President.¹⁶⁴

The Supreme Court first considered the concept of immunity for executive officials in *Spalding v. Vilas*.¹⁶⁵ The Court found that even if the defendant executive official had acted with malice, he still operated under an absolute immunity for actions which arose within the scope of his authority.¹⁶⁶ The Court extended the long-accepted doctrine of judicial immunity to actions taken by executive branch officials in their official duties.¹⁶⁷ The Court recognized that the policy concerns for the public welfare, which demanded a grant of absolute immunity to the judiciary,¹⁶⁸ applied equally to decisions made by chief executive officials in the discharge of their legal duties.¹⁶⁹

The Court in *Spalding* reasoned that public interest required due protection to be accorded to executive officials engaged in their official acts.¹⁷⁰ The Court was most concerned with the effect that subjecting executive officials to civil liability would have upon the exercise of their official functions.¹⁷¹ The Court concluded that subjecting executive officials to liability would "seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government."¹⁷²

164. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (finding that the Court lacked jurisdiction to enjoin the President from his official duties); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) (concluding that the powers of the Executive made the President beyond the reach of other branches, except for the provisions of the Impeachment Clause).

165. 161 U.S. 483 (1896). A suit was brought against the United States Postmaster General who at the time was a member of the President's cabinet and thus an executive official. *Id.* at 484-85. The plaintiff in *Spalding* was an attorney who had contracted with certain postal employees to represent them in seeking payment of salaries allegedly owed to them by the postal department. *Id.* at 488. *Spalding* claimed damages resulting from the Postmaster General's malicious interference with those contracts which caused *Spalding* to lose the benefit of many of them. *Id.* at 489.

166. *Id.* at 498.

167. *Id.*; see also Barry Okun, *Presidential Immunity from Constitutional Damage Liability*, 60 B.U. L. REV. 879, 885-86 (1980) (noting that the policies supporting judicial immunity supported executive immunity as well, especially since serious executive abuses were infrequent and because of the potentially chilling effect of damage suits on executive action).

168. *Spalding*, 161 U.S. at 498. The public interest demands that the judges appointed to administer the law may do so independently and freely. *Id.* at 495. The judiciary is immune from civil actions for damages arising from the judge's performance of judicial functions. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871); see *supra* notes 96-99 and accompanying text.

169. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

170. *Id.* As with judicial immunity, the Court noted the distinction between actions taken within the official's authority and those outside the authority. *Id.*

171. *Id.* "In exercising the functions of his office, the head of an Executive Department, 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." *Id.*

172. *Id.* The Court felt that absolute immunity was necessary, regardless of the rights of the citizen-plaintiff which may be materially impaired. *Id.*

The Supreme Court further expanded the protection given to executive officials in *Barr v. Matteo*¹⁷³ by granting absolute immunity to any executive official, and not just to presidential cabinet members.¹⁷⁴ In addition to reiterating the policy grounds established in *Spalding*, the Court also noted that the defense of a civil suit would consume valuable time and resources of executive officials, thereby detracting attention from the officials' governmental duties.¹⁷⁵ The Court reasoned that the threat of liability in civil suits could "appreciably inhibit the fearless, vigorous, and effective administration of policies of government."¹⁷⁶

The *Barr* Court noted that immunity is an expression of public policy with the purpose of protecting the effective functioning of government.¹⁷⁷ The goal of effective government therefore justified extending the immunity granted in *Spalding* to all executive officials for their official actions.¹⁷⁸ The Supreme Court eventually restricted the immunity available to most executive branch officials by granting them only a qualified or good faith immunity based on the reasonableness of their actions.¹⁷⁹ However, the Court has specifically disregarded the concept of qualified immunity for the chief executive official, and has granted the President absolute immunity.¹⁸⁰

B. *Nixon v. Fitzgerald*¹⁸¹

It was not until the 1970s, when the Watergate scandal rocked Washington, that the Supreme Court was forced to spend considerable time determining precisely how the doctrines of executive privilege and executive immunity

173. 360 U.S. 564 (1959).

174. *Id.* at 572-73. The plaintiffs in *Barr* filed a libel action against Barr, the Acting Director of the Office of Rent Stabilization, as a result of a press release issued by Barr which stated his intention to suspend the plaintiffs, subordinate officials in his office, based on their mismanagement of agency funds. *Id.* at 565.

175. *Id.* at 571. Government officials should be free to exercise their duties without fear of damage suits which otherwise might "appreciably inhibit the fearless, vigorous, and effective" administration of government policies. *Id.*

176. *Id.* The Court quoted extensively from Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), another executive official immunity case. *Barr*, 360 U.S. at 571-72. Judge Hand felt that just the potential of submitting officials to trial would "dampen the ardor" of all but the most resolute, or the most irresponsible, of government officials in the discharge of their legal duties. *Id.* at 571; *Gregoire*, 177 F.2d at 581. By granting immunity for officials' actions, a balance was struck between allowing dishonest officials to go free and subjecting honest officials to the fear of retaliation for performing their duties. *Barr*, 360 U.S. at 572.

177. *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959).

178. *Id.*

179. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); see *supra* notes 117-22 and accompanying text.

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

181. 457 U.S. 731 (1982).

applied to the President.¹⁸² The controversy surrounding President Richard Nixon's claim of executive privilege from discovery of the Watergate tapes led to a considerable constitutional debate concerning the extent of the executive privilege.¹⁸³ The issue of whether the executive privilege was actually a constitutionally-based value, as determined unanimously by the Court in *United States v. Nixon*,¹⁸⁴ would divide the Court eight years later in *Nixon v. Fitzgerald*.¹⁸⁵

Nixon v. Fitzgerald involved a suit by an Air Force management analyst who was dismissed during a departmental reorganization.¹⁸⁶ Fitzgerald

182. *Id.*; *United States v. Nixon*, 418 U.S. 683 (1974). The Watergate scandal erupted on June 17, 1972, when five men were arrested for breaking into the offices of the Democratic National Committee in the Watergate office complex in Washington, D.C.. BALL, *supra* note 15, at 22. These men, along with two others later arrested, had various connections to the C.I.A., F.B.I., and the White House. *Id.* The following week, President Richard Nixon met with his top aides in a tape-recorded conversation which, amongst others, became the subject of the executive privilege case of *United States v. Nixon*, 418 U.S. 683 (1974). BALL, *supra* note 15, at 22-23.

It was during these conversations in the summer of 1972 that Nixon ultimately authorized the cover-up plan for the break-in at Watergate and its subsequent investigation. *Id.* at 23. The investigation of the Watergate events by WASHINGTON POST reporters Bob Woodward and Carl Bernstein led to a Senate investigation by the Ervin Committee. *Id.* at 24. On May 12, 1973, the Senate passed a resolution to appoint a special prosecutor to head the governmental investigation of Watergate. *Id.* at 25. Witness Alexander Butterfield revealed the existence of the recorded conversations in the President's possession on July 16, 1973. *Id.* at 27. Special Prosecutor Archibald Cox subpoenaed those tapes, and on August 29, 1973, Judge John Sirica of the Federal District Court for the District of Columbia ordered the tapes to be turned over. U.S. v. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT 1 (Leon Friedman ed., 1974).

President Nixon's ultimate failure to comply with this order led to impeachment proceedings by the House of Representatives in May 1974. BALL, *supra* note 15, at 33. The litigation in *United States v. Nixon* and the contents of the recorded conversations finally led to President Nixon's resignation of the presidency on August 9, 1974. *Id.* at 136.

For a detailed account of the events surrounding Watergate by the journalists who first brought the scandal to the attention of the Nation, see CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

183. BALL, *supra* note 15, at 61-62.

184. 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."). See also BALL, *supra* note 15, at 64-68, 133-35 (discussing the constitutional issue raised by *United States v. Nixon*).

185. 457 U.S. 731 (1982) (5-4 decision) (White, J., and Blackmun, J., dissenting, joined by Brennan, J., and Marshall, J.).

186. *Nixon v. Fitzgerald*, 457 U.S. 731, 733-34 (1982). A. Ernest Fitzgerald lost his job in January of 1970. *Id.* at 733. In November of 1968, Fitzgerald testified in a widely publicized congressional hearing. *Id.* at 734. Fitzgerald testified to the Joint Economic Committee that cost-overruns on a new Department of Defense transport plane amounted to \$2 billion, and that the aircraft had experienced unexpected technical difficulties during its development. *Id.*

Amidst concerns that Fitzgerald had been fired in retaliation for his negative testimony to Congress, a subcommittee of the Joint Economic Committee held public hearings on the events surrounding Fitzgerald's dismissal. *Id.* Fitzgerald also complained to the Civil Service

eventually filed suit in federal district court against President Nixon and two other White House aides.¹⁸⁷ The Supreme Court granted certiorari in order to determine the scope of immunity available to the President of the United States.¹⁸⁸

In a five-to-four decision, the Supreme Court held that the President was absolutely immune from suits for civil damages for conduct arising out of any actions within the outer perimeter of his official capacity.¹⁸⁹ Although the Court considered both constitutionally-based privileges¹⁹⁰ and common law influences¹⁹¹ in making its decision, the major force behind the majority opinion was the public policy concern of preventing the diversion of the President's energies.¹⁹² The Court distinctly left open the question of what immunity would be available to the President if Congress established a damages

Commission. *Id.* at 736. Although the Commission found that Fitzgerald's dismissal violated certain civil service regulations, it did not find that Fitzgerald's dismissal was in retaliation for his congressional testimony. *Id.* at 738-39.

187. *Id.* at 739. Fitzgerald's first complaint was dismissed under the applicable three-year statute of limitations. *Id.* Fitzgerald then filed an amended complaint in July of 1978, in which he named former President Nixon as a defendant for the first time. *Id.* at 740.

In March of 1980, the district court ordered the case to trial against the remaining three defendants (Nixon, Harlow, and Butterfield). *Id.* The court also ruled against the President's claim of absolute immunity. *Id.* at 741. When the court of appeals dismissed the President's appeal on the immunity issue, the Supreme Court granted certiorari to decide the scope of immunity available to the President. *Id.*

188. 452 U.S. 959 (1981) (granting certiorari).

189. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (Powell, J.) ("In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility.")

190. *See id.* at 747-56. The Court explained: "Because the Presidency did not exist through most of the development of common law any historical analysis must draw its evidence primarily from our constitutional heritage and structure." *Id.* at 748; *see also* Theodore P. Stein, *Nixon v. Fitzgerald: Presidential Immunity As a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 778-85 (1983) (describing the Court's approach to analyzing the doctrines of official immunity and separation of powers in the *Nixon* decision).

191. *See Nixon*, 457 U.S. at 755. The Court spent considerable time throughout the decision tracing its past immunity decisions, in particular, *Butz v. Economou*, 438 U.S. 478 (1978), and *Imbler v. Pachtman*, 424 U.S. 409 (1976). *See also* Note, *Immunity of the President and Other Government Officials*, 96 HARV. L. REV. 226, 230-31 (1982) (arguing that no constitutionally-based executive immunity exists).

192. *Nixon*, 457 U.S. at 751-53. The Court stressed that the diversion of the President's attention by responding to civil lawsuits would raise unique risks to the effective functioning of the government. *Id.* at 751. Because of the prominence and visibility of the President's office, the Court was also concerned with the possibility of the President being an easy target for civil damages suits. *Id.* at 753. The Court applied this immunity to Richard Nixon, even though he was no longer President, because the alleged liability rested on official actions taken while President. *Id.* at 749.

claim against the President, as it has done against state officials.¹⁹³ Furthermore, the scope of immunity granted by the Court to President Nixon was clearly limited to official actions,¹⁹⁴ leaving open the immunity issue for actions arising outside the presidential office.¹⁹⁵ The present allegations against President Clinton are based on actions arising outside of the presidential office, and thus, the Court may have to address the issue of presidential immunity yet again.

V. IMMUNITY CONTROVERSY AS REFLECTED IN *JONES V. CLINTON*¹⁹⁶

The suit filed against President Bill Clinton by Paula Corbin Jones on May 6, 1994,¹⁹⁷ immediately raised the issue of the scope of immunity granted to the person filling the office of President of the United States.¹⁹⁸ Although *Nixon v. Fitzgerald* attempted to settle the issue of presidential immunity for acts arising within the responsibilities of the office,¹⁹⁹ the Court did not consider the possibility of suits against the President for actions occurring prior to taking office.²⁰⁰ By granting a "temporary" immunity to President Clinton, the protection available to the President against civil actions has again been

193. *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982). "[O]ur holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress." *Id.* Congress has already created a damages claim against state officials in 42 U.S.C. § 1983, which establishes liability against state actors for violations of constitutional rights. See *supra* note 76 for the text and a brief discussion of § 1983.

194. *Nixon*, 457 U.S. at 756.

195. See *infra* notes 234-37 and accompanying text.

196. 858 F. Supp. 902 (E.D. Ark. 1994); *Jones*, 869 F. Supp. 690 (E.D. Ark. 1994).

197. See *supra* notes 20-28 and accompanying text.

198. See, e.g., Julia Malone, *Sex Lawsuits May Push Clinton into Uncharted Legal Territory*, ATLANTA J. & CONST., May 8, 1994, at C1 (calling the *Jones* suit against Clinton "unprecedented"); *The Presidency on Trial*, ATLANTA J. & CONST., May 11, 1994, at A10 (arguing that any immunity argument presented by President Clinton would be poorly received by the public); Michael Kramer, *Why Paula Jones Should Wait*, TIME, June 27, 1994, at 40 (summarizing President Clinton's potential immunity arguments).

199. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). But see Ray, *supra* note 39, at 810 (arguing that the Court's failure to provide a definitive answer to the presidential immunity issue in *Nixon v. Fitzgerald* left open a considerable question for ongoing resolution at the trial court level).

200. Jones based her claims against President Clinton on an alleged sexual advance which occurred on May 8, 1991, at a conference attended by then Governor Clinton in Little Rock, Arkansas. Plaintiff's Complaint ¶ 7, *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994) (No. LR-C-94-290). Clinton allegedly approached Jones, who was then 24 years old and an employee of an Arkansas executive branch agency, through a staff-member and arranged to meet her in his hotel room. Complaint ¶¶ 6, 10-13. In Jones' Complaint, she accused the President of various unwanted sexual indiscretions while in the hotel room, including the lowering of his trousers to reveal his erect penis. *Id.* ¶¶ 18-24. Jones filed suit under 42 U.S.C. §§ 1983, 1985 against the President and his agents for violations of equal protection and due process rights under the United States Constitution as a result of this incident. Complaint, Counts I-II. She also filed state law claims of intentional infliction of emotional distress and defamation. Complaint, Counts III-IV.

expanded, and yet a concrete immunity decision still does not exist.²⁰¹

The scope of the immunity granted by the district court in *Jones v. Clinton* will have a greater impact and applicability than the immunity decision in *Nixon v. Fitzgerald*.²⁰² Although the immunity granted to the President in *Nixon* seemed broad in its scope, it was still limited to actions that were directly related to the President and his official responsibilities.²⁰³ A Supreme Court resolution of the question raised by the *Jones* case, however, would have immediate applicability to any civil suit against the President. Thus, the Court will once again be forced to balance the needs of the plaintiff against the public interest in an undistracted President.²⁰⁴

A. *The Plaintiff's Rights*

The competing interests at work in any suit against the President are substantial. A plaintiff has a considerable interest in having the case decided in

201. *Jones v. Clinton*, 869 F. Supp. 690, 698 (E.D. Ark. 1994). The actions upon which the suit by Paula Jones is based occurred before Clinton became President and have no connection to any presidential actions. The granting of any immunity in the present case, therefore, would enlarge the immunity available to the President, and may include actions far outside the scope of the presidential office. However, the district court did place a limitation on the President's immunity, similar to the requirements of the SSCRA stay. *Jones*, 869 F. Supp. at 698; see *supra* notes 133-55 and accompanying text.

The district court in *Jones* granted a temporary immunity partly because the plaintiff lacked any real necessity for a speedy recovery. *Jones*, 869 F. Supp. at 698. For example, Jones filed suit two days before the expiration of the statute of limitations on her claims and has publicly stated that any judgment awarded in excess of her legal costs will be donated to charity. Stuart Taylor, Jr., *Why Clinton Should Get Limited Immunity*, AM. LAWYER, July 1994, at 37. In its decision, the court gave examples of what types of cases would require the presidential immunity concept to be abandoned, such as an accident victim desperately seeking damages for recovery, the division of assets in a divorce, or a child custody action with immediate personal need at stake. *Jones*, 869 F. Supp. at 698. However, by basing the grant of immunity on the plaintiff's needs, the court essentially left open the issue of presidential immunity for actions outside of the responsibilities of the office.

202. See *supra* notes 181-95 and accompanying text.

203. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). The President is immune from liability for actions within the outer perimeter of his official responsibility. *Id.*

204. The decision on immunity in the *Jones* case will likely apply to any civil suit involving acts occurring prior to office, just as *Nixon* applies to any actions occurring within the perimeters of the presidential office. *Nixon*, 457 U.S. at 756. Although civil suits against the most well-known political persons in the world may seem unlikely, an allegation of sexual misconduct against a philandering President was also unheard of until May, 1994. Suits which could possibly be affected by an immunity decision are familial disputes, such as custody or divorce actions, contract claims, or claims for personal damages arising from accidents. *When the President is Sued*, WASH. POST, May 29, 1994, at C6. The district court left open considerable avenues of argument for plaintiffs who choose to file suit against the President by basing its temporary immunity decision partly on the plaintiff's necessity. *Jones*, 869 F. Supp. at 698.

a timely fashion.²⁰⁵ The policies of judicial economy and the efficient administration of justice promote the ideal of resolving all claims in an expeditious manner.²⁰⁶ All potential plaintiffs in suits against the President are entitled to have their cases heard promptly, just as any other citizen, without regard to the validity of their claims or to the political position of the defendant.²⁰⁷ Seeking damages in a court of law for compensation of one's injuries is the proper course of action for plaintiffs such as Paula Jones.²⁰⁸

Furthermore, the concept of no person being "above the law" was one of the underlying assumptions of the Founders as they established the Nation's constitutional framework.²⁰⁹ The Supreme Court has historically made this a primary concern when dealing with possible infractions of the law by those

205. Rule 16 of the Federal Rules of Civil Procedure grants trial judges the authority to impose reasonable time limits on trials. FED. R. CIV. P. 16; William O. Bertelsman, *Right to a Speedy Trial*, A.B.A. J., Oct. 1994, at 116. Judge Bertelsman argues that the time limits authorized by Rule 16 are also justified by the public's right to preserve judicial resources. *Id.*

206. "[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determinations of every action." FED. R. CIV. P. 1. See generally MELVIN M. BELL, "READY FOR THE PLAINTIFF!": A STORY OF PERSONAL INJURY LAW 3-11 (1956) (describing the problems facing plaintiffs in personal injury cases, including the lengthy appeal process).

207. See, e.g., *Too Much Immunity in the Jones Case*, N.Y. TIMES, Dec. 30, 1994, at A30 (arguing that the fundamental value at stake in the Clinton case "is the right of a citizen to get timely justice, even if the defendant has become President."); Bob Minzesheimer, *Debate Rules the Day after Jones Decision*, USA TODAY, Dec. 29, 1994, at A4 (quoting conservative legal scholar Bruce Fein: "Justice delayed is justice denied."); *Coddler-in-Chief*, PROGRESSIVE, July 1994, at 7 ("Neither the fact that Paula Jones has received support from Clinton's political enemies, nor the fact that the defendant in the case is the President, should affect her right to pursue justice.").

208. Damages have historically been considered "the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 395 (1971).

209. 1 RECORDS, *supra* note 4, at 398 (quoting Mr. Charles Coatworth Pinkney: "Every free man has a right to the same protection and security . . ."). Mr. Pinkney even went so far as to assert that the Founders intended no privilege for the Executive at all because those granted privileges would abuse them. Charles Pinkney, Remarks in the United States Senate (Mar. 5, 1800), in 3 RECORDS, *supra* note 4, at 385.

Likewise, the members of the Continental Congress who approved the Declaration of Independence found equality under the law to be a primary consideration: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also Thomas Jefferson, *Notes on the Proceedings of the Continental Congress, June-July 1776*, in A CASEBOOK ON THE DECLARATION OF INDEPENDENCE 28-30 (Robert Ginsberg ed., 1967) (discussing the adoption of Jefferson's draft of the Declaration of Independence).

The beliefs of our Founding Fathers were also shared by the drafters of the Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

responsible for promoting it.²¹⁰ As Chief Justice John Marshall proclaimed in *Marbury v. Madison*,²¹¹ “[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.”²¹²

The concept of individual accountability for wrongful conduct is fundamental to the structure of any organized society.²¹³ The Constitution applies to all people equally, whether they be rulers or citizens.²¹⁴ Thus, the belief that the President should be held accountable to the laws of the United States, just as any other citizen, is one firmly entrenched in the American judicial system.²¹⁵ However, concerns for the public interest also demand that

210. See *United States v. Lee*, 106 U.S. 196, 220 (1882), where the Court stated: No 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.

Id. *Lee* involved a suit to eject the defendants from land which they claimed rights to and which the President had ordered seized and converted into what became Arlington National Cemetery. *Id.* at 197-98.

211. 5 U.S. (1 Cranch) 137 (1803).

212. *Id.* at 163. Chief Justice Marshall also believed that the President should be “subject to the general rules which apply to others.” *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694).

213. Former Supreme Court Chief Justice Warren Burger firmly propounded the idea that “no person is above the law” in *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981). “Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies.” *Id.* at 429 (dissenting opinion). Chief Justice Burger wrote that individual accountability was essential to avoid anarchy and to maintain both the civil and criminal justice systems. *Id.*

214. The Supreme Court held in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that even in periods of national emergency during the Civil War, President Abraham Lincoln would have to abide by a writ of habeas corpus. *Id.* at 131. The Court held that the provisions of the Constitution would apply even during the greatest exigencies of government. *Id.* at 121. “The Constitution of the United States is a law for rulers and people, . . . and covers with the shield of its protections all classes of men, at all times, and under all circumstances.” *Id.* at 120-21.

215. See, e.g., *United States v. Nixon*, 418 U.S. 683, 706 (1974) (“Neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”); *McGautha v. California*, 402 U.S. 183, 252-53 (1971) (Brennan, J., dissenting) (“The principle that our Government shall be of laws and not of men is so strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution.”).

See generally Memorandum in Support of Paula Jones’ Response in Opposition to President Clinton’s Motion to Dismiss on Grounds of Presidential Immunity, *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994) (No. LR-C-94-290). “[T]he President can never be placed ‘above the law’” *Id.* at 11. “An American citizen, even one who happens to be president, is not above the normal processes established for the legal testing of a plaintiff’s claims.” Plaintiff’s Memorandum in Opposition to the Motion of Defendant Clinton to Set Briefing Schedule at 1, *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994) (No. LR-C-94-290).

the President not be thwarted in the execution of his duties.

B. Public Interest in Protecting the Office of the President

The arguments for granting the President's request for immunity while in office have been raised repeatedly in both the presidential privilege cases²¹⁶ and the executive immunity cases.²¹⁷ The Court in *Nixon v. Fitzgerald* considered the potential harm to the Nation's affairs a primary reason for finding President Nixon immune from suit.²¹⁸ The diversion of the President's attention while defending a civil suit would raise unique risks to the effective functioning of the government.²¹⁹ Furthermore, the mere cognizance of the possibility of being sued would pose a serious distraction of the President's attention to his public duties.²²⁰

The risk to the efficient operation of all that the President oversees is threatened even further in this age of the media.²²¹ As other political entities

The American Civil Liberties Union friend-of-court brief (which was refused by Judge Wright in the *Jones* case, along with all other outside party briefs other than that of the Justice Department) also argued that a presidential immunity from suit is unwarranted. Memorandum of Law of Amicus Curiae the American Civil Liberties Union at 11, *Jones* (No. LR-C-94-290) (on file with author); John Omicinski, *Clinton on Vacation: Too Busy for Paula Jones Suit?*, GANNETT NEWS SERVICE, Nov. 26, 1994, available in LEXIS, News Library, Wires File. See generally Aviva A. Orenstein, *Presidential Immunity from Civil Liability*, 68 CORNELL L. REV. 236, 236 (1983) (arguing that the grant of absolute immunity in *Nixon v. Fitzgerald* was overbroad and that the policy goals behind the Court's decision were mere assumptions); Stein, *supra* note 190, at 763 (arguing that the extension of absolute immunity to the President is not justified based on either public policy or the separation of powers doctrine).

216. See, e.g., *United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (rejecting a general claim of presidential privilege from withholding information from a criminal proceeding, but finding a limited constitutionally-based presidential privilege against revealing military, diplomatic, or sensitive national security secrets).

217. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (finding an absolute executive immunity from civil suits based on presidential actions).

218. *Id.* at 753 n.32. "Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.*

219. *Id.*; Ray, *supra* note 39, at 750.

220. The Court in *Nixon v. Fitzgerald* was concerned with the distraction posed to the President by a vulnerability to civil suit. *Nixon*, 457 U.S. at 753. "Cognizance of this personal vulnerability [to suit] frequently 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." *Id.* This public policy concern was based on the Nation's need for an undistracted leader, not out of any personal concern for the person holding the office of the presidency. *Id.*

221. Meeting the public's expectations through the vehicle of the mass media is a formidable task for any public figure, much less any politician. The bias of the traditional media towards conflict and bad news has afflicted both liberal and conservative political leaders even-handedly.

have discovered, bad publicity from any source can effectively destroy political careers.²²² Even if successful as a political candidate, once elected, the President must still carefully mold his image to the public's strictest scrutiny.²²³ In *Nixon v. Fitzgerald*, the Supreme Court recognized that the sheer prominence of the presidential office makes the office-holder an easy target for suits for civil damages.²²⁴ With political careers being won and lost

Michael Oneal, *Who Speaks for America?*, BUS. WEEK, May 8, 1995, at 90 (reporting that the networks "slammed" both President Clinton and Republican Speaker of the House of Representatives Newt Gingrich, over 60% of the time during the first 100 days of the 104th Congress).

Furthermore, the voters expect and demand everything; and candidates must fulfill those expectations if they hope to be elected. See Howard Fineman, *Rolling Thunder*, NEWSWEEK, Nov. 7, 1994, at 24. "They want leaders to change everything—and nothing; to be independent of everyone else—but beholden to them; to use a machete on spending—but hold their own benefits harmless." *Id.*

222. For example, Gary Hart based his decision to drop out of the campaign for the 1988 Democratic presidential nomination on the intolerable media attention focused on his private life. James Coates, *Hart Storms Out of '88 Race*, CHI. TRIB., May 9, 1987, at A1. Specifically, the media hounded Hart for his extra-marital relationship with model-actress Donna Rice. *Id.* Hart described the media as "hunters" and political candidates as the "hunted." *Id.*

In 1991, the congressional hearings concerning the appointment of then Supreme Court nominee Clarence Thomas were a "televized crisis." Dottie Enrico, *A Happy Ending to 1991: Everyone's Glad It's Over*, NEWSDAY, Dec. 30, 1991, at 27. The media covered in great detail the sexual harassment charges alleged against Thomas by Anita Hill. See *id.* Unlike many thrust into the media's attention, Thomas ultimately survived and was appointed to the Supreme Court. See *id.*

Another media event erupted in 1993, when President Clinton attempted to nominate first Zoe Baird, and then Judge Kimba Wood, for the office of Attorney General. Mark Tran, *Clinton Puts Forward Third Woman*, GUARDIAN, Feb. 12, 1993, at 9. The media's coverage of the revelation that the potential nominees failed to pay social security taxes on illegal immigrants hired as household employees created an "intense public outrage" called "Nannygate." *Id.* The women were ultimately forced to withdraw their names as nominees. *Id.*

Most recently, President Clinton's nomination of Henry Foster for the abruptly vacated position of Surgeon General lacked sufficient support to force a Senate vote on the nomination. *Nation*, TIME, July 3, 1995, at 11. The media quickly focused not on Foster's merits for the position, but on the number of abortions he may have performed during his career as a gynecologist. Bill Turque & Bob Cohn, *Foster Follies*, NEWSWEEK, Feb. 20, 1995, at 27.

223. Author John Steinbeck noted the irony surrounding the public's expectations of the person holding the office of the President of the United States. STEINBECK, *supra* note 1, at 46. The public expects the President to be greater than everyone else because he is the leader of the nation. *Id.* Yet at the same time, because the President is a mere citizen like everyone else, the President is no better than anyone else. *Id.* The President is subject to the criticisms of a demanding public analyzing every move he makes. Laura H. Burney, Casenote, *The President Is Absolutely Immune from Civil Damages Liability for Acts Done Within the "Outer Perimeter" of his Official Capacity*, 14 ST. MARY'S L.J. 1145, 1164 (1983).

224. *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). In his concurring opinion, Chief Justice Warren Burger emphasized that the President's position of prominence opens presidential actions to "undue judicial scrutiny as well as . . . harassment." *Id.* at 762. Although Chief Justice Burger primarily noted that it is the extensive impact of the President's decisions which provides ample opportunities for suits by allegedly aggrieved plaintiffs, the theory that prominence is an impetus for

by "spinmasters,"²²⁵ the sheer impact of being sued while in office would detrimentally affect the President's service to the Nation.²²⁶

The debate over whether officials within the executive department, even the President himself, should be immune from civil suit actions while holding office has consumed a considerable amount of the Court's energy in the past several decades.²²⁷ Historically, suits against the President were relatively unheard of, especially ones concerning matters unrelated to the political office of the President.²²⁸ Since Watergate,²²⁹ however, the public's image of the President has dramatically changed, partially due to an expanding multimedia.²³⁰ With the new far-reaching nature of the media, the

unfounded civil suits is certainly not limited to those suits arising out of presidential actions. See *id.*

225. SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 231 (1991). The rising trend of low-voter turnout has been attributed, in part, to the emergence of the "spinmaster," the political campaign strategists most adept at manipulating the images of political candidates to meet voters' expectations. *Id.*

For example, the Democratic National Party hired a Hollywood producer to stage the 1988 Democratic Convention in order to provide a unified front for the television audience, and thus a more favorable impact on voters. STEPHEN J. WAYNE, *THE ROAD TO THE WHITE HOUSE 1992: THE POLITICS OF PRESIDENTIAL ELECTIONS* 161 (1992). The atmosphere of the party conventions can be a considerable factor in the campaign: since 1968, the party with the most harmonious convention has emerged victorious in every general election. *Id.* at 165.

226. *Nixon*, 457 U.S. at 753; Ray, *supra* note 39, at 740. "A sitting President is merely the biggest imaginable target [for partisan-based civil suits]." Edwin M. Yoder, *Sideways Must Not Distract President*, HOUS. CHRON., May 12, 1994, at B18.

227. See discussion *supra* section IV.

228. Research shows only three suits filed against a sitting President for actions arising prior to taking office. *Jones v. Clinton*, 869 F. Supp. 690, 697 (E.D. Ark. 1994); see also Statement of Interest of the United States at 1 n.1, *Jones* (No. LR-C-94-290). The three suits consisted of: an action against Theodore Roosevelt and the New York City Police Board for the dismissal of a patrolman which was resolved in the Board's favor, *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904); a suit for damages against Harry Truman based on his conduct as a state court judge which was resolved in Truman's favor, *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946); and a tort action against John F. Kennedy for claims in an automobile accident which was settled out of court, *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. July 5, 1962).

229. See *supra* notes 182-83 and accompanying text. Watergate is often considered a turning point in the American perception of the President. BALL, *supra* note 15, at 2. "Watergate taught . . . people the dangers of the strong presidency . . ." JOHN M. ORMAN, *PRESIDENTIAL SECRECY AND DECEPTION* 123 (1980).

230. The present-day public has an unquenchable thirst for personal information about national figures. POPKIN, *supra* note 225, at 224. Professor Popkin contrasts the media coverage of President Franklin D. Roosevelt's crippling polio with the coverage of President Ronald Reagan's cancer of the colon and nose. *Id.* FDR's affliction was discussed less in his 12 years in office than Reagan's colon surgery was publicized in a week. *Id.* Popkin further contends that FDR may very likely never have gained election in today's media-dominated campaigns, where physical attributes are directly linked with one's ability to govern. *Id.*

Meanwhile, President Clinton struggles to maintain his effectiveness as a world leader, while at one point in early 1995, only 39% of Americans believed he was handling his job well. Bob

indiscretions of the President have become part of the public domain.²³¹ At the same time, the litigious nature of American society has increased tremendously.²³² These two societal trends have inevitably merged in the form of lawsuits against the President for damages allegedly caused by the presidential office, its employees, or the President individually.²³³

Meanwhile, without a decisive, all-encompassing Supreme Court decision on the issue of presidential immunity, plaintiffs like Paula Jones must wait while the lawyers and judges untangle the existing maze of immunity law.²³⁴ Congressional action on the issue would force the Court to definitively establish that presidential immunity is not constitutionally-based, rather than once again

Cohn & Bill Turque, *Reinventing the President*, NEWSWEEK, Jan. 9, 1995, at 42. Clinton is not the only President to struggle with Americans' perception of government. *Id.* "The entire executive branch is under attack The president has now become flypaper for everything Americans hate about politics." Michael R. Beschloss, *The End of an Era?*, NEWSWEEK, Jan. 9, 1995, at 45.

A University of Michigan study shows that the percentage of people who trusted the government "always" or "most of the time" has dropped from nearly 80% in 1964 to less than 20% in 1994. Cohn & Turque, *supra*, at 42. This generalized feeling of discomfort with politics is also reflected in the low voter turnout rates for elections, which was dramatically reflected in the 38.7% turnout for the most recent election of federal officials. *Voter Turnout Hit 38.7%, Up Slightly from Last Two Midterm Elections*, CHI. TRIB., Nov. 10, 1994, § 1, at 21.

231. Until only recently, the personal affairs of President John F. Kennedy remained under a veil of mystery through the cooperation of the members of the Washington press corps of the time. Unlike the nearly familial relationship which President Kennedy enjoyed with the media, recent presidents have been faced with the increasingly antagonistic Washington media which often looks to the personal lives of the presidential families for story material. *Cf.* Godfrey Sperling, Jr., *Is the Press Really Treating the President Better Now?*, HOUS. POST, Sept. 21, 1994, at A21 (noting that the Washington press who fell in love with President John F. Kennedy has "turned" on President Clinton); Steven D. Stark, *Clinton Brought "Talk Shows" to Politics*, ARIZ. REPUBLIC, May 22, 1994, at C5 (referring to Kennedy's presidency as a "press agent's dream," while noting that President Clinton has "allowed the office to become further demystified"); Sam Fenton, *Journalists Should Report on "Deed" More Than "Doer."* ORLANDO SENTINEL, May 1, 1994, at 10 (reporting that in 1960, news references to John F. Kennedy were favorable 75% of the time; whereas in 1992, less than 40% of references to Bill Clinton were favorable).

232. *See* Marc Galanter, *Pick a Number, Any Number*, AM. LAWYER, April 1992, at 82. Professor Galanter analyzes the public's conception of the inadequacies of the American civil justice system. *Id.* Galanter discusses the various public concerns about the legal system; including the feelings that America is the most litigious society in the world, that the courts are overwhelmed with frivolous lawsuits, and that going to court is a first rather than a last resort. *Id.*

233. President Clinton alone has had several other suits filed against him since taking office, most of which failed to survive the President's motion for summary judgment. *See, e.g.,* Day v. Day, 114 S.Ct. 4, 5 (1993) (denying pro se litigant's request to proceed *in forma pauperis* and reprimanding his misuse of the judicial system, which included naming President Clinton as a defendant to his suit); Tyler v. Carter, 151 F.R.D. 537, 537 (S.D.N.Y. 1993) (dismissing case in which President Clinton was named as defendant and against whom a pro se litigant sought to enjoin the World Trade Center bombing trial).

234. *See generally* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1110 (1981) (noting that the courts have been forced to determine the extent of public officials' immunity without the benefit of specific legislation).

reserving the issue for the next case.²³⁵ While the doctrine of immunity law has considerable importance to the effective functioning of government,²³⁶ no constitutional framework exists in which to place the doctrine of executive immunity, unlike the immunity specifically granted to legislative branch members.²³⁷ However, Congress is granted the authority to legislate as necessary to provide for the general welfare of the United States and to make all laws which are necessary and proper for the welfare of the Nation.²³⁸

Although the Necessary and Proper Clause of the Constitution has generally not been read as providing a sweeping grant of implied powers to Congress,²³⁹ the Court has granted Congress great deference in its implementation of federal powers²⁴⁰ since *McCulloch v. Maryland*.²⁴¹ Congressional legislation must

235. *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982). The Court avoided the issue of presidential immunity "as it would arise if Congress expressly had created a damages action against the President of the United States." *Id.*

The immunity judicially granted to the office of the President can be likened to a "constitutional common law." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 704 n.14 (1995). Constitutional common laws are judicially recognized principles based on the Constitution but which are still subject to statutory modification. *Id.*

236. *Butz v. Economou*, 438 U.S. 478, 481 (1978). Immunity law also is an essential part of the "vindication of constitutional guarantees." *Id.*

237. *See Halperin v. Kissinger*, 606 F.2d 1192, 1211 (D.C. Cir. 1979) ("[T]he Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight."). *See also Okun, supra* note 167, at 885 (discussing the policy foundation rather than the constitutional framework of the executive immunity); *see discussion supra* notes 85-92 and accompanying text on congressional immunity.

238. The Constitution states: "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States; . . . [and] To make all Laws which shall be necessary and proper for the carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 1, para. 18.

239. *See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW* 115 (4th ed. 1991). The federal government is one of enumerated powers: it can only act according to the specific powers granted to it. *Id.* The federal government does not possess a general police power and all federal actions must relate to a constitutional grant of power. *Id.* at 121.

240. *Id.*; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) (finding that Congress' judgment is sufficient to determine whether the means chosen to further the ends of an enumerated power are rationally-based).

241. 17 U.S. (4 Wheat.) 316 (1819). The Court in *McCulloch* considered the constitutionality of the second chartering of the Bank of the United States. *Id.* at 319. Maryland attempted to limit the powers of the Bank by levying a tax on the issuance of bank notes. *Id.* at 317. The Bank refused to comply, and Maryland brought an action against the Bank's cashier, McCulloch, for the amounts due. *Id.* at 317.

In *McCulloch*, the Court established three main aspects of federal power, finding that the tax on the Bank was unconstitutional. *Id.* at 426. First, the federal government draws its authority directly from the people. *Id.* at 403-07. Second, the Necessary and Proper Clause allows Congress a wide scope of authority to implement the enumerated powers of the Constitution. *Id.* at 411-25.

simply be reasonably related to a constitutional grant of power.²⁴² Various sources of federal authority appear throughout the Constitution,²⁴³ with the powers of the President specifically enumerated in Article II.²⁴⁴

Congressional legislation protecting the President from having to defend against civil suits while holding office would be reasonably related to upholding the powers constitutionally granted to the President. The President has the special obligation to "preserve, protect and defend the Constitution of the United States" to the best of his ability.²⁴⁵ Legislatively preventing the distraction of the President from his duties is certainly a reasonable and appropriate means of assuring that the President will successfully accomplish his constitutional duties to the Nation. Furthermore, legislation which sets down the exact nature of the immunity available to the President, and which specifies limitations on those suits to which the President must reply, will not disrupt the balance of power between the coordinate branches.²⁴⁶

While the Court in *Nixon* distinctly determined that the President was entitled to absolute immunity against all civil suits regarding official actions, the Court did not declare that an all-encompassing constitutional executive immunity

Finally, the Court found that state legislation which interferes with the exercise of federal powers is invalid. *Id.* at 425-30.

242. NOWAK & ROTUNDA, *supra* note 239, at 121; *McCulloch*, 17 U.S. (4 Wheat.) at 421. As Chief Justice Marshall stated, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

243. Article I lists the basic grants of congressional power. U.S. CONST. art. I, § 8. Article III grants Congress the power to regulate the jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2, cls. 1-2. Article IV grants the federal government a general power over the property of the United States. U.S. CONST. art. IV, § 3, cl. 2.

244. U.S. CONST. art. II, § 2. The President's enumerated duties, among others, include the power as the Commander in Chief of the military, the power to make treaties, and the power to appoint Supreme Court justices. *Id.* § 2, cls. 1-2.

245. U.S. CONST. art. II, § 1, cl. 8.

246. The balance of power between the legislative and executive branches is disrupted only when action taken by Congress "impermissibly undermines the powers of the Executive Branch" or "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977); *Morrison v. Olson*, 487 U.S. 654, 654 (1988). The absolute immunity provided in the model legislation, *infra* notes 253-96 and accompanying text, adopts the same immunity allowed by the Supreme Court in *Nixon v. Fitzgerald*. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). The underlying purpose of the model legislation is to prevent restraining the President in the performance of his duties. The stay provision also seeks to avoid the disruption of the President's tasks.

exists.²⁴⁷ The establishment of a specific statutory framework for the filing of claims against the President, for acts either within or outside the official capacity, would resolve the issue for all similarly-situated plaintiffs. Thus, Congress should take this opportunity to clearly establish that the immunity granted in *Nixon* applies only to suits involving executive actions. In addition, Congress should make clear that certain restraints must be placed on suits against the President to in order protect the welfare of the Nation.²⁴⁸ Providing a stay for any actions filed against a sitting President to which an absolute immunity cannot be claimed will function to the benefit of the Nation as a whole. Congress should adopt the following model legislation which definitively establishes the absolute immunity doctrine and delineates certain limitations on the filing of civil suits to which the President is not immune.

VI. PROPOSAL FOR A PRESIDENTIAL STAY

Although the Supreme Court in *Nixon v. Fitzgerald* arguably established a clear rule for determining civil claims against the President that concern official actions,²⁴⁹ the Court still left open the question of what special status, if any, should be granted to the President for suits concerning non-official acts.²⁵⁰ Although some may feel that Paula Jones' unprecedented civil suit against the President is a one-time publicity stunt staged by conservative activists,²⁵¹ a casual glance at the affairs of the Clintons already made public during his term

247. *Nixon*, 457 U.S. at 755-56. In his concurring opinion, which formed the majority for the five-to-four decision in *Nixon v. Fitzgerald*, Chief Justice Burger specifically noted that absolute immunity does not extend beyond those actions within the scope of the President's official duties. *Id.* at 761 n.4 (Burger, C.J., concurring). Although absolute immunity will not apply to all suits against the President, the policy arguments which favor the President's immunity for official actions are certainly not abandoned altogether when the suit is based on suits outside of his official capacity. See Statement of Interest of the United States at 7, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290).

248. See *infra* notes 253-69 and accompanying text.

249. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). But see Orenstein, *supra* note 215, at 236.

250. *Nixon*, 457 U.S. at 748 n.27; see *supra* notes 193-95 and accompanying text.

251. See, e.g., Tom Teepen, *This Time Jones Is the Victim*, ATLANTA J. & CONST., Dec. 4, 1994, at F5 (alleging that Jones was persuaded to go forward with her suit by a network of right-wing publications and activists). But see George S. Mitrovich & Teresa Godwin Phelps, *Perspective on Presidential Immunity*, L.A. TIMES, May 20, 1994, at B7 ("Only a fool would believe that Jones' action will be the last of such cases if it can be shown that you can seriously damage a President—if not bring about his removal from office—simply by filing a civil suit."); William R. O'Toole, *Discretion Ruled in the Paula Jones Case*, N.Y. TIMES, Jan. 6, 1995, at A26 ("[A]ny President can be held hostage by an unscrupulous opposition orchestrating false accusations of personal misconduct.").

shows that the case is easily duplicated.²⁵² By adopting the following statutory framework, Congress could protect both the interests of the Nation in preserving the office of the President and the interests of potential plaintiffs by establishing exactly how civil actions against the President will proceed.

MODEL LEGISLATION FOR PRESIDENTIAL IMMUNITY
AND SUSPENSION OF CIVIL LIABILITIES

§ 1. Official immunity.

In order to provide for, strengthen, and expedite the effective functioning of the government of the United States, and to enable the President to successfully fulfill the requirements of the presidential office, the President and Vice President of the United States shall be absolutely immune from any civil liability arising out of acts within the outer perimeters of their official responsibilities.

Comment: Section One codifies the absolute immunity granted to the President in *Nixon v. Fitzgerald*.²⁵³ By adopting the language used by the Court in *Nixon*, the proposed legislation firmly establishes the doctrine of absolute presidential immunity for liability in suits arising out of presidential actions. This provision will also prevent confusion between those actions for which the President may claim an absolute immunity,²⁵⁴ and those actions over which the President maintains only a temporary immunity.²⁵⁵ The President maintains an absolute immunity from suits concerning actions within the outer perimeter of his official duties.²⁵⁶ The President's official responsibilities are those

252. For example, a breach of contract or other similar suit could arise out of Clinton's involvement with the Whitewater affair, or one of Clinton's alleged former mistresses could file a paternity action against Clinton. The most realistic example would be if the spouse of a President filed for divorce during his term of office. Omicinski, *supra* note 215.

Although suits such as these examples could certainly be considered politically-motivated maneuvers, the situations involved are everyday situations requiring practical resolutions. *Jones v. Clinton*, 869 F. Supp. 690, 698 (E.D. Ark. 1994).

253. 457 U.S. 731, 756 (1982); *see supra* section IV.B.

254. *See supra* Section IV.B. for a discussion of the absolute immunity available to the President for actions taken within the scope of the presidential office.

255. *See infra* notes 261-69 and accompanying text.

256. *Nixon v. Fitzgerald*, 457 U.S. 748, 756 (1982). The Court in *Nixon* realized that the functional approach normally applied when granting immunity to executive officials would be insufficient when considering the duties of the President. *Id.* at 755-56. The Court "refused to draw functional lines finer than history and reason would support." *Id.* at 755. Due to the many discretionary responsibilities and innumerable functions of the President, many of which are highly sensitive, the Court found that the functional approach would be difficult to apply. *Id.* at 756. Thus, the Court rested absolute presidential immunity on those actions within the "outer perimeter"

which are delegated to his office under the Constitution.²⁵⁷ Thus, Section One does not apply to those suits concerning damages for actions occurring prior to office or those arising outside the realm of presidential duties. Section Two of the model legislation will address those actions by providing the President a "temporary" immunity in those suits.

The provision also includes the office of the Vice President in its grant of absolute immunity for acts performed within the responsibilities of the office. The Vice President's role as the potential President is unique from all other executive branch officials and therefore demands that the office be granted the same immunity as the President in pending civil actions. Because the Vice President, unlike most other executive officials,²⁵⁸ is dependent solely on the President for his official responsibilities,²⁵⁹ and because the Vice President may suddenly assume the responsibilities of the presidential office at any time,²⁶⁰ the absolute immunity doctrine should apply to official vice-presidential actions as well.

§ 2. Suspension of Enforcement of Civil Liabilities.

In order to enable the President of the United States to devote his entire energies to the needs of the Nation, the court in which any action or any proceeding against the President concerning acts occurring prior to taking office or acts arising outside the perimeters of office is commenced or pending, shall order a stay of the action or proceeding for

of the President's office, echoing language from *Barr v. Matteo*. *Id.*; *Barr v. Matteo*, 360 U.S. 564, 575 (1959).

257. See generally THE POWER OF THE PRESIDENCY 14-21 (Robert S. Hirschfield ed., 1968) (summarizing the constitutional provisions concerning the powers of the President); *Nixon*, 457 U.S. at 750 (describing the President's constitutional duty to enforce federal laws, conduct foreign affairs, and manage the executive branch); see *supra* notes 40-48 and accompanying text.

258. Many executive branch officials, such as the executive cabinet members, have specific statutorily-based duties. For example, the Secretary of Agriculture is specifically charged with the duty of filing charges against any agriculture trade association which unlawfully monopolizes or restrains trade in interstate commerce. 7 U.S.C. § 292 (1988 & Supp. V 1993). See also 16 U.S.C. § 5008 (1988 & Supp. V 1993) (charging the Secretary of Commerce and the Secretary of Transportation with enforcing the terms of a conservation treaty).

259. See *supra* section II.B.

260. U.S. CONST. art. II, § 1, cl. 6; see *supra* note 52. The recent months have provided many examples of the safety risks faced by the President everyday, which, in turn, show the potential importance of the office of the Vice President. See Melinda Liu & Douglas Waller, *Terror on the South Lawn*, NEWSWEEK, Sept. 26, 1994, at 42 (describing the kamikaze strike on the White House by a Cessna aircraft pilot who violated the no-fly airzone over Washington, D.C., and crashed into the White House); *Another Attack*, NEWSWEEK, Nov. 7, 1994, at 6 (describing the random attack by Francisco Duran who fired 20 to 30 rounds from a semiautomatic assault weapon at the White House while the President was home).

the length of the presidential term(s) and three months thereafter, the period of the stay not to exceed eight years and three months, unless, in the opinion of the court, the ability of the defendant to defend the action is not materially affected by the responsibilities of the presidential office and the defendant's appearance will not significantly harm national interests.

The court in which any action or any proceeding against the Vice President concerning acts occurring prior to office or acts arising outside the perimeters of office is commenced may, in its discretion, on its own motion, or on application to it, order a stay of the action or proceeding for the length of the vice-presidential term and three months thereafter, the period of the stay not to exceed eight years and three months.

Comment: Section Two attempts to resolve the conflict created by civil suits against the President which arise either before or during the President's term and which are unrelated to presidential activities. Thus, the President receives a stay in all civil actions to which he is not immune when the suits concern actions outside the perimeter of his official duties.²⁶¹ The Court in *Nixon v. Fitzgerald* discussed at length the importance of having an executive free from the diversion caused by pending civil litigation.²⁶² The worthiness of this goal is evidenced by the fact that, since 1940, members of the armed forces have been granted a similar temporary immunity from suit in order to fulfill their obligation to the national defense unrestrained.²⁶³ That the responsibilities of the office of the President are equally important to the safety and welfare of the nation is beyond dispute.

The provision further provides that the granting of a similar stay to the Vice President for actions unrelated to his official duties is within the discretion of the court hearing the suit. Allowing such a stay to the Vice President is necessary because of the importance of the Vice President's office as successor to the

261. This provision is modeled in part after the stay granted to members of the military by the SSCRA. 50 U.S.C. app. §§ 510, 523-524 (1988 & Supp. V 1993). For the full text of the SSCRA stay, see *supra* note 140.

262. *Nixon v. Fitzgerald*, 457 U.S. 731, 751-54 (1982); see also Amar & Katyal, *supra* note 235, at 713 (noting that the President must be prepared at any moment "to do whatever it takes to preserve, protect, and defend the Constitution and the American people.").

263. 50 U.S.C. app. § 521 (1988 & Supp. V 1993). "It would be ironic if everyone in the military except the commander in chief should have th[e] relief [of the stay]." Tony Mauro, *Delay Sought in Jones Sex Suit*, USA TODAY, Aug. 11, 1994, at A4 (quoting Harvard constitutional law professor Laurence Tribe).

President.²⁶⁴ The stay is left in the discretion of the court so that if the court finds that the Vice President's appearance in the suit while holding office will not materially affect the Vice President's ability to defend his interests, nor significantly harm national interests or the functioning of the executive branch, the court may allow the suit to proceed.

Like the stay granted to members of the military,²⁶⁵ the burden of proving that defending the suit would harm neither the interests of the defendant nor the Nation rests on the plaintiff. When applying the stay to the Vice President, the court should additionally weigh the probable length of time which the Vice President would be removed from his duties and the potential that the Vice President would be elected to the presidency, wherein the stay would be mandatory, against a showing of the plaintiff's immediate need for relief. Unlike the stay provided for actions against the Vice President, the model legislation proposes a mandatory stay for any suits against the President while in office. Thus, any plaintiff who alleges that a suit should go forward against the President because a defense by the President would not materially affect his performance of official functions must overcome a heavy presumption to the contrary.

The stay provided to members of the military while serving their Nation is an equitable provision for both parties.²⁶⁶ Granting a similar stay of actions to the President would protect both the interests of potential plaintiffs and the American public. Furthermore, by granting only a temporary stay of the proceedings pending against the President or Vice President, rather than an immunity from suit, this provision also ensures that the Executive is in no way "above the law" in disputes involving personal affairs. Some have argued that the mere filing of suits against the President should not be allowed;²⁶⁷ therefore, the small step that this model legislation takes in an attempt to protect the interests of the Nation certainly does nothing to place the President or Vice President entirely above the law.

Although the statute does allow for a relatively lengthy stay based on the constitutional term limits of the President,²⁶⁸ the fixed time limit provides a

264. The Vice President is constitutionally assigned the duty of assuming the office of the President in the event of the President's inability to act. U.S. CONST. art. II, § 1, cl. 6; U.S. CONST. amend. XXV. See *supra* notes 52-54 and accompanying text.

265. 50 U.S.C. app. § 521 (1988 & Supp. V 1993). See *supra* notes 140-55 and accompanying text.

266. See Baron, *supra* note 134, at 138.

267. Mitrovich & Phelps, *supra* note 251, at B7.

268. The President's term of office is limited to eight years by the Constitution. U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. amend. XXII, § 1.

sense of stability to the plaintiff by providing a specific time when the suit will proceed.²⁶⁹ Instead of waiting throughout the seemingly endless appeal process, as Paula Jones was forced to do, future plaintiffs would know that their case would automatically go forward at the end of the President's term of office. The President and the Nation both have a considerable interest in seeing that the President remains focused on his constitutional responsibilities.

§ 3. Limitations on filing.

The actions of the President or Vice President upon which the suit is based must have been reasonably ascertainable by the plaintiff for not more than two years prior to the current presidential term, and any action or proceeding concerning such actions of the President or Vice President must be filed within six months of either the beginning of the current presidential term, or the time at which the events upon which the suit is based were reasonably ascertainable by the plaintiff.

Comment: Section Three addresses the special circumstances surrounding any potential civil suit against the President. An adjustment in the statute of limitations for filing suit against the President addresses the need to prevent falsified claims from going forward. The Supreme Court has recognized that statutes of limitations are necessary in order to prevent stale claims.²⁷⁰ A two-and-one-half-year period in which to consider whether to go forward with a suit

269. The provision of a stay for suits filed against the President while in office is also justified based on the court's right to arrange its calendar as it sees fit. FED. R. CIV. P. 40. "The district courts shall provide by rule for the placing of actions upon the trial calendar . . ." *Id.* District courts are allowed to fix trial dates "as the courts deem expedient." *Id.* "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

By providing that suits against the President will be stayed during the President's term of office, the court is making an adjustment in its calendar schedule based on the needs of the parties. See Whitman Knapp, *Discretion Ruled in the Paula Jones Case*, N.Y. TIMES, Jan. 6, 1995, at A26. Judge Knapp is a District Court Judge for the Southern District of New York. *Id.* Judge Knapp argued that the great disparity between the needs of the President of the United States and those of a plaintiff who waited until two days before the expiration of the statute of limitations to file her claim placed Judge Wright's decision to postpone the trial within the discretion granted to the court under Federal Rule of Civil Procedure 40. *Id.*

270. See *Garcia v. Wilson*, 471 U.S. 261, 271 (1985) (allowing federal claims to go forward at any time would be "utterly repugnant to the genius of our laws" (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1905))); Robert M. Jarvis & Judith Anne Jarvis, *The Continuing Problem of Statutes of Limitations in Section 1983 Cases: Is the Answer Out at Sea?*, 22 J. MARSHALL L. REV. 285, 291 (1988). The Court in *Garcia* recognized that "even wrongdoers are entitled to assume that their sins may be forgotten." *Garcia*, 471 U.S. at 271.

against the President is a fair amount of time for a plaintiff to establish any claim.²⁷¹ Moreover, claims that are truly legitimate should easily present themselves within the statutory time limits.

This statute of limitations will apply to any and all claims against the President for actions taking place prior to or after inauguration.²⁷² In the event that the incidents upon which the President's liability is alleged occur during the presidential term, the six-month window for the filing of suits during the President's term will accordingly begin at the time which the events were reasonably ascertainable to the plaintiff, rather than at the beginning of the current presidential term. Although this provision may at first seem unduly harsh, a six-month statute of limitations for a federal claim is not unusual.²⁷³ Furthermore, the six-month limitation applies only to suits filed during the President's term of office. If the plaintiff's claim arises at a point in the President's term so that the claim's applicable statute of limitations has not otherwise run at the end of the President's term, the plaintiff is always free to file suit against the former President for actions arising outside of the presidential duties.

Section Three also prevents the use of the courts as a medium for a mud-slinging campaign against the President or his political party. The proposed legislation limits the potential for offensive suit-filing as a political weapon of the opposing party by limiting suits to those discovered within a reasonably short period prior to the President's taking office. Although the legal liabilities of the person holding presidential office are a matter of public concern, allowing civil suits unrelated to executive activities to be filed and go forward, even if at a later date, may open the doors to false claims against the President in an

271. Most personal injury actions under state laws have relatively short statutes of limitations; therefore, such a limitation on suits against the President is not extraordinary. See *Jarvis & Jarvis*, *supra* note 270, at 287. For example, Colorado law provides that suits for injuries resulting from assault and battery or false imprisonment must be brought within one year. *Id.* at 287 n.17. Nor would this statute of limitations on actions against the President stand out amongst congressionally-mandated statutes of limitations. *Id.* at 291. For instance, certain statutes of limitations under federal maritime law require suits to be filed within as little a time period as six months. *Id.* at 291 n.46.

272. Thus, the stay will also necessarily apply to suits filed against the President-elect, since the stay in section two of the model legislation also applies to any suits pending against the President while in office.

273. See, e.g., 5 U.S.C. § 7118(a)(4)(A) (1994) (providing that complaints filed against labor organizations for unfair labor practices must be filed within six months of the alleged unfair labor practice); 28 U.S.C. § 2401(b) (1988) (providing that all tort claims against the United States which are denied by the appropriate federal agency are barred unless action against the United States is begun within six months of the agency's notice of final denial of the claim). See also GA. CODE ANN. § 36-33-5 (1994) (providing that all claims for monetary damages must be presented to the governing authority within six months of when the events upon which the claim is based occurred).

attempt to prematurely end the President's time in office. Attaching a shorter limitation period to the filing of claims arising prior to office should help to reduce the filing of concocted lawsuits against the President.²⁷⁴

§ 4. Discovery.

In order to preserve necessary evidence which would be adversely affected by a lengthy stay of any action or proceeding against the President or Vice President granted under the provisions of Section Two, the court may, in its discretion, on its own motion, or by request of a party, order the interrogatories of either the plaintiff, the defendant, or both, in any action or proceeding against the President or Vice President, to be taken at the time of the order of the stay. These interrogatories shall be placed under seal of the court until such time as the action or proceeding goes forward. The court shall also grant a protective order over the contents of the interrogatories known to either party, violation of which would place either party under the contempt powers of the court. Upon settlement of the action or proceeding prior to trial, each parties' interrogatories under seal with the court may be returned to such party upon request.

All other discovery, including depositions, additional interrogatories, requests for production, or requests for admissions, shall be stayed, upon request of either party, for a period not to exceed the period of eight years and three months or the period of the stay granted under Section Two of this Act. Upon a showing of good cause, the court hearing the action may make such orders for additional discovery as are necessary to preserve evidence which would not otherwise be available until the time of trial.

Comment: Section Four, unlike the district court's decision in *Jones v. Clinton*,²⁷⁵ provides that only the interrogatories of the primary parties may

274. See generally Burney, *supra* note 223, at 1164 (arguing that although a small number of meritorious claims may be precluded based on presidential immunity, that cost is imperative in order to maintain the effective operation of our government).

275. 869 F. Supp. 690 (E.D. Ark. 1994). Judge Wright, in a controversial decision, elected to deny a grant of absolute immunity to the President. *Id.* at 698. Although the court granted a temporary immunity to the President, the court held that the full discovery and deposition process should proceed. *Id.* at 699.

be taken while the suit is stayed. Once taken, the interrogatories will remain under seal with the court until the time of trial or settlement. This provision provides a compromise between the threat of lost evidence on the one hand, and placing unnecessary demands on the President's attention while in office on the other.

The stay provided by this section simply codifies a stay of discovery which could be granted by the court hearing the action under the applicable civil procedure rules on discovery.²⁷⁶ A protective order requiring the use of only interrogatories is especially appropriate when the party to be deposed is a

However, after President Clinton served notice of his intent to appeal the district court's denial of absolute immunity to the Eighth Circuit, the President filed a motion for a stay of the district court's order regarding discovery. *Jones v. Clinton*, 879 F. Supp. 86, 87 (E.D. Ark. 1995). On February 24, 1995, the district court granted the President's motion for a stay of all discovery proceedings, finding that an appeal from a denial of presidential immunity requires a stay of *all* proceedings pending resolution of the appeal. *Id.* On January 9, 1996, the Eighth Circuit affirmed the court's denial of President Clinton's motion to dismiss and to allow discovery to go forward, but reversed its order granting a stay of the trial for the duration of his presidency. *Jones v. Clinton*, 1996 WL 5658, at *7 (8th Cir. Jan. 9, 1996).

276. Federal Rule of Civil Procedure 26(c) authorizes protective orders granting a stay of discovery. FED. R. CIV. P. 26(c); 2 DISCOVERY PROCEEDINGS IN FEDERAL COURT 9 (Jon L. Craig et al. eds., 2d ed. 1991) [hereinafter DISCOVERY]. Rule 26(c) provides:

Upon motion by a party . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . :

(2) that the disclosure or discovery may be had only on specified terms and conditions . . . ;

(6) that a deposition, after being sealed, be opened only by order of the court

FED. R. CIV. P. 26(c)(2), (6).

In addition, Rule 26(b)(2) authorizes the court to limit the use of discovery methods if the burden of the proposed discovery outweighs its likely benefit. FED. R. CIV. P. 26(b)(2). Rule 26(b)(2) provides:

The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that:

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(iii).

Therefore, the discovery methods mandated by the model legislation proposed in this note do not provide any limitations on discovery methods which are not already within the power of the court to require.

governmental official.²⁷⁷ Interrogatories can provide the same detailed information as that discovered through the use of depositions.²⁷⁸ In addition, upon a showing of good cause,²⁷⁹ the model legislation provides that a party may request additional discovery methods if required for the preservation of necessary evidence.²⁸⁰

Although the problem of lost evidence is certainly considerable whenever a trial is delayed for any length of time,²⁸¹ allowing full pretrial discovery to go forward would place nearly the same constraints on the President's attention as would a trial.²⁸² Placing a limit on discovery places an equal burden on both parties.²⁸³ By allowing only interrogatories of the main parties to be taken, the risk of loss of any additional evidence will be born by both of the parties equally. Furthermore, full discovery would require the active

277. 2 DISCOVERY, *supra* note 276, at 16. To depose government officials or heads of government agencies, the party seeking discovery must usually show that the deposition is necessary to prevent injustice, or that the information cannot be obtained through the use of interrogatories. *Id.*; see also *United States v. Northside Realty Assoc.*, 324 F. Supp. 287, 295 (N.D. Ga. 1971) (granting a protective order against depositions of the Attorney General and the Secretary of Housing and Urban Development); *Peoples v. United States Dep't of Agric.*, 427 F.2d 561, 567 (D.C. Cir. 1970) (providing that a cabinet officer is not subject to an oral deposition).

278. 1 DISCOVERY, *supra* note 276, at 308. Interrogatories can save time and promote definiteness and certainty of issues. *Id.*; see also *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 190 (N.D. Ill. 1985) (finding that interrogatories were a proper method of providing information and depositions were not a preferred discovery method); *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 43 (S.D.N.Y. 1984) (finding that interrogatories may affect judicial economy, may avoid delay, and may narrow issues for trial).

279. A showing of good cause by the party requesting the protective stay would usually be required for the granting of a protective stay similar to that provided statutorily by this section. FED. R. CIV. P. 26(c); 2 DISCOVERY, *supra* note 276, at 4-5.

280. The court should balance the interests of the plaintiff seeking discovery against the public interest in an undistracted President. See generally 2 DISCOVERY, *supra* note 276, at 4-5 (describing the burden of establishing good cause for protective orders). The plaintiff must demonstrate a particular need for the preservation of the evidence requested, by a showing that a clearly defined and serious injury will result to the plaintiff if the evidence is not immediately preserved. *Id.*

In addition, the parties in litigation against the President should be able to cooperate sufficiently to protect against the loss of necessary evidence. President Clinton recognized the necessity of preserving documentary evidence in the *Jones* case and has suggested that the parties could cooperate to obtain informal discovery after the formal discovery process was stayed by the district court. *Jones v. Clinton*, 879 F. Supp. 86, 88 (E.D. Ark. 1995).

281. Evidence may be physically lost or witnesses may die, disappear, become incapacitated, or become forgetful. See *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994).

282. See *Minzesheimer*, *supra* note 207, at 4. Although pretrial proceedings would be likely to draw less attention than the actual trial, the President would still need to consult with his attorneys to a significant degree for any pretrial discovery. *Id.*

283. See Statement of Interest of the United States at 11 n.8, *Jones* (No. LR-C-94-290). The chance of evidence being lost or witnesses forgetting information is equally likely to happen to the President's case as it is to any plaintiff's case. See *Amar & Katyal*, *supra* note 235, at 723.

participation of the President at every step of the process in order to ensure that his counsel adequately represented the President's interests. This would be an equal burden on the President's attention, and should be stayed in order to preserve the President's attentions for national interests.²⁸⁴

§ 5. Transfer of Venue for Convenience.

Any suit, action, or proceeding against the President of the United States may be brought in the District of Columbia, as well as any other district in which it may have been brought according to the applicable statute. The district court where the suit was originally brought shall consider the District of Columbia as a district where any civil suit against the President or Vice President might have been brought for purposes of transferring the suit for the convenience of the parties and witnesses.

Comment: Section Five again helps eliminate any unnecessary distraction of the President from the duties of office by providing that the District of Columbia shall automatically be considered a district meeting the federal venue requirements in suits against the President.²⁸⁵ Venue is the appropriate place for trial within a given jurisdiction.²⁸⁶ Selecting the proper venue primarily consists of choosing a convenient forum for the witnesses and litigants,

284. "[Discovery would be] a distraction for the President and . . . it is inconsistent with the basic premise of the judge's decision." Carl Rauh, President Clinton's attorney, *quoted in Judge Preserves Harassment Suit Against Clinton*, ORLANDO SENTINEL, Dec. 29, 1994, at A1. "An especially burdensome part of discovery is the taking of depositions, which often last for several days and occasionally even weeks." Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 563 (1992) (presenting recommendations of the President's Council on Competitiveness).

In addition, one commentator has observed that the deliberative or inadvertent release of any potentially sensitive information discovered during the fact-finding process would also be very disruptive to the national interest. *Paula Jones' Suit Moves On*, PHOENIX GAZETTE, Jan. 7, 1995, at B6. A plaintiff suing a President should adjust to the peculiar demands of the office. *Limited Immunity From Trial, Not Past Conduct*, SEATTLE TIMES, Jan. 2, 1995, at B4.

285. See 28 U.S.C. §§ 1391(a)-(b), 1404(a) (1988 & Supp. V 1993). In a diversity suit, proper venue exists in the federal district where: (1) the defendant resides, if all defendants reside in the same state; (2) in a judicial district where a substantial amount of the events giving rise to the claim occurred; or (3) where the defendant is subject to personal jurisdiction if the suit may be brought in no other district. *Id.* § 1391(a). In a suit involving a federal question, the first two venue possibilities are the same, but the third is changed to consist of any district where the defendant may be found if the suit may be brought in no other district. *Id.* § 1391(b). However, district courts with proper venue may also transfer any civil action to any other district where the suit could have been brought, for the convenience of the parties and witnesses and in the interest of justice. *Id.* § 1404(a).

286. Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 788 (1985).

particularly the defendant.²⁸⁷

Venue generally affords defendants protection against defending an action far from their homes or from the location at which evidence is most likely available.²⁸⁸ The model legislation merely adds the District of Columbia as a district with permissible venue.²⁸⁹ This provides two opportunities to avoid inconveniencing the President. First, plaintiffs may now file suit in the district in which the President is temporarily residing without the limitation of impermissible venue. Secondly, and more importantly, this provision allows the district court where the suit is filed to transfer the action to Washington, D.C., if convenient for the parties and if in the interest of justice.²⁹⁰ In particular, adding Washington, D.C., as a court having permissible venue would permit any discovery which was allowed under Section Four of the model legislation to be administered by the federal court for the District of Columbia. This venue provision is not an automatic strike against the plaintiff's choice of forum, but rather statutorily expands the available venues as an aide in preventing the potential distraction of the President.

§ 6. Recovery of Interest.

To any judgment of damages awarded to the plaintiff in a civil suit against the President or Vice President which was stayed under the provisions of Section Two of this Act, the court may, upon request of the plaintiff, award additional compensation in the form of prejudgment interest based on the length of time from the order of the stay to the date of trial.

Comment: Finally, Section Six provides a means by which to ensure that a winning plaintiff is compensated for the time lost under the provisions of this legislation. Although no amount of damages can ever truly make up for lost

287. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180, 183-84 (1979). The restraints on permissible venues depend on considerations of convenience for the litigants and witnesses. 1A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.340[1.-1], at 4007 (2d ed. 1994).

288. *Id.*

289. The phrase "unless otherwise provided by law" in § 1391(a)-(b) allows actions to be brought in districts where other special provisions of law, such as this model legislation, state that the action may be brought. 1A MOORE ET AL., *supra* note 287, ¶ 0.344[1.-1], at 4209 n.19.

290. The burden to establish that the action should be transferred will rest on the defendant, generally the moving party. 1A MOORE ET AL., *supra* note 287, ¶ 0.345[5], at 4360. The exercise of the power to transfer venue is in the sound discretion of the district court in light of all the circumstances of the case. *Id.* at 4362. Ordinarily, the plaintiff's choice of venue will be entitled to great deference, and will be outweighed only if the public interest in transfer is great. *Id.* at 4362-63.

time, when a plaintiff seeks monetary damages to compensate for injuries suffered at the hands of the defendant, an award of prejudgment interest for the length of time that the suit was stayed should provide additional benefit to the prevailing plaintiff.²⁹¹ The primary objective of awarding damages has always been to compensate the injured plaintiff,²⁹² and a denial of prejudgment interest frustrates this goal.²⁹³

Although courts traditionally required an ascertainable loss in order to award prejudgment interest,²⁹⁴ statutes which specifically provide prejudgment interest regardless of whether the loss is liquidated create incentives for settlement and deter delay.²⁹⁵ The proposed legislation provides prejudgment interest from the commencement of the action to compensate plaintiff for the delay necessitated by the position of the President.²⁹⁶ Although the plaintiff's rights to have her claim expeditiously heard are outweighed in this instance by the public interest in an undistracted executive, no such public policy interest can deny the plaintiff a just award and full compensation.

VII. CONCLUSION

The concept of presidential immunity from suit while in office is essential to the effective functioning of the United States government. A stay of all suits not relating to presidential functions does not grant an unconstitutional immunity to the President. Rather, it places simple limitations on the filing of suits against the President. Although a plaintiff's relief may be temporarily delayed, the preservation of the welfare and safety of the Nation depend in part on

291. Prejudgment interest is awarded at the time of the judgment, but begins accruing at a time before the judgment. 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES* 335 (2d ed. 1993). It serves to compensate plaintiffs for their loss of investment opportunities. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985).

292. *KEETON ET AL.*, *supra* note 59, § 2, at 11. The goal of any damages award in a civil suit is generally not to punish the defendant. *Id.* at 9. "The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 115 S. Ct. 2091, 2095 (1995).

293. *See Cavnar*, 696 S.W.2d at 552. Plaintiffs are not fully compensated if awarded only the amount of damages sustained at the time of the incident giving rise to the suit. *Id.*; 1 DOBBS, *supra* note 291, at 333.

294. *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1157 (7th Cir. 1989). However, the court in *Zayre* points out that the recent trend has been to award prejudgment interest in order to fully compensate plaintiffs for their injuries. *Id.*

295. 1 DOBBS, *supra* note 291, at 346. A statutory award of prejudgment interest may seek to punish unreasonable delay. *Id.*

296. By entitling prevailing plaintiffs to prejudgment interest on their awards, the financial "cost" of delay is significantly reduced. *See Statement of Interest of the United States at 10 n.7, Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) (No. LR-C-94-290).

protecting the President from the unnecessary distraction of defending a civil suit while in office.

The model legislation proposed by this Note offers a much needed sense of finality on the issue of what will happen when a civil suit is filed against the President of the United States. The plaintiff will no longer be forced to venture unknowingly through a lengthy appeals process which is currently the norm in any suit against the President. Consequently, the plaintiff will be prepared for the exact procedures involved when suing the President.

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