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Introduction

When in the fall of 1990 President George Bush announced a shift in his Persian Gulf strategy from a defensive to an offensive posture, a number of lawsuits were filed against the President questioning his power to commence military operations against Iraq without congressional approval.[1] In the controversy surrounding the President's policy, little attention was paid to the form of this protest, and yet the filing of these lawsuits represents a quiet revolution in presidential accountability under the rule of law.

From the end of the Civil War until the final days of the Watergate drama, legal gospel held that the President of the United States enjoyed immunity from suit. With the issuance of its opinion in *United States v. Nixon*[2] in 1974, however, the Supreme Court demonstrated that a President could be amenable to legal process. Since that date, the federal courts have entertained numerous actions by private and government litigants against Presidents of the United States. The Court has never, however, provided a rationale for this doctrinal shift, leaving the lower courts to evaluate the propriety of actions against Presidents under an assortment of oblique legal theories.

The question of whether the nation's chief executive may be sued touches the quick of the American system of government. On one side are the arguments that support immunity from suit: the

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[1] *See infra* notes 359-87 and accompanying text.

[2] 418 U.S. 683 (1974).

special deference owed to the President as the only government official elected by all the people; the extraordinary demands on the President's time and energy imposed by the duties of his office; and the lingering sense, embodied by the political question doctrine, that the voting booth rather than the courthouse is the proper forum for resolving disputes over presidential conduct. The counterarguments are equally fundamental: the constitutional mandate for checks on the powers of each branch of government; the role of the courts as a politically insulated and therefore independent expositor of the law; and the precept that no person, even the President, is above the law.[3]

It is therefore surprising that the Supreme Court has never resolved the question of the President's amenability to suit.[4] Although lower federal courts ruled on the issue in several Watergate cases filed against President Richard Nixon,[5] the Supreme Court limited its opinion in *United States v. Nixon* to the executive

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[3] There is a voluminous literature about the presidency. The classic book on the subject is EDWARD CORWIN, THE PRESIDENT, OFFICE AND POWERS (1957). *See also* CLINTON ROSSITER, THE AMERICAN PRESIDENCY (1956); ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); GLENDON SCHUBERT, THE PRESIDENCY IN THE COURTS (1957); BERNARD SCHWARTZ, THE SUPREME COURT (1957); ROBERT G. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY (1971); WILLIAM H. TAFT, THE PRESIDENCY (1916). For useful articles on judicial restraint of presidential power, see, for example, Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982); P. Allan Dionisopoulos, *New Patterns in Judicial Control of the Presidency: 1950's to 1970's*, 10 AKRON L. REV. 1 (1976-77); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987); John P. Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, *in* THE PRESIDENCY 701 (Aaron Wildavsky ed., 1969); William F. Swindler, *The Supreme Court, the President and Congress*, 19 INT'L & COMP. L.Q. 671 (1970); H.G. Peter Wallach, *Restraint and Self Restraint: the Presidency and the Courts*, 7 CAP. U. L. REV. 59 (1977-78); Stephen L. Wasby, *The Presidency Before the Courts*, 6 CAP. U. L. REV. 35 (1976-77); Raul Robert Tapia et al., Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352 (1974).

[4] Although the Court has not addressed the issue, others in the past have expressed great skepticism about the ability of the courts to control executive conduct. Three scholars writing in the 1950s agreed that the courts had little power to restrain the President. Edward Corwin observed: "Judicial review has been, in fact, of somewhat minor importance in determining the scope of presidential powers. While the Court has sometimes rebuffed presidential pretensions, it has more often labored to rationalize them; but most of all it has sought on one pretext or other to keep its sickle out of this 'dread field.'" CORWIN, *supra* note 3, at 17-18. Glendon Schubert announced: "It should be perfectly obvious by now that the most significant aspect of judicial review of presidential orders is its ineffectiveness." SCHUBERT, *supra* note 3, at 347. Clinton Rossiter concluded: "For most practical purposes the President may act as if the Supreme Court did not exist. . . . It is clearly one of the least reliable restraints on presidential activity." ROSSITER, *supra* note 3, at 38-40.

[5] *See, e.g.*, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); *infra* notes 135-43 and accompanying text.

privilege problem in the context of a subpoena *duces tecum*.[6] That opinion apparently satisfied both litigants and the lower courts that the President was an approved defendant, and numerous cases have been filed against President Nixon's successors without occasioning further discussion of the amenability issue by the courts.[7]

Although the legal result seems entirely appropriate, the curious lacuna left in the Supreme Court's jurisprudence raises serious institutional concerns. One of the Court's primary responsibilities is the resolution of disputes between the branches of government. Acting as what Justice Frankfurter called "the mediator of powers within the federal system,"[8] the Court is the final arbiter of the conflicting authority and privileges claimed by the judiciary and its coordinate branches. By allowing a result without a rationale, the Court has abdicated that function in favor of an unarticulated change in the law of separation of powers. As a consequence, the lower courts have struggled to evaluate the demands of plaintiffs seeking relief from the President in light of the special nature of the presidential office and their own authority to restrain presidential conduct. This Article analyzes the leading cases concerning the President's role in the judicial process,[9] reviews the responses of the lower federal courts,[10] and discusses the implications of the Court's abdication of its institutional role.[11]

I. LITIGATION AND THE PRESIDENT

A. The President as Witness: United States v. Burr[12]

When counsel for John Poindexter and Oliver North subpoenaed former President Ronald Reagan to testify at their Iran-Contra trials and to produce his White House diaries,[13] it seemed likely that for the third time in American history members of the Supreme Court would face a presidential assertion of exemption

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[6] See United States v. Nixon, 418 U.S. 683, 703-714 (1974).

[7] *See infra* part II.

[8] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 667 (1943) (Frankfurter, J., dissenting).

[9] See *infra* part I.

[10] *See infra* part II.

[11] See *infra* Conclusion.

[12] 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

[13] For a useful account of the Iran-Contra prosecutions, see 45 CONG. Q. ALMANAC 551-65 (1989); 46 CONG. Q. ALMANAC 534-35 (1990).

from furnishing evidentiary material to a federal court. The Reagan controversy never reached the Supreme Court, but it did reawaken concerns about the participation of the President in judicial proceedings, a situation that has not to date been clearly illuminated by the Supreme Court.

In light of the pervasive role of the President in American political life, it is surprising that the President has been summoned so seldom by a court to provide testimony or evidence.[14] Under the American system of government, the President is subject to the rule of law and has no constitutional immunity from the citizens' general duty to assist the courts in the performance of their judicial duties. Yet, on those few occasions when a President, current or former, was served with a third party subpoena—Thomas Jefferson by Aaron Burr, Nixon by the Watergate special prosecutor, Reagan by Oliver North and John Poindexter—the resulting confrontations revealed the chief executive's notable reluctance to play his part in the judicial process and the judiciary's equally notable caution in forcing his participation. Of course, each of these confrontations involved the most sensational political drama of its day, a motif that may help to explain both the fact that a President was subpoenaed and the basis for his reluctance to cooperate. A comparison of the judicial resolutions of the Burr and Watergate subpoenas reveals the curious ambivalence that surrounds the idea of the President as witness.

The celebrated episode of Aaron Burr's trial for treason bears some remarkable resemblances to the even more celebrated episode of the Nixon tapes. In each case, a President resisted a subpoena *duces tecum* issued by a federal court in a trial of high political import and great public interest. In each case, a President was suspected of placing his own political objectives above the demands of the judicial process while using the rhetoric of constitutional prerogative as a screen. And in each case, an opinion by a Chief Justice denied the President the absolute privilege asserted without either rejecting or setting firm boundaries for a modified privilege.

In 1807, Aaron Burr was accused of raising an army to lead against Spain and of conspiring to divide the union; Chief Justice John Marshall presided over the ensuing trial in his capacity as

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[14] For an account of those instances, see Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. ILL. L.F. 5 (1975).

circuit justice.[15] Burr, who had lost the presidential election of 1801 to Jefferson by a single vote, was the target of powerful hostility from the President and his partisans in the Republican Party.[16] Jefferson, President and lawyer, had gone so far as to assert to Congress that of Burr's guilt "there can be no doubt."[17] Marshall, Federalist and author of *Marbury v. Madison*,[18] represented the independent judiciary that Jefferson denounced as a threat to liberty and democratic government. Albert J. Beveridge, Marshall's biographer, called his chapter discussing the trial "Administration Versus Court," capturing neatly the polarized atmosphere that preceded the decision by Burr's counsel to subpoena from Jefferson a letter written to him by General John Wilkinson, the prosecution's chief witness against Burr, and copies of orders issued to the Army and Navy concerning Burr's apprehension.[19]

The argument over Burr's motion was hard fought, lasting over two days. An observer noted that although only a few issues were addressed, "Much ability and eloquence were displayed by both sides."[20] The government's counsel, led by Jefferson's United States Attorney George Hay,[21] first raised a preliminary objection to the motion for subpoena, on the ground that Burr was not entitled to the use of process because he had not yet been indicted by the grand jury.[22] Curiously, the government then conceded Burr's right to serve the President with a subpoena *ad testificandum* while balking at the subpoena *duces tecum*.[23] Such a subpoena, the

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[15] Also sitting with Marshall was Cyrus Griffin, a district court judge. 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 112 (photo. reprint 1969) (1808). Albert J. Beveridge, John Marshall's biographer, observed that Griffin's impact "throughout the proceedings was negligible." 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 398 (1919).

[16] For an account of Jefferson's political hostility to Burr, see 3 BEVERIDGE, *supra* note 15, at 277-80.

[17] United States v. Burr, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14,692d).

[18] 5 U.S. (1 Cranch) 137 (1803).

[19] *See* 3 BEVERIDGE, *supra* note 15, at 398. Marshall concluded that a subpoena for the military orders should properly be directed not to the President but to "the head of the department in whose custody the orders are." Burr, 25 F.Cas. at 38.

[20] *Burr*, 25 F.Cas. at 31.

[21] Hay was accompanied by William Wirt and Alexander MacRae. 3 BEVERIDGE, *supra* note 15, at 407.

[22] *See Burr*, 25 F.Cas. at 32 ("Until the grand jury shall have found a true bill, the party accused is not entitled to subpoenas . . . .").

[23] *See id.* at 34. Wirt argued:

> The counsel for the prosecution do not deny that the general subpoena *ad testificandum*, may be issued to summon the president of the United States, and that he is as amenable to that process as any other citizen. If his public

government argued, was improper because the President could not be compelled to disclose confidential communications; further, the release of those communications, like the Wilkinson letter, might pose a threat to national security.[24] The government also disputed the assertion in Burr's supporting affidavit that the subpoenaed papers were material to Burr's defense[25] and rejected the claim for original documents when certified copies were available.[26]

Burr's team of defense lawyers[27] acknowledged that a subpoena *duces tecum* might create a potential national security problem by asking for sensitive documents but insisted that the President could raise that problem in his response to the subpoena.[28] There was, however, no basis in law for the government's broader claim of a presidential privilege for confidential communications. On the issue of materiality, the defense insisted on the importance of confronting Wilkinson, whose testimony formed the cornerstone of the prosecution's case, on the witness stand with his original letter.[29] The defense also denied that the executive branch had made certified copies of subpoenaed documents available.[30]

> functions disable him from obeying the process, that would be a satisfactory excuse for his non-attendance *pro hac vice*; but does not go to prove his total exemption from the process.

1 ROBERTSON, *supra* note 15, at 136.

[24] *See Burr*, 25 F.Cas. at 31. MacRae argued for the government that "if a communication is confidentially made to Thomas Jefferson, he is not bound to appear before this or any other court, to disclose it." 1 ROBERTSON, *supra* note 15, at 133. Wirt maintained "that there may be cases in which the very safety of the state may depend on concealing the views and operations of the government," and that Wilkinson's letter was such a case. *See* 1 *id.* at 142.

[25] In making this argument, Hay relied heavily on the language of Burr's affidavit, which asserted that Wilkinson's letter "*may* be material." 1 ROBERTSON, *supra* note 15, at 149 (emphasis in original).

[26] *See* 1 *id.* at 141.

[27] Burr was represented by John Wickham, Edmund Randolph, Benjamin Botts, Luther Martin, and John Baker. 3 BEVERIDGE, *supra* note 15, at 407.

[28] Wickham argued: "The writ of subpoena *duces tecum* ought to be issued, and if there be any state secrets to prevent the production of the letter, the president should allege it in his return. . . ." 1 ROBERTSON, *supra* note 15, at 146. Although Botts insisted that "[i]n a government of laws, . . . there are but few instances in which the policy of state secrecy can prevail," he also conceded that parts of the subpoenaed material might be confidential. *See* 1 *id.* at 134. Wickham questioned whether the problem of confidential material could be addressed by placing "an indorsement on such as the president would not wish to go out of the court?" 1 *Id.* at 121.

[29] *See* 1 *id.* at 147.

[30] *See Burr*, 25 F.Cas. at 31-32. Luther Martin claimed that the defense "did apply for copies; and were refused under presidential influence." 1 ROBERTSON, *supra* note 15, at 128.

The foregoing summary of the legal arguments presented fails to capture the passionate delivery and hyperbolic rhetoric of counsel for both sides, recorded in contemporary accounts. Luther Martin, one of Burr's lawyers, denounced Jefferson for proclaiming Burr's guilt before trial in these terms:

> He has assumed to himself the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend.[31]

William Wirt's response for the government was no more restrained. He imagined the reaction of a foreigner observing the conduct of Burr's counsel and the court's tolerance of that conduct: "It would only be inferred, while they are thus suffered to roll and luxuriate in these gross invectives against the administration, that they are furnishing the joys of a Mahometan paradise to the court as well as to their client."[32] Although Marshall cautioned counsel that "the gentlemen on both sides had acted improperly in the style and spirit of their remarks," and urged them to "confine themselves on every occasion to the point really before the court,"[33] the arguments remained intemperate throughout.[34]

Marshall's opinion on the motion is itself a good deal more temperate than the debate that preceded it. On the preliminary issue of Burr's right to court process, Marshall concluded that "[u]pon immemorial usage . . . and upon what is deemed a sound construction of the constitution and the law of the land," an accused was entitled to compulsory process and thus could subpoena witnesses to appear before the grand jury.[35] Although the prosecution had conceded that a subpoena *ad testificandum* might

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[31] 1 ROBERTSON, *supra* note 15, at 128.

[32] *Id.* at 145.

[33] *Id.* at 147-48.

[34] At one point, Robertson reported that "some warm desultory conversation took place at the bar." *Id.* at 117. For other examples of heated rhetoric, see *id.* at 137 (noting that Wirt asked on behalf of the government: "Would you expose the offices of state to be ravaged at the mere pleasure of a prisoner, who, if he feels that he must fall, would pant for nothing more anxiously than 'to *grace* his fall and make his ruin glorious,' by dragging down with him the bright and splendid edifice of the government?") (emphasis in original); *id.* at 155 (noting that Randolph described the trial as the "funeral pile of the prosecution" at which General Wilkinson "is to officiate as the high priest of this human sacrifice").

[35] *See Burr*, 25 F. Cas. at 33.

issue to the President, Marshall felt it important to address that question nonetheless, and his answer cuts to the core of the relation of the President to the court.

The starting point for Marshall's analysis was the language of the Sixth Amendment that assures the accused "compulsory process for obtaining witnesses in his favor."[36] That language, Marshall noted, contained "no exception whatever," and therefore only a person excused by the law of evidence from testifying could be exempt from the issuance of a subpoena.[37] Is the act of testifying in court such an affront to the personal dignity of the President that no subpoena naming him should issue? Marshall answered this question by comparing the American President with the English king. The king can do no wrong, while the President may be impeached for high crimes and misdemeanors. The king inherits his office and "can never be a subject," while the President is elected for a term and then "returns to the mass of the people again."[38] For Marshall, these selected points illustrated "[h]ow essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the chief executive."[39]

In his insistence on the distinction between king and President, Marshall was continuing a line of political argument that permeated the debates surrounding the drafting and adoption of the Constitution. The prerogatives of the British crown, explained in detail by Blackstone, were familiar to the Framers and their contemporaries as a form of executive authority to be avoided in the creation of the new republic.[40] As set forth by Blackstone, these prerogatives constituted the royal dignity that set the king apart from his subjects "by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation."[41] The king possessed both "*sovereignty*,

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[36] U.S. CONST. amend. VI.

[37] *See Burr*, 25 F. Cas. at 34.

[38] *Id.*

[39] *Id.*

[40] Blackstone was among the legal sources read and cited by the colonists. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 7, 14 (1969). When the colonists drafted their state constitutions, they were at pains to reject the executive prerogatives possessed by the British crown. *Id.* at 135-37. Notably, when Blackstone was first published in America in 1771, John Marshall's father was one of the original subscribers, and according to Beveridge, "Thomas Marshall saw to it that his son read Blackstone as carefully as circumstances permitted." 1 BEVERIDGE, *supra* note 15, at 56.

[41] 1 WILLIAM BLACKSTONE, COMMENTARIES *241.

or pre-eminence,"[42] and "absolute *perfection*;"[43] as a ruler he possessed as well "absolute immortality," surviving politically the deaths of the individuals who wore the crown.[44] Blackstone concluded that "[i]n the exertion, therefore, of these prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution."[45]

The royal prerogatives furnished the king with protections unavailable to any of his subjects. As a consequence of his pre-eminence, no legal action could be brought against the king in any of his own courts: "For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but, who, says Finch, shall command the king?"[46] As a consequence of his perfection, "The king can do no wrong."[47] Thus, in the political sphere, error by the government "is not to be imputed to the king, nor is he answerable for it personally to his people."[48] The king, then, enjoyed both legal and political immunity from the ordinary processes of correction and retribution. Blackstone was, however, at pains to explain that the British constitution provided some recourse to the king's subjects. For private injuries, they could seek discretionary relief in the court of chancery;[49] for public harms, the king's counsellors could be indicted and impeached.[50] There was, however, no possibility under the British constitution of an accused traitor, someone in Burr's situation, issuing a subpoena to the king for material relevant to his defense.

The idea that the President of the United States, unlike the English king, would be both accountable and subject to the rule of law recurred throughout the convention debates. Delegates repeatedly countered proposals for the structure and powers of the

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[42] 2 *id.*

[43] 2 *id.* at *246.

[44] 2 *id.* at *249 ("[T]he King never dies, Henry, Edward, or George may die; but the King survives them all.").

[45] 2 *id.* at *251.

[46] 2 *id.* at *242. 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 DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 527 (1945).

[47] 2 BLACKSTONE, *supra* note 41, at *246.

[48] 2 *id.*

[49] *See* 2 *id.* at *243.

[50] *See* 2 *id.* at *244.

national executive with the objection that such proposals might create what Edmund Randolph of Virginia termed "the foetus of a Monarchy."[51] Although some delegates praised the British government—Alexander Hamilton called it "the best model the world ever produced"[52]—there was a strong sense that the unchecked privileges and powers of its king were antithetical to the goals of American society.[53] Thus, the new American Constitution contained numerous provisions designed to limit the power of the President,[54] but even these structural and functional checks were not deemed sufficient. In the impeachment provision of the Constitution,[55] the delegates found a method of restraint they believed

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[51] 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 92 (1911). Randolph favored a three person executive body over a unitary executive. Other delegates also criticized proposals that resembled monarchies. George Mason considered a single executive to be a "more dangerous monarchy, an elective one." 1 *id.* at 101. Elbridge Gerry believed "[t]here were not 1/1000 part of our fellow citizens who were not agst. every approach towards Monarchy." 1 *id.* at 425. Gouverneur Morris of Pennsylvania styled himself "as little a friend to monarchy as any gentleman." 1 *id.* at 35. Hugh Williamson of North Carolina argued that a single magistrate "will be an elective king, and will feel the spirit of one." 1 *id.* at 101. Randolph continued his objections to a single executive throughout the debates and ultimately refused to sign the completed Constitution. *See* 1 *id.* at 644-49. For other comments by Randolph, see, for example, 1 FARRAND at 74 (a single executive would "savor too much of a monarchy"); 1 *id.* at 88 (the "permanent temper of the people was adverse to the very semblance of Monarchy"); 3 *id.* at 278 (the people will see in the President "the form at least of a little monarch"). Mason also insisted, at the close of the convention, that the form of government adopted "would end either in monarchy, or a tyrannical aristocracy." 2 *id.* at 632. Mason, like Randolph, did not sign the final draft. For his explanation of his decision to Jefferson, see 3 *id.* at 304-05.

[52] 1 *id.* at 299. Hamilton's praise of the British government as a model for the new nation apparently inspired a rumor that he favored a monarchy. *See* 1 *id.* at 288 n.6. For an exchange between Hamilton and Timothy Pickering on the subject of the rumor, see 3 *id.* at 397-98.

[53] Charles Pinckney, for example, argued that despite its virtues the British constitution "can not possibly be introduced into our System—that its balance between the Crown & the people can not be made a part of our Constitution." 1 *id.* at 398. For an extended comparison of the powers of the British king and the powers of the President under the new constitution, see Letter from Pierce Butler to Weedon Butler, May 5, 1788, *in* 3 *id.* at 301-02. Although Butler detailed what he called "a material difference" between the two governments, with the American system giving substantially more power to the people, he also noted that the President's powers in the completed draft were greater than he had intended and therefore a potential source of danger. *See* 3 *id.* at 302.

[54] According to George Bancroft, "The convention was anxious to reconcile a discreet watchfulness over the executive with his independence." 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 188 (1883). Examples of this attempted reconciliation clearly exist in the Constitution. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (authorizing the President to make treaties with the concurrence of two-thirds of the Senate and to nominate ambassadors, Supreme Court justices, and other government officials with the advice and consent of the Senate).

[55] U.S. CONST. art. II, § 4, cls. 6-7 (granting Senate the power of impeachment). For

sufficient to prevent the President from overreaching his authority. The British constitution might be founded on the proposition that the king can do no wrong, but the American Constitution coolly contemplates the possibility of a President, acting out of ambition or corruption, doing a great deal of wrong and warranting the strong sanction of removal from office.[56]

Marshall's opinion in *Burr* reflects the same insistence on the subjection of the President to the processes that implement the rule of law. Burr's subpoena struck precisely at the heart of the new American government by asserting that a federal judge could order the President to assist in the collection of evidence to put before a grand jury. Writing for the Supreme Court in *Marbury v. Madison*, Marshall had insisted on judicial authority to review executive branch conduct but nonetheless suggested special treatment for the President by the courts:

> An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of

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debate concerning the need for an impeachment provision, see, for example, 1 FARRAND, *supra* note 51, at 86 (noting Mason's argument that "[s]ome mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen"); 2 *id.* at 64 (noting North Carolina representative William Davie's description of an impeachment provision "as an essential security for the good behaviour of the Executive").

[56] For Alexander Hamilton, the test of an appropriate executive was whether it combined "the requisites to energy" with "the requisites to safety, in a republican sense,—a due dependence on the people, a due responsibility?" THE FEDERALIST No. 77 (Alexander Hamilton). Refuting critics of the Constitution who had characterized the new President as possessing "more than royal prerogatives," *id.*, No. 67, Hamilton constructed an extended comparison of the powers of king and President. The king is an hereditary monarch while the President holds elective office for a limited term of years; the king is immune from any punishment while the President is subject to both impeachment and the regular processes of the law; the king has an absolute veto over parliamentary acts while the President's veto may be overridden by two-thirds of the legislature; the king commands the nation's military forces and may declare war while the President's command of the militia is subject to legislation and to Congress's power to declare war; the king may dissolve Parliament at will while the President may adjourn Congress only in the event of internal disagreement; the king makes treaties and appoints government officials independently, while the President may do so only with the support of the Senate. *Id.*, No. 69. In each instance, the power of the President is qualified by the governmental power of the legislative and judicial branches or by the elective power of the people. What answer, Hamilton asks, should be given to those claiming a likeness of king and President? "The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism." *Id.*

> judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution.[57]

Marshall also admitted in his *Burr* opinion that originally "the court felt some doubt concerning the propriety" of issuing a subpoena to the President and ordering the introduction in court of his nonpublic papers, but despite this initial reluctance Marshall found "no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process."[58] The propriety, Marshall insisted, "must depend on the character of the paper, not on the character of the person who holds it."[59]

This sweeping language did not, however, emerge unqualified from the opinion. Marshall recognized two restraints on the reach of the court's subpoena power into the President's office. First, Marshall conceded that the demands of the President's official duties might make a subpoena unduly burdensome. Although he dryly noted that "this demand is not unremitting"—an observation that enraged Jefferson[60]—Marshall saw the distraction of the President from national matters as a reason for declining to obey a subpoena rather than for failing to issue one.[61] Second, Marshall acknowledged that a subpoena *duces tecum* might seek papers that would "endanger the public safety," and that such material "if it be not immediately and essentially applicable to the point, will, of course, be suppressed."[62] Neither claim, however, served to distinguish the President from any other proposed recipient of process. In Marshall's formulation, the court, by issuing a subpoena, could assert its own authority without in any way treading on the President's dignity. Marshall deferred for a more suitable occasion the more difficult question of how to evaluate a presidential response to a subpoena claiming danger to the public safety in light of the applicability of the subpoenaed material to the issue before the court.

That occasion, or at least an approximation of it, surfaced later in Burr's trial, when the defense sought to submit in evidence

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[57] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149 (1803).

[58] *Burr*, 25 F. Cas. at 35.

[59] *Id.* at 34.

[60] *See* 3 BEVERIDGE, *supra* note 15, at 445, 455-56.

[61] *See Burr*, 25 F. Cas. at 34. Marshall noted that a court can protect the President "from being harassed by vexatious and unnecessary subpoenas" by its conduct after rather than before issuance. *See id.*

[62] *Id.* at 37.

the original of the letter from General Wilkinson.[63] Jefferson had sent the letter to Hay, with instructions that Hay exercise his discretion regarding its release, and Hay insisted that certain passages should not be made public.[64] Burr and his counsel responded that the defendant was entitled to the entire letter as evidence material to his defense. In resolving the issue, Marshall rejected the prosecution's argument while expressing greater deference to the President than in his earlier ruling.

Although he did not retreat from his position that the President could be "subpoenaed, and examined as a witness, and required to produce any paper in his possession," Marshall offered several qualifications on the court's treatment of the President.[65] First, he conceded that the President "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."[66] In evaluating such situations, the court must necessarily rely on the President's representations concerning the propriety of production. Second, in the most quoted passage of the opinion, he observed that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual."[67] Although Marshall did not describe at length the distinctions in treatment he

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[63] Two different letters were at issue in Marshall's two decisions. The first letter was dated October 21, 1806. *See Burr*, 25 F. Cas. at 31. The second was dated November 12, 1806. *See* United States v. Burr, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694) (*Burr II*). Both letters apparently described the activities on which the charge of treason was based. At the time of the second attempt to secure production of a Wilkinson letter, the charge of treason had been dismissed by the court, and Burr stood accused only of the misdemeanor of "setting on foot, and providing the means of, a military expedition against the dominions or territory of the king of Spain." *Id.* at 187. For the text of Marshall's celebrated opinion on the doctrine of constructive treason, see United States v. Burr, 25 F. Cas. 55, 159 (C.C.D. Va. 1807) (No. 14,693).

[64] *See* 2 ROBERTSON, *supra* note 15, at 511-12. After Burr's counsel declined Hay's offer to review the letter privately, Marshall issued a subpoena *duces tecum* to Hay. Hay responded to the subpoena by deleting passages from the letter and offering to let the court verify the prosecution's contention that those passages were not material to Burr's defense. Burr, however, continued to insist personally and through counsel on presentation of the entire letter. *See* 2 *id.* at 513-14. Prior to the issuance of the subpoena, Burr even went so far as to argue that "the president was in contempt, and that he had a right to demand process of contempt against him." 2 *Id.* at 504. Hay and his cocounsel continued to argue that the President could delegate his right to determine which portions of the letter should be withheld in the public interest. *See, e.g.*, 2 *id.* at 520 (MacRae stating, "The attorney . . . is to be regarded in the same view as the president would be if he were standing here and called on to divulge the letter in question.").

[65] *See Burr II*, 25 F. Cas. at 191.

[66] *Id.*

[67] *Id.* at 192.

envisioned, he did specify two relevant factors: First, the party seeking the document must clearly establish its materiality; and, second, the President must exercise the discretion to withhold the document himself and not delegate it to a subordinate.[68] Jefferson, however, had offered no basis for the decision to withhold the letter and in fact had allowed Hay to exercise his own discretion. At the same time, the defense continued to insist on the materiality of the letter. Marshall therefore concluded that the letter must be produced.[69]

Wilkinson's letter might have generated a third and more detailed ruling from Marshall, but circumstances conspired to disappoint students of executive privilege. Although Jefferson attempted to force Marshall's hand by sending his own certificate claiming exemption for portions of the letter,[70] Marshall's subsequent ruling on the inadmissibility of crucial government evidence in turn forced the prosecution to abandon the case against Burr in the Virginia court.[71] Marshall never assessed the claims made personally by Jefferson for withholding portions of the Wilkinson letter from the defense.

The result of the Burr trial, then, is a precedent combining strong general principles with clearly marked escape routes. Like

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[68] *Id.*

[69] Marshall was willing to protect the portions of the letter the prosecution wished to remain confidential. Although he felt that Burr should review the letter himself, Marshall indicated that "if it should be thought proper" he would order that "no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case." *Id.* During argument, even Burr's counsel conceded that the public interest might require that some materials be withheld. *See, e.g.*, 2 ROBERTSON, *supra* note 15, at 513 (Wickham arguing that the letter could be withheld only if the President asserted that it contained state secrets); *id.* at 524 (Burr conceding that when disclosure of documents "would be mischievous to great national interests, . . . the constitutional officer has a right to withhold them, for a time, from the public view").

[70] *See Burr II*, 25 F. Cas. at 193. Beveridge reports: "For some reason the matter was not again pressed. Perhaps the favorable progress of the case relieved Burr's anxiety." 3 BEVERIDGE, *supra* note 15, at 522 n.4.

[71] Marshall ruled, *inter alia*, that Burr's acts performed in a judicial district outside Virginia could not be admitted. For a summary of Marshall's ruling, see *Burr II*, 25 F. Cas. at 201. The prosecution moved to discharge the jury, but the court denied the motion in the absence of Burr's consent. The jury returned a verdict of not guilty. *See id.*

The issue of the Wilkinson letter did arise once more, on a motion to commit Burr for trial in another jurisdiction. With General Wilkinson on the witness stand, Burr once again sought production of the unedited letter, this time from Wilkinson himself. Although there is no published opinion, a contemporary reporter noted that Marshall refused to require Wilkinson to produce the parts of the letter that the President had withheld unless Burr presented sufficient evidence of their relevance. *See* Edwin S. Rhodes, *From Burr to Nixon*, 35 FED. B.J. 218, 222-23 (1976-77). For Rhodes's account of the passages withheld by Jefferson, see *id.* at 224.

all citizens, the President is subject to a court's process and may be compelled to testify or to produce documents in court. At the same time, the demands of office and the public interest make it inappropriate for a court to treat the President as "an ordinary individual." Marshall acknowledged that the conflicting claims of a defendant and the President may confront a court with a difficult situation, but he concluded that "I cannot precisely lay down any general rule for such a case."[72] Instead, he outlined the relevant factors for a court to weigh in deciding whether to compel conduct by the President. Rather than taking a purely egalitarian stand, Marshall arrived at a pragmatic compromise. The broad and absolute prerogatives of the British king are replaced by the narrow and contingent prerogatives of the President. Neither outside the law nor inescapably within its grasp, the President occupies a position of indeterminate privilege that the courts may either recognize or reject.[73]

B. The President as Defendant: Mississippi v. Johnson[74]

The question of presidential exemption from judicial process first came before the full Supreme Court some sixty years after Aaron Burr's trial,[75] again in a highly political context, when the state of Mississippi sought to enjoin President Andrew Johnson from enforcing the Reconstruction Acts of 1867. The opinion in *Mississippi v. Johnson*, as in *United States v. Burr*, was written by a Chief Justice, this time Salmon Chase. Writing for a unani-

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[72] *Burr II*, 25 F. Cas. at 192.

[73] It is not surprising that scholars have reached different conclusions about Marshall's opinions. *Compare* Rhodes, *supra* note 71, at 218 (arguing that it was Marshall's position "that the withholding of confidential communications in the public interest rests solely in the discretion of the executive") *with* RAOUL BERGER, EXECUTIVE PRIVILEGE 191 (1974) (arguing that "Marshall asserted judicial power to decide whether a presidential claim of privilege had merit, and that a claim of secrecy in the 'public interest' would have to yield to the necessities of the accused"). For a detailed examination of Marshall's rulings, see Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111-22 (1973-74).

[74] 71 U.S. (4 Wall.) 475 (1868).

[75] Marshall, sitting as circuit justice in Virginia, faced another challenge to President Jefferson when, in 1811, he heard a case of trespass filed by Edward Livingston against Jefferson in connection with conduct during his term in office affecting property in New Orleans. Livingston v. Jefferson, 15 F. Cas. 660 (1811) (No. 8,411). Both Marshall's opinion and that of district Judge Tyler resolved the case against Livingston on the grounds that trespass is a local action and can be brought only in the jurisdiction where the land is located. Neither opinion referred at any point to the propriety of suing a former President for actions taken while in office.

mous Court, Chase held that a state could not sue the President to block the enforcement of an allegedly unconstitutional statute.[76] Chase relied primarily on the doctrine of separation of powers to reach the Court's result, and his opinion seemed much less interested in the extent of presidential power than in the relation between branches of government. Although *Mississippi v. Johnson* has been cited often, it is almost invariably invoked to support a point either broader or narrower than its actual holding, which is in fact compatible with Marshall's position in *Burr*.

Arguing for Mississippi, W.L. Sharkey relied expressly on Marshall's opinion in *Burr* to support his view that there was no legal or constitutional obstacle to a suit to enjoin the President. The injunction sought in the case, Sharkey claimed, was simply the inverse of the subpoena sought by Burr. One order would restrain the President from acting, while the other would compel him to act. According to Sharkey, "The principle is the same in the two cases, as well as the means of coercing obedience; and the reasoning of Chief Justice Marshall reaches and settles the question now before the court."[77] Echoing Marshall's statement that the right to a subpoena "must depend on the character of the paper, not on the character of the person who holds it,"[78] Sharkey argued further: "The case is the criterion, no matter who is plaintiff or who defendant; and if the President be exempt from the process of the law, he is above the law."[79] Sharkey's cocounsel, R.J. Walker, cited at length in his argument Marshall's comparison of king and President[80] to support Mississippi's position that the President enjoyed no special privileges. Had Jefferson failed to obey the subpoena, Walker argued, Marshall would clearly have had the authority to issue an attachment for contempt.[81] Thus, the Supreme Court should follow Marshall's lead in holding the President subject as well to an injunction.

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[76] The case came before the Court as a motion to file a bill, a motion generally granted as a matter of course. After Attorney General Stanbery objected that the bill was an improper one because it named the President, the Court agreed to hear argument on the limited question of whether the state of Mississippi could file its bill. *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 478 (1868). For an account of the court proceedings and their report in the press, see CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 (1971).

[77] *Johnson*, 71 U.S. (4 Wall.) at 479.

[78] *Burr*, 25 F. Cas. at 34.

[79] *Johnson*, 71 U.S. (4 Wall.) at 479.

[80] *See id.* at 493.

[81] *See id.* at 493-94.

Attorney General Stanbery responded to Mississippi's argument by proclaiming that Marshall had made "a very great error" in holding the President subject to a subpoena.[82] Most dramatically, Stanbery rejected Marshall's comparison of President and king in categorical terms:

> I deny that there is a particle less dignity belonging to the office of President than to the office of King of Great Britain or of any other potentate on the face of the earth. He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world. . . . It is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President.[83]

To accept Marshall's position, Stanbery argued, would be to set foot upon a slippery slope that would lead from a President's principled refusal to comply with a subpoena, to the court's issuance of a quasi-criminal attachment for contempt, to the eventual imprisonment—and de facto removal from office—of the President for failure to accept the court's authority.[84] Thus, only by impeachment could the President be held accountable for his performance in office, and only after impeachment resulting in removal could the President be subjected to the jurisdiction of the courts.[85]

Both sides thus found in *United States v. Burr* and its opposition of royal prerogative to presidential power the precedent that, depending on the advocate, illuminated either the wisdom or the folly flowing from Marshall's vision of the relation of President to court. In resolving the issue before the Supreme Court, however, the Chief Justice avoided any mention of *Burr* or presidential privilege. Instead, Chase focused on another point of disagreement between the parties: whether the President's conduct in enforcing the Reconstruction Acts was ministerial and thus within Marshall's opinion in *Marbury v. Madison*[86] or discretionary and thus outside *Marbury's* reach.

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[82] *See id.* at 483.

[83] *Id.* at 484.

[84] *Id.* at 485-87.

[85] *See id.* at 484-85, 491.

[86] In *Marbury*, Marshall had carefully distinguished between the issuance of a writ of mandamus to the Secretary of State and to the President. *See supra* text accompanying note 57. Chase also cited Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), another case authorizing judicial enforcement of ministerial conduct by an official of the executive branch. *See Johnson*, 71 U.S. (4 Wall.) at 491.

Chase was careful, at the outset of his opinion, to exclude the larger questions that had engaged counsel for both parties:

> We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.[87]

He then framed the issue for decision as narrowly as the facts permitted: "[C]an the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?"[88] Chase's opinion deflected attention from the President himself to his conduct. In enforcing the Reconstruction Acts, the President, acting as Commander in Chief, would be appointing generals to exercise governmental authority in the newly created military districts of the south and supervising their performance. Such an exercise of the presidential duty to see that the laws are faithfully executed was "purely executive and political."[89] It fell outside the definition of a ministerial duty, "a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."[90] In the opinion's only reference to John Marshall, Chase noted that any attempt by the Court to enforce such executive duties would be, "in the language of Chief Justice Marshal [sic], 'an absurd and excessive extravagance.'"[91]

Chase's primary concern was defining the power of the Court rather than confining the power of the President. His slippery slope led not to the unseemly spectacle of an imprisoned President but to dangerous confrontations among the three branches of government. If the President chose to obey the Court's injunction, then Congress might impeach him for failing to execute the laws; if the Court then intervened to protect the President, it would be interfering with the Senate's judicial responsibilities.[92] The formula that Chase offered served at once to assert and to restrain the Court's authority:

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[87] *Johnson*, 71 U.S. (4 Wall.) at 498.
[88] *Id.*
[89] *Id.* at 499.
[90] *Id.* at 498.
[91] *Id.* at 499.
[92] *Id.* at 500-01.

> [T]he Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.[93]

Although the opinion did not specify what those proper cases might be, *Johnson* made clear the Court's position that its refusal to entertain Mississippi's bill was a matter of jurisdiction rather than discretion.[94] In *Burr*, Marshall insisted on judicial authority to subpoena the President, deferring to a later stage in the proceedings the evaluation of the President's reasons for refusing to comply Here, however, Chase declined at the threshold the invitation to extend the Court's authority to presidential conduct. His distinction between ministerial and discretionary actions has proved a durable one, and his concern over separation of powers valid. The opinion carefully avoids, however, any countervailing language suggesting, as Marshall did, the precept, central to American political theory, that the President is subject to the rule of law The message of Chase's opinion is that the President cannot under most circumstances be held accountable in the courts for his conduct in office. Without mentioning *Burr*, *Johnson* largely circumscribed its authority

In the years since its issuance, *Johnson* has become a standard case citation for the distinction between ministerial and discretionary conduct by the executive branch.[95] It has also become a source for what the Supreme Court has called "the general principles which forbid judicial interference with the exercise of executive discretion."[96] More broadly, however, *Johnson* came to stand for

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[93] *Id.* at 500.

[94] "But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." *Id.* at 501. Chase also noted that if the President disobeyed its injunction, "the court is without power to enforce its process." *Id.*

[95] *See, e.g.*, Winsor v. Hunt, 243 P 407, 411 (Ariz. 1926); State v. Staub, 23 A. 924, 927 (Conn. 1892); Dunagan v. Stadler, 29 S.E. 440, 440 (Ga. 1897); Nagle v. Wakey, 43 N.E. 1079, 1082 (Ill. 1896) (Phillips, J., dissenting).

[96] Gaines v. Thompson, 74 U.S. (7 Wall.) 347, 353 (1869); *see also* Colegrove v. Green, 328 U.S. 549, 556 (1946) ("The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion.") (citing *Johnson*). Because *Johnson* links together discretionary and political conduct by the executive, it is also cited as authority for the Court's refusal to hear political questions. *See, e.g.*, Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496 (1971) (noting that the Court will not entertain "original actions that seek to embroil this tribunal in "political questions.") (citing *Johnson*).

the invulnerability of the President to judicial command,[97] and courts cited it regularly for that proposition.[98] Although Chase expressly declined to answer that larger question, his opinion apparently discouraged litigants from bringing it to the Court for later resolution. Yet nothing in the holding of the case precluded courts from either enjoining the President to perform a purely ministerial duty or entertaining suits against the President for non-injunctive relief. Some eighty-five years later, *Youngstown Sheet & Tube Co. v. Sawyer*[99], the most important pre-Watergate challenge to presidential conduct, carried forward the legacy of *Johnson* in two respects: The plaintiffs assumed that their suit could not be brought directly against President Harry S. Truman, and

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[97] The political scientist Glendon Schubert, writing in 1957, made the point emphatically:

> It is accepted as a political and legal fact today that the President of the United States is immune from prospective control by the judiciary. The principal reason for this is the President's power of direction over the Department of Justice and other national police agencies, and his position as Commander in Chief of the armed forces: therefore, he cannot be forced to accept service of legal process. Certainly, no positive law grants him this immunity, nor does it necessarily follow from his legal or political status. Neither was it the understanding or intent of many of the principal participants in the Philadelphia Convention that he alone, of all the one hundred and sixty million people of the United States today, should enjoy personal immunities appertaining elsewhere in the Western state system only to reigning monarchs like the Queen of the United Kingdom. . . . Therefore, the principle of presidential immunity from judicial process is not a constitutional rule, but a judicial one, based primarily upon the decisions of judges who were brought face to face with the brute fact that they could not coerce the President.

SCHUBERT, *supra* note 3, at 318-19. Chase did note in *Johnson*: "If the President refuse obedience, it is needless to observe that the court is without power to enforce its process." *Johnson*, 71 U.S. (4 Wall.) at 500-01. The difficulties of enforcement also worried William Howard Taft. *See* TAFT, *supra* note 3, at 115; *see also* SCHLESINGER, *supra* note 3, at 70 (agreeing with Corwin that the courts cannot compel the President to perform his responsibilities or to refrain from exceeding his powers).

[98] *See, e.g.*, National Ass'n of Internal Revenue Employees v. Nixon, 349 F. Supp. 18, 22 (D.D.C. 1972) (finding lack of jurisdiction over the President because "[t]he fundamental doctrine of separation-of-powers dictates this result, and it has been settled since the case of State of Mississippi v. Johnson") (citation omitted), *rev'd*, 492 F.2d 587 (2d Cir. 1974); Reese v. Nixon, 347 F. Supp. 314, 316-17 (C.D. Cal. 1972) (holding that the court lacked jurisdiction over the President because "[t]he executive power is vested in the President by Article II of the United States Constitution, and judicial interference in the exercise of that power is extremely limited, if not constitutionally prohibited, in order to preserve the separation of powers within the Federal government. State of Mississippi v. Johnson.") (footnote and citation omitted); *see also* San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672, 672 (N.D. Cal. 1971) (dismissing an action against the President without citing *Johnson* but noting that "a long standing policy, if not a positive rule, has avoided such an intragovernmental confrontation").

[99] 343 U.S. 579 (1952).

the Supreme Court accepted their assumption by producing seven opinions without a single mention of the propriety of naming the President as a defendant.

C. The Presidential Proxy: Youngstown Sheet & Tube Co. v. Sawyer[100]

The *Youngstown* litigation began when President Truman, unable to resolve a wage dispute between the country's steel companies and their employees' union, moved to prevent a threatened strike and maintain production by issuing an executive order directing Secretary of Commerce Charles Sawyer to seize the nation's steel mills.[101] In a federal action for injunctive relief that named Sawyer as the sole defendant, the companies challenged the President's power to seize the mills in the absence of congressional authorization. Judge Pine of the district court agreed, issuing a preliminary injunction against the defendant's continued seizure and possession of the mills.[102] After the court of appeals stayed the injunction,[103] the Supreme Court granted certiorari and set an early date for argument.[104] Its opinions in *Youngstown*—six by members of the majority and one in dissent—explored exhaustively the nature of presidential power under the Constitution and the relationship among the three branches of government before ruling that President Truman lacked the authority to issue his executive order. The Court did not, however, address the underlying issues of the President's amenability to suit and the significance of naming a cabinet officer instead of the President as defendant.

The central issue raised by *Youngstown* was the existence and extent of presidential power to seize private property without specific constitutional or congressional authority to meet a perceived

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[100] 343 U.S. 579 (1952).

[101] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582-83 (1952). Truman had referred the dispute to the Federal Wage Stabilization Board, but the Board was unable to arrange a settlement. *See id.* For a thorough examination of the Youngstown episode, see MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

[102] *See* Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.D.C. 1952), *aff'd*, 343 U.S. 579 (1952).

[103] Sawyer v. United States Steel Co., 197 F.2d 582, 585 (D.C. Cir. 1952).

[104] Certiorari was granted on May 3 and argument scheduled for May 12. *See Youngstown*, 343 U.S. at 584.

national emergency.[105] The parties identified as a corollary, however, the question of whether a suit against the President was either possible or proper. In his argument before the district court, Assistant Attorney General Holmes Baldridge relied on *Mississippi v. Johnson* as the sole precedent for his expansive position that the judicial branch lacked authority to hold the President or any of his agents accountable for executive conduct.[106] John J. Wilson, counsel for Youngstown Sheet and Tube, countered that *Mississippi v. Johnson* did not establish "the blanket, absolute rule" Baldridge described.[107] In granting preliminary injunctions against Sawyer, Judge Pine was careful to distinguish *Youngstown* from *Mississippi v. Johnson* on the ground that in the case before the court the President had not been sued and was not an indispensable party to the action.[108] Citing Supreme Court authority, Judge Pine ruled that "officers of the Executive Branch of the government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment."[109] The opinion did not respond directly to Wilson's point or offer any further observations on the amenability of the President to suit, but it did implicitly rebuke Baldridge for his argument of executive invulnerability by finding the defendant's cabinet status "no bar to plaintiff's claim to relief."[110]

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[105] For discussions of the Court's holding in *Youngstown* and the implications of its seven opinions, see SCHWARTZ, *supra* note 3, at 62-67; Edwin S. Corwin, *The Steel Seizure Case: A Judicial Brick without Straw*, 53 COLUM. L. REV. 53 (1953); Paul G. Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141 (1952).

[106] H.R. Doc. No. 534, 82d Cong., 2d Sess. 372, 379-80 (1952). Although Baldridge maintained that the government's position did not "rest primarily upon the question of the immunity of the President from suit," *id.* at 378, he nonetheless insisted that Sawyer was the "alter ego" of the President and thus enjoyed the same immunity that was afforded the President. *See id.* at 362, 380. More dramatically, Baldridge argued that there were only two checks on executive power: "One is the ballot box and the other is impeachment." *Id.* at 371. In response to questions from Judge Pine, Baldridge agreed that he read the Constitution to limit the power of the legislative and judicial branches but not the executive branch. *See id.* at 377.

[107] *See id.* at 399-400. Wilson had faced the issue earlier, when the parties argued before Judge Holtzoff on plaintiffs' claim for a temporary restraining order. Judge Holtzoff specifically asked Bruce Bromley, counsel for Bethlehem Steel Company, whether he was not in fact seeking a restraining order against the President and whether the court had authority to issue such an order. *See id.* at 246. After Bromley insisted that the court could enjoin the President, *see id.* at 247, Wilson expressed doubt on that point but argued that *Mississippi v. Johnson* should be limited to situations involving "personal action against the person of the Chief Executive himself." *Id.* at 249.

[108] *See Youngstown*, 103 F. Supp. at 576.

[109] *Id.*

[110] *Id.*

In the wake of Judge Pine's ruling, the parties adjusted their positions on presidential immunity in their briefs to the Supreme Court. The plaintiffs now echoed the district court in arguing that their suit was not brought against the President[111] and that *Mississippi v. Johnson* did not apply to suits brought against presidential subordinates.[112] The defendant, in contrast, muted his earlier insistence on complete executive immunity. *Mississippi v. Johnson* was cited only once in the government's brief, in a footnote, and no longer was part of Baldridge's sweeping claim of judicial impotence. Instead, the government urged the ambiguity of the law on injunctions against department heads, concluding "that the issue is sufficiently uncertain and delicate as to constitute a compelling reason for leaving the plaintiffs to their legal remedy for damages."[113] At oral argument, John W. Davis, representing the plaintiffs, emphasized the separation of powers issue and constitutional restraints on executive power; Solicitor General Philip Perlman, representing Sawyer, emphasized the international situation that had prompted the President's action and reviewed prior presidential seizures.[114]

When the Court issued its decision less than three weeks after oral argument,[115] the majority opinion by Justice Black identified two issues to be resolved: whether the case was ripe for full review on the basis of a preliminary injunction, and whether the seizure of the steel mills was within the President's constitutional powers.[116] At no point in the majority opinion or in any of the separate opinions that accompanied it did any member of the Court raise the issue that had troubled the district court in the earlier stages of the case: whether this was in fact a suit against the President, and, if so, under what circumstances such litigation was permissi-

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[111] *See* H.R. Doc. No. 534, *supra* note 106, at 668. The point was made in the joint brief filed by counsel for Youngstown Sheet and Tube, Republic Steel, Armco Steel, Bethlehem Steel, Jones & Laughlin Steel, United States Steel, and E.J. Lavino & Company. It was repeated in a separate brief filed by counsel for Armco Steel and Sheffield Steel. *See id.* at 940.

[112] *See id.* at 674-75. The brief also argued that the Court did not need to reach the issue of the judicial power to enjoin the President directly. *See id.* at 670.

[113] *Id.* at 760-61 n.40. The shift in position may in part be explained by a shift in personnel. Solicitor General and Acting Attorney General Philip Perlman signed the defendant's brief and argued before the Supreme Court. For a critical assessment of Baldridge's performance before Judge Pine, see MARCUS, *supra* note 101, at 117-26.

[114] *See* MARCUS, *supra* note 101, at 167-74.

[115] *See Youngstown*, 343 U.S. at 579. The argument took place on May 12 and 13; the Court issued its decision on June 2.

[116] *See id.* at 584.

ble.[117] The language of all the opinions makes clear that the Justices viewed the case as one of presidential rather than delegated authority; Charles Sawyer, the named defendant, was very much the forgotten man.[118] The Justices made the natural assumption that as Secretary of Commerce, Sawyer would implement the orders he received from the President. They did not, however, reflect on the implications of Sawyer's presumed transparency: If a cabinet officer acts simply to implement presidential orders, then in what sense is a suit against that officer anything other than a suit against the President?

There is, of course, a direct connection between the issue the Court addressed and the issue it deflected. As Marshall saw so clearly in *Burr*, a chief executive whose power is limited by the terms of the Constitution should enjoy no automatic unwritten exemption from the judicial processes basic to the rule of law. Of all the members of the *Youngstown* Court, Justice Jackson was the only one to follow Marshall in tying his analysis of presidential power to the Framers' rejection of the royal prerogative. Noting the Framers' exposure to the exercise of that prerogative by George III and its description in the Declaration of Independence, Jackson observed that such history "leads me to doubt that they were creating their new Executive in his image."[119] Yet none of the opinions, including Jackson's, cited *Burr* or linked the Court's concern with the boundaries of presidential power to the idea of a President personally accountable within the legal system for his

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[117] In his dissenting opinion, which was joined by Justices Reed and Minton, Chief Justice Vinson observed: "[W]e assume that defendant Charles Sawyer is not immune from judicial restraint and that plaintiffs are entitled to equitable relief if we find that the Executive Order under which defendant acts is unconstitutional." *Id.* at 677-78. There is no further discussion of the point.

[118] For example, Justice Frankfurter observed in his concurring opinion that "[i]t is not a pleasant judicial duty to find that the President has exceeded his powers." *Id.* at 614. Also, Chief Justice Vinson concluded in dissent that the judiciary "must independently determine for itself whether the President was acting, as required by the Constitution, to 'take Care that the Laws be faithfully executed.'" *Id.* at 709 (quoting U.S. CONST. art. II, § 3).

[119] *Id.* at 641. Jackson also ended his concurring opinion by comparing the role of the Court in ruling against the President with the efforts of the British judiciary to subject the king to the rule of law:

> We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: "Then I am to be *under* the law—which it is treason to affirm." Chief Justice Coke replied to his King: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law.'"

Id. at 655 n.27 (citations omitted).

exercise of that power. All of the Justices, including the three dissenters, agreed that it is the role of the Court to review the constitutionality of presidential conduct, but none anchored the exercise of judicial review in the plaintiff's right to invoke the legal system as a route to that review.

What *Youngstown* did establish, however obliquely, was the validity of a useful legal fiction. After *Youngstown*, there could be no doubt of a litigant's ability to challenge a presidential order in the courts as long as the named defendant was a presidential proxy, the agent selected to implement the executive command. The absence of any discussion in the Court's opinions suggests that the propriety of the suit against Sawyer was unquestioned. The approval of this legal fiction to circumvent a restriction, real or imagined, on suit against a chief executive was not original with the Court; Blackstone had defended the king's immunity from suit with a similar strategy of the British constitution, the right to sue the king's "evil counsellors" and "wicked ministers" responsible for any abuse of royal power.[120] *Youngstown* simply adapted this strategy to the American context as a convenient way to reach the merits of the steel companies' challenge to President Truman's executive order without addressing the scope of *Mississippi v. Johnson.*

Just as the Court in *Johnson* had expressly declined to reach the broad issue of the President's amenability to suit, the Court in *Youngstown* found a means of evading that same issue without evading its duty of judicial review. Some commentators took the deed for the word and concluded that the Court by ruling as it did had in fact established the judiciary's right to enjoin the President or at least to review presidential conduct by means of a proxy.[121] The distinction did not become a crucial one until twenty

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[120] "For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has, therefore, provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land." 1 BLACKSTONE, *supra* note 41, at *244.

[121] For a review of responses to the decision on this point, see MARCUS, *supra* note 101, at 220-21. Marcus concludes: "[T]he Supreme Court did not expressly reject the maxim that the federal courts cannot enjoin the President, but in fact the Court exercised just such a power." *Id.* (footnote omitted). Marcus quotes from a letter by Learned Hand to Justice Frankfurter critical of the Court's position: "I think I should have taken the point that to enjoin the Secretary was to enjoin the President, save that nobody seems to agree with me." *Id.* at 346 n.100 (citing Frankfurter Papers, Library of Congress). For a discussion of the significance of the Court's ruling, see SCHWARTZ, *supra* note 3, at 68-70. Schwartz

years later, when the Watergate controversy presented the Court with a situation in which no presidential proxy was available.

D. The President as Target: The Watergate Cases

The Watergate episode was the most dramatic confrontation between the President and the legislative and judicial branches of government in American history, a confrontation that brought the country to the brink of impeachment for the first time in over a century. It was also the first time that legal process had been directed to the President in connection with suspected executive wrongdoing. In *Burr*, Jefferson was subpoenaed for documents related to charges of treason against Aaron Burr, his former Vice President and political enemy. Although Burr's counsel suggested to the court that Jefferson was personally interested in securing Burr's conviction, there was no claim that the President's reluctance to comply with the court's subpoena was part of an illegal conspiracy to withhold exculpatory materials. In *Johnson*, the plaintiff sought to enjoin Andrew Johnson from enforcing congressionally enacted statutes. The *Johnson* case raised no question of the President's personal bias because Johnson himself opposed the Reconstruction Acts and had already vetoed them when his Attorney General argued against the injunction.[122] *Youngstown* called into question President Truman's exercise of power, but even the Justices who voted against the President exonerated his act from any taint of personal aggrandizement.[123]

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locates the significance of *Youngstown* in "its rejection of the claim that acts of the President are immune from judicial review." *Id.* at 69. For his interesting account of the British origins of the proxy approach to executive accountability, see *id.* at 67-69; Bernard Schwartz, *Bad Presidents Make Hard Law: Richard M. Nixon in the Supreme Court*, 31 RUTGERS L. REV. 22, 23-25 (1977). For an account of "new patterns" of judicial restraint of the President dating from *Youngstown*, see Dionisopoulos, *supra* note 3.

[122] FAIRMAN, *supra* note 76, at 177.

[123] Justice Frankfurter observed in his opinion: "It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown*, 343 U.S. at 593-94 (Frankfurter, J., concurring). Justice Douglas ended his opinion with a similar acknowledgement of Truman's good faith: "Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure." *Id.* at 633-34 (Douglas, J., concurring).

By the time *United States v. Nixon*[124] came before the Supreme Court, however, President Nixon had been named an unindicted coconspirator by the grand jury investigating the break-in at Democratic National Committee Headquarters and a possible White House cover-up during the subsequent inquiry.[125] Furthermore, the tapes of presidential conversations sought by Special Prosecutor Leon Jaworski for use in his prosecutions of several White House aides were in President Nixon's personal possession; there was no possibility of a *Youngstown* approach because no presidential subordinate had the ability to secure and release the tapes at issue. For the first time the courts were faced with a situation in which a President openly refused to comply with compulsory process that called for production of evidentiary materials capable of incriminating both the President himself and his closest aides.[126]

The challenge for the lower courts facing the issue of presidential resistance was to craft an opinion with the limited precedents available. The first to face the challenge was Chief Judge Sirica of the district court for the District of Columbia. Then Special Prosecutor Archibald Cox came to the court seeking compliance with a subpoena *duces tecum*, issued on behalf of the Watergate grand jury and directed to the President, or any subordinate official, for presidential tapes and documents.[127] In a letter to the court, President Nixon explained his refusal to provide the subpoenaed tapes by citing his own version of historical precedent: "I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that

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[124] 418 U.S. 683 (1974).

[125] After Special Prosecutor Leon Jaworski filed his petition for certiorari, James St. Clair, the President's counsel, filed a cross-petition asking the Court to review the authority of the grand jury to name the President an unindicted coconspirator. LEON FRIEDMAN, UNITED STATES V. NIXON, THE PRESIDENT BEFORE THE SUPREME COURT 169, 185-87 (1974) [hereinafter THE PRESIDENT BEFORE THE SUPREME COURT]. The Court granted certiorari on the question, but in its final opinion noted that addressing the issue was unnecessary for the resolution of the case and dismissed the cross-petition as improvidently granted. *See* United States v. Nixon, 418 U.S. 683, 687 n.2 (1974).

[126] Jaworski subpoenaed presidential tapes in connection with his prosecution of H.R. Haldeman, former White House Chief of Staff; John Ehrlichman, former Assistant to the President for Domestic Affairs; John Mitchell, former Attorney General; and other White House aides for conspiracy to obstruct justice. *See* United States v. Mitchell, 377 F. Supp. 1326 (D.D.C. 1974), *aff'd sub nom.* United States v. Nixon, 418 U.S. 683 (1974). For an identification of the legal issues raised by Jaworski's use of the subpoena, see Lee A. Albert & Larry G. Simon, *Enforcing Subpoenas Against the President: The Question of Mr. Jaworski's Authority*, 74 COLUM. L. REV. 545 (1974).

[127] *See In re* Subpoena to Nixon, 360 F. Supp. 1, 3 (D.D.C. 1973).

the President is not subject to compulsory process from the courts."[128]

In his opinion ordering the President to submit all subpoenaed materials for an *in camera* examination by the court, Sirica relied most heavily on Marshall's opinion in *Burr* to correct Nixon's reading of history. Sirica, like Marshall, began his analysis by asserting the court's right to issue process to anyone and placing the burden on the President to justify his exemption.[129] Quoting extensively from Marshall, Sirica ruled that the court would determine, based on its own examination, whether in the national interest any of the subpoenaed materials should not be released.[130] The opinion relied as well on *Youngstown* as answering the question remaining after *Johnson*, whether the President could be compelled by the courts to perform a ministerial act:

> [T]o persist in the opinion, after 1952, that he cannot would seem to exalt the form of the *Youngstown Sheet & Tube Co.* case over its substance. Though the Court's order there went to the Secretary of Commerce, it was the direct order of President Truman that was reversed.[131]

Sirica concluded this section of his opinion by again quoting at length from Marshall, this time the passage in *Burr* comparing the English king with the American President.[132] Acknowledging that *Burr* did not itself resolve the issue before the court, Sirica nonetheless insisted that "[t]he conclusion reached here cannot be inconsistent with the view of that great Chief Justice nor with the spirit of the Constitution."[133]

Sirica's opinion represents the customary effort of a court faced with an issue of first impression to draw on available precedent in shaping new legal doctrine. In this case, of course, the stakes were unusually high because the issue involved the collision of the executive will with the court's own authority to compel the collection of evidence for a criminal prosecution of national significance, and

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[128] *Id.* Nixon did release memoranda of Gordon Strachan and W. Richard Howard sought by the subpoena. *See id.*

[129] *See id.* at 6-7. Sirica noted that Nixon had conceded the court's authority to issue a subpoena and was contesting the court's authority to enforce compliance with that subpoena. *See id.* at 7.

[130] *See id.*

[131] *Id.* at 8 (footnote omitted).

[132] *See id.* at 10.

[133] *Id.*

time was short.[134] In his synthesis, Sirica departed from prior courts in adopting a narrow reading of *Johnson* and relied on *Youngstown*, despite its silence on the question of the President as defendant, to supplement *Burr* as the dominant precedent. The resulting opinion showed more deference to John Marshall than independent analysis but recognized clearly the American tradition of binding the executive branch to the rule of law and made its own contribution to that tradition by rejecting the President's distorted reading of the history of executive prerogative.

The court of appeals, sitting en banc to hear *Nixon v. Sirica*,[135] produced a more elaborate opinion approving and developing the district court's jurisdictional ruling.[136] Agreeing with Sirica that *Youngstown* endorsed jurisdiction over the President as well as lesser executive branch officials, the per curiam opinion found significance in Supreme Court silence: "There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party."[137] Although the court expressed a preference, based on comity, for directing legal process to executive subordinates, it rejected the notion that the President should enjoy any exemption from judicial authority: "The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own."[138] The appeals court thus exposed the fallacy of the legal fiction implicit in *Youngstown*, the potential for a President to shield executive conduct from judicial review by the simple expedient of embracing a challenged act as his own.

The recurrent theme of the appeals court opinion is its rejection of any presidential prerogative to avoid the courts' jurisdiction.

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[134] The parties argued before the court on August 22. The opinion was issued a week later, on August 29. *See id.* at 1, 4.

[135] 487 F.2d 700 (D.C. Cir. 1973).

[136] The case was argued before the court of appeals for the District of Columbia Circuit on September 11; the decision was rendered a month later, on October 12. *See* Nixon v. Sirica, 487 F.2d 700, 700 (D.C. Cir. 1973). Both the President and the Special Prosecutor challenged the district court order. The President sought a writ of mandamus directing the district court to vacate its order; the Special Prosecutor sought a writ directing the district court to order immediate disclosure of the tapes to the grand jury. *See id.* at 706. The court of appeals found that it had jurisdiction to review the President's petition but, after noting that review of the Special Prosecutor's petition was not essential to resolution of the issues before it, the court dismissed his petition without decision. *See id.* at 707-08.

[137] *Id.* at 709.

[138] *Id.*

Just as the opinion reads *Youngstown* to treat the President and his subordinates alike, so it reads *Burr* to give the courts discretion to weigh the President's "special interests" in determining whether compliance with a subpoena should be required.[139] The appeals court also interpreted *Johnson* as rejecting the claim that the President's dignity places him above the law.[140] Further, the court was unpersuaded by the argument that the Impeachment Clause[141] of the Constitution and the President's election by the entire nation warrant immunity from judicial process even in the absence of a specific constitutional provision; the court termed these arguments "invitations to refashion the Constitution" and rejected them.[142] For the court of appeals, as for the district court, the procedural issue raised by the grand jury subpoena was the same as the substantive issue raised by the President's claim of executive privilege: whether the President was beyond the reach of the law. Both courts viewed compulsory process, like judicial review, as a mechanism by which they fulfilled their obligation to enforce the rule of law. Blending the language of *Burr* with the silence of *Youngstown*, both courts found authority for the position that the President's constitutional prerogatives do not include immunity from court process.[143]

Nixon v. Sirica thus set the stage for a Supreme Court ruling on the question of the President's amenability to process. Before the curtain could go up, however, the chief actor left the scene. President Nixon chose not to appeal within the five days allowed

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[139] *See id.* at 710. Like the district court, the appeals court quoted generously from Marshall's opinion in *Burr* to support the court's authority to enforce as well as issue a subpoena to the President. *See id.* at 709-10.

[140] *See id.* at 712 n.53. Although the Supreme Court had not expressly rejected Attorney General Stanbery's argument based on presidential dignity, the court of appeals "deem[ed] it significant that the Supreme Court declined to ratify these views." *Id.* The court also rejected the President's argument that the conduct at issue was discretionary rather than ministerial, observing: "The discretionary-ministerial distinction concerns the nature of the act or omission under review, not the official title of the defendant." *Id.* at 712.

[141] U.S. CONST., art. I, § 3, cl. 6.

[142] *See Nixon v. Sirica*, 487 F.2d at 711.

[143] Two members of the court of appeals dissented from portions of the court's opinion. Judge MacKinnon found on separation of powers grounds that "recordings of presidential deliberations cannot be the subject of a judicial subpoena if it would even remotely influence the conduct of such deliberations or their final outcome. Enforcement of the subpoena demonstrably would have just such an effect in this case." *Id.* at 752 (MacKinnon, J., concurring in part and dissenting in part). Judge Wilkey insisted: "It can hardly be questioned that in any direct confrontation between the Judiciary and the Executive, the latter must prevail. Therefore, the 'issue' of whether the President is amenable to court process is an illusory one." *Id.* at 792 (Wilkey, J., dissenting).

by the court of appeals, and the decision became final.[144] The issue returned to court shortly thereafter, however, when Cox's successor, Jaworski, subpoenaed 64 additional tapes, and Judge Sirica again ordered the President to deliver the tapes to the court.[145] The Supreme Court granted Jaworski's petition for certiorari before judgment,[146] and once more it appeared that the Court was poised to resolve the issue of the President's amenability to process.

Both the special prosecutor's petition for certiorari and his brief clearly raised the amenability issue. The petition included "[w]hether the President is amenable to the judicial process"[147] among what it characterized as "issues worthy of review by this Court."[148] The brief then developed at some length the idea that because "[n]o one would deny that every other officer of the executive branch is subject to judicial process, there is little basis in logic, policy or constitutional history for concluding that a matter becomes walled off from judicial authority simply because the President has elected to become personally involved in it."[149] Jaworski argued that the President shares the obligation of every citizen to assist the government in criminal prosecutions and interpreted that obligation as a ministerial duty subject to judicial authority under *Johnson*.[150] Predictably, the President's counsel responded in his brief that as a consequence of the separation of powers "compulsory process cannot issue against a President."[151]

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[144] *See id.* at 722; THE PRESIDENT BEFORE THE SUPREME COURT, *supra* note 125, at 21. Nixon's efforts to circumvent the court's order by releasing partial transcripts rather than the tapes themselves resulted in a confrontation with Special Prosecutor Cox and the subsequent Saturday Night Massacre of October 20, 1973, when the President fired Cox, and both Attorney General Elliot Richardson and his deputy, William Ruckleshaus, resigned. *Id.*

[145] The tapes were subpoenaed in connection with Jaworski's prosecution of several White House aides for conspiracy to defraud the United States and to obstruct justice. *Id.* at 162. For the district court decision denying President Nixon's motion to quash the subpoena, see *Mitchell*, 377 F. Supp. 1326, *aff'd sub nom.* United States v. Nixon, 418 U.S. 683 (1974).

[146] *See* United States v. Nixon, 417 U.S. 927 (1974).

[147] THE PRESIDENT BEFORE THE SUPREME COURT, *supra* note 125, at 177.

[148] *Id.* The brief in opposition to certiorari filed by the President's counsel offered as its sole argument the ill-advised nature of an expedited review by the Supreme Court in the absence of a decision by the court of appeals. *See id.* at 179-84.

[149] 3 CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS AND MATERIALS 211-12 (A. Boyan ed., 1976) (footnote omitted) [hereinafter CONSTITUTIONAL ASPECTS OF WATERGATE]. The brief relied on *Burr* and *Nixon v. Sirica* for its principal authority and referred to the Framers' hostility toward the royal prerogative in arguing against any constitutional immunity from process for the President. *See id.* at 213-21.

[150] *See id.* at 223-27.

[151] *See id.* at 395.

The brief found support in the ambiguous resolution of the *Burr* subpoenas and in *Johnson* for the President's right to resist court process.[152] For both sides, then, *United States v. Nixon* presented procedural questions of executive immunity from judicial process as well as substantive questions of executive privilege.

It is curious that the procedural issue surfaced only briefly in the oral argument and never engaged the sustained interest of the Court. James St. Clair, arguing for the President, maintained that the existence of an impeachment inquiry in Congress prevented the courts from adjudicating issues related to that inquiry.[153] The Court, obviously troubled by this challenge to judicial authority, resisted the bait offered by St. Clair when he told the Justices that "I don't think the President is subject to the process of the court unless he so determines he would give evidence."[154] Even when St. Clair made his most sweeping statements of presidential prerogative, the Court remained more concerned with the impeachment issue and the President's relation to the criminal prosecution than with the amenability issue. Thus, when St. Clair claimed that "law as to the President has to be applied in a constitutional way which is different than anyone else,"[155] only one Justice pursued the point by asking if a President could be sued for back taxes,[156] and the discussion quickly returned to the role of the tapes in the upcoming trial. When St. Clair tied his claim of presidential immunity from criminal process to the exclusive nature of the impeachment remedy for an incumbent President and to legislative immunity under the

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[152] *See id.* at 400-05. The President's brief noted with approval Jefferson's failure to comply with either of the subpoenas issued by Marshall. In his reply brief, Jaworski rejected this interpretation of *Burr* and countered with an account of the subpoena served on President Monroe in connection with the court martial of Dr. William Barton. Although Monroe claimed in the return of service that official duties prevented his attendance in court, he offered to give his evidence by deposition; eventually, Monroe submitted written answers to the court martial's interrogatories. *See id.* at 522. The brief interpreted this incident as illustrating Monroe's acceptance of a subpoena as proper under *Burr*. *See id.*

[153] *See id.* at 666-67.

[154] *Id.* at 667. Justice Stewart responded, "Putting that to one side," and returned to the relation of the impeachment inquiry to the criminal prosecution and the subpoena. *See id.*

[155] *Id.* at 678-79. St. Clair repeated the point a short while later: "Because while I said the President is not above the law, the law can only be made applicable to him in a certain way while he is in office." *Id.* at 683.

[156] *See id.* at 679. The transcript does not identify the questioner. Another unattributed response followed St. Clair's concession that the President could be sued individually: "The Constitution speaks of persons, any person." *Id.* The argument then shifted back to the role of the tapes in the criminal prosecution. *See id.*

Speech and Debate Clause, the Court pursued the latter distinction rather than the former.[157] During his argument, Jaworski never raised the amenability issue in any of its guises. The proceedings before the Court ended without any participant, Justice or counsel, invoking the *Burr* case as a source of illumination.[158]

Thus, it is not surprising that, although the Court's unanimous decision in *United States v. Nixon*[159] resolved a constitutional crisis, it did not resolve the teasing question of the President's amenability to process. In the structure of the Court's opinion, in its merging of the procedural issue with the substantive issue of executive privilege, and in the qualifications it imposed on its own ruling, the Court was careful to avoid any sweeping or comprehensive statement that would settle, once and for all, the scope of judicial authority to compel the chief executive.

The organization of Chief Justice Burger's opinion for the Court clearly differentiated between a trio of threshold issues and the dramatic centerpiece of the opinion, the fourth section addressing the claim of an executive privilege of confidentiality exempt from judicial review. In Section I, labeled Jurisdiction, the Court determined that the traditionally nonfinal nature of a denial of a motion to quash a subpoena did not deprive the Court of jurisdiction;[160] in Section II, labeled Justiciability, the Court rejected the President's claim that the case was an intra-executive branch dis-

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[157] According to St. Clair:

> [E]ven if this is criminal the President is immune from ordinary criminal process. He is not immune from process. But that process that is available to the President is the process of impeachment which does not include the function of the judiciary branch. And therefore we say that if under *Gravel* the congressman is entitled to immunity even from criminal conduct for actions taken within the legislation sphere of his conduct then it would be very hard to support a proposition that the President as the chief executive of the country is entitled to less.

Id. at 683. An unidentified Justice responded, "Except they didn't put it in the Constitution." *Id.*

[158] St. Clair did invoke *Johnson* as authority for his argument that "the Courts will not direct a President to exercise his discretion in any manner," *id.* at 682, including the decision to release subpoenaed tapes. He cited the case once again in his surrebuttal. *See id.* at 703.

[159] Then Associate Justice Rehnquist did not participate in the case, *see United States v. Nixon*, 418 U.S. at 718, presumably because of his prior service as Assistant Attorney General in the Nixon administration. Rehnquist has observed: "[I]t seems ironic to me that in the most celebrated case to have come before the Court since I became a justice, the Nixon Tapes Case, I was not even able to listen to the argument." WILLIAM REHNQUIST, THE SUPREME COURT 89 (1987).

[160] *See United States v. Nixon*, 418 U.S. at 690.

agreement in which the President retained authority to control the special prosecutor's demands for evidence;[161] and in Section III, labeled Rule 17(c), the Court found the subpoena *duces tecum* to be in compliance with the standards of the rule.[162] Each of the three preliminary sections made special mention of the effect of presidential involvement on the controlling law. Thus, in Section I, the Court found that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises," and declined to force the President to the "unseemly" necessity of disobeying a court order to ensure judicial review.[163] Again, in Section II, the Court based its ruling that the special prosecutor had standing to bring the action in part on "the uniqueness of the setting in which the conflict arises"[164] and—in a third use of the word—"the unique facts of this case."[165] Finally, in Section III, the Court asserted that "where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied."[166]

The Court's handling of these preliminary issues suggests its determination to reach the core of the case without creating any broader precedent than necessary. Its emphasis on the "unique" nature of the case is offered as justification for both bending the rules in Sections I and II and applying the rule in Section III with only a minimal accommodation to the President. There is, after all, no suggestion that different standards for Rule 17(c) apply to the President. Rather, there is only the requirement that the same standards should be meticulously applied, a privilege that arguably should be available on appeal to all subpoena challengers. Although the authority cited for this accommodation is *United States v. Burr*,[167] the Court omits from its opinion a section addressing what

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[161] *See id.* at 692.

[162] *See id.* at 697.

[163] *See id.* at 691-92.

[164] *Id.* at 697.

[165] *Id.*

[166] *Id.* at 702. In *The Brethren*, a source that must be treated with some skepticism, the authors claim that the phrase "particularly meticulous" represents Justice Brennan's compromise between Justice Powell's view that the President should be given special treatment and Justice White's conflicting view that the President should be treated like any other recipient of a subpoena under the rule. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 320, 323-24 (1979).

[167] *See United States v. Nixon*, 418 U.S. at 702.

was for Marshall the threshold question in his case, whether a subpoena may be issued to the President. Instead, the Court collapses the questions separated by Marshall—the court's authority to issue a subpoena and its authority to compel compliance with it—into the single subject of Section IV, which the Court labels The Claim of Privilege.[168]

Section IV opens with a formulation of the President's claim that the district court should have granted the motion to quash the subpoena "because it demands 'confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.'"[169] Thus, from the outset, the Court's focus is on the privilege of confidentiality rather than the privilege of exemption from process. Even when the Court addresses the President's argument that separation of powers precludes a subpoena arising from a criminal prosecution, the line between issuance and compliance is blurred. The Court starts its discussion by rejecting either separation of powers or confidentiality as a basis for "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[170] The discussion immediately shifts, however, to the problem of confidentiality and the limits of judicial deference to the President's need for candid conversations with his advisors. By the end of the paragraph, the transition is complete:

> Absent a claim of need to protect military, diplomatic, or national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such

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[168] Gerald Gunther notes the distinction between the two separate issues of the case, presidential amenability to judicial process and executive privilege, and observes: "It was possible to decide against President Nixon's claim as to the first issue and yet support his argument as to the second. . . . The opinion in *United States v. Nixon* tended to merge and blur those separate issues." Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 34 (1974); *see also* Paul J. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 80 (1974). Kenneth L. Karst and Harold W. Horowitz agree that "[a]lthough the opinion expresses the point only fleetingly, the Court's decision is a clear rejection of the notion that the President is constitutionally immune from all judicial process." Kenneth L. Karst & Harold W. Horowitz, *Presidential Prerogative and Judicial Review*, 22 UCLA L. REV. 47, 49 (1974). For their discussion of the immunity issue, concluding that the issues raised by the claims of immunity and executive privilege are in fact the same, see *id.* at 48-54.

[169] *United States v. Nixon*, 418 U.S. at 703 (quoting Appellant's Brief at 48a).

[170] *Id.* at 706.

> material for *in camera* inspection with all the protection that a district court will be obliged to provide.[171]

Of course, if the courts may compel presidential compliance with a subpoena, then logically there should be no obstacle to the lesser intrusion of issuing that subpoena. The distinction is not, however, without significance even in the context of the Court's opinion. In the case of military, diplomatic, or national security matters, would a court be barred from issuing a subpoena or only from compelling disclosure? Would the grounds for a motion to quash properly be separation of powers or confidentiality? By the beginning of the opinion's next subsection, the Court uses the term "judicial process" to refer broadly to the legal disposition of criminal charges rather than the service of court papers.[172] Although the Court subsequently approves the issuance of the subpoena,[173] there is no resolution of the President's boldly stated claim of complete immunity from compulsory process.

What the Court offers in *United States v. Nixon* is a balancing test that weighs the President's need for confidentiality against the legal system's need for relevant evidence in criminal prosecutions. This narrow formulation limits the opinion to the context of the case before the Court, and Burger makes explicit the Court's intention of excluding from its language subpoenas issued in both civil litigation and congressional inquiries:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.[174]

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[171] *Id.* This subsection of the opinion, IVB, concludes with another blurring of the distinction, when the Court rejects "an absolute privilege as against a subpoena essential to enforcement of criminal statutes" because the President's "generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions" would disturb the constitutional balance of the branches. *Id.* at 707. The passage fails to make clear whether the privilege would protect against issuance or only against compliance with the subpoena.

[172] "Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.*

[173] *See id.* at 713.

[174] *Id.* at 712 n.19.

The Court strikes the balance in favor of what it terms "the fundamental demands of due process of law in the fair administration of criminal justice,"[175] a compelling definition that makes inevitable the resolution of the case.

The Court's chief authority for its opinion is *Burr*, which it cites six times. All of those citations, however, rely on *Burr* to support judicial deference to the President. Thus, Burger twice appreciatively quotes Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual."[176] Burger also cites *Burr* as endorsing "high respect to the representations made on behalf of the President;"[177] as requiring a compelling demonstration by the subpoena's proponent that the evidence sought is essential to the case before the court;[178] as protecting the President from harassment by unnecessary subpoenas;[179] and as providing a "high degree of deference" to presidential records.[180] Although Marshall in *Burr* was clearly concerned about the conflict of executive and judicial authority created by the issuance of a subpoena to the President, Burger's use of *Burr* mutes Marshall's central theme, the subjection of the President, like every other citizen, to the rule of law embodied in the customary forms of legal process. Even when Burger acknowledges the limits inherent in Marshall's caution against treating the President as an "ordinary individual," he insists on a presidential prerogative:

> Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article.[181]

The difference between Burger and Marshall is more than one of emphasis. Where Burger treats the President's "unique role" as a basis for unusual deference by the courts, Marshall places on the

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[175] *Id.* at 713.

[176] *Id.* at 708, 715. The other four citations to *Burr* appear at 707, 713, 714, and 715.

[177] *Id.* at 707.

[178] *Id.* at 713. It is noteworthy that Burger here interpolates "criminal" to limit the scope of Burr: "[I]t became the further duty of the District Court . . . to require the Special Prosecutor to demonstrate that the Presidential material was 'essential to the justice of the [pending criminal] case.'" *Id.* at 713 (citation omitted).

[179] *Id.* at 714.

[180] *Id.* at 715.

[181] *Id.*

President a heavy burden of establishing a basis in his official duties for any exemption from the ordinary compulsions of the law. Where Burger elevates presidential prerogative, Marshall restrains it. *United States v. Nixon* suggests that the Court has followed the result of *Burr* but has presented its message in a more deferential light than Marshall would have employed.

If *United States v. Nixon* failed to resolve the difficult question of the President's relation to the judicial process, it is only fair to take into account the extraordinary circumstances under which it was written and the extraordinary effect it achieved. After receiving lengthy briefs prepared on an expedited briefing schedule, the Court heard argument on July 8, 1974.[182] Although the Court had completed the work of its regular term and was able to concentrate exclusively on the case, it was acutely aware of the ongoing impeachment inquiry in the House of Representatives, the national mood of crisis, and the suggestions by President Nixon, reinforced by the evasive language of his counsel at oral argument, that the President might refuse to obey a Supreme Court decision ordering release of the tapes.[183] Under these circumstances, it is understandable that the Justices would try, as they had at other times of national distress, to produce a unanimous opinion, one that would

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[182] *See id.* at 690. Because certiorari had been granted prior to judgment by the court of appeals, the only decision before the Court was that of Judge Sirica for the district court.

[183] In the most quoted exchange of the argument, St. Clair parried Justice Marshall's efforts to extract a concession that President Nixon would be bound by the Court's resolution:

> Justice Marshall. You are submitting the matter to this Court—
>
> Mr. St. Clair. To this Court under a special showing on behalf of the President—
>
> Justice Marshall. And you are still leaving it up to this Court to decide it.
>
> Mr. St. Clair. Yes, in a sense.
>
> Justice Marshall. In what sense?
>
> Mr. St. Clair. In the sense that this court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties. . . .
>
> Justice Marshall. Well, do you agree that that is what is before this Court, and you are submitting it to this Court for decision?
>
> Mr. St. Clair. This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.
>
> Justice Marshall. Are you submitting it to this Court for this Court's decision?
>
> Mr. St. Clair. As to what the law is, yes.

CONSTITUTIONAL ASPECTS OF WATERGATE, *supra* note 149, at 671.

speak with the full institutional authority of the Court.[184] The compromises necessary to achieve unanimity on such a difficult issue may well account for the doctrinal lapses of the opinion, for its uneasy blend of general deference to executive prerogative with a specific demand for immediate compliance, and for its choice of the narrowest available grounds for resolution.[185]

Though its jurisprudence was flawed, the opinion proved to be swift and potent in resolving the Watergate crisis. *United States v. Nixon* was issued on July 24, sixteen days after oral argument. On July 31 and August 1 the House Judiciary Committee voted articles of impeachment; on August 5, President Nixon released the tapes listed in the subpoena; and, four days later, on August 9, he became the first President of the United States to resign from office.[186] Like *Youngstown*, a case cited twice by the Court,[187] *United States v. Nixon* was an institutional victory for the Court and the country.[188] Neither case expressly proclaimed the Court's constitutional authority to hold the President accountable by means of judicial process for the conduct of his office, yet both achieved precisely that practical result. President Truman released the steel mills, President Nixon released the tapes, and in each case a constitutional crisis was averted.

The Court, however, is more than a political institution, and its performance must be measured by gauges more sensitive than practical results. *United States v. Nixon* left unresolved the question that had troubled the courts since *Burr*, the question of the President's amenability to the judicial process. It offered the lower

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[184] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Education, 347 U.S. 483 (1954).

[185] For two analyses of the implications of unanimity for the opinion, see William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 120-23 (1974); Mishkin, *supra* note 168, at 86-90. For an account of the Court's internal disagreements and compromises, again to be read with some skepticism, see WOODWARD & ARMSTRONG, *supra* note 166, at 308-46.

[186] Philip B. Kurland, *United States v. Nixon: Who Killed Cock Robin?* 22 UCLA L. REV. 68, 69 (1974). Kurland believes that the Court's decision was "a political decision not a judicial one" and is strongly critical of the Court's reasoning. *See id.* at 70-75.

[187] *Youngstown* is cited as authority for the Court's ability to rule conduct by the executive or legislative branches unconstitutional. *See United States v. Nixon*, 418 U.S at 703. Burger also cites Justice Jackson's concurring opinion for the proposition that the Constitution "enjoins upon [the government's] branches separateness but interdependence, autonomy but reciprocity." *Id.* at 707.

[188] For the argument that the Watergate situation should have been left to Congress in the exercise of its impeachment power rather than to the Court, see Gunther, *supra* note 168.

courts, in which numerous cases were soon to be filed against President Nixon's successors, only a loosely crafted precedent, uninformed by a clear vision of the presidency and the courts.

E. The Presidential Pocket: Nixon v. Fitzgerald[189]

In the wake of *United States v. Nixon,* Richard Nixon departed from the White House but not from the courts. Eight years later, in *Nixon v. Fitzgerald,*[190] the Supreme Court returned to the question of the President's amenability to the judicial process. If the earlier case had concealed the Justices' differences behind its broad language and loose argument, the later case made clear the powerful disagreement that existed among the six members of the Court who participated in both decisions.[191] The Court in *Nixon v. Fitzgerald* divided five-four, and instead of a single opinion there were four perspectives, two in dissent, on the relation of the President to the courts.[192]

Unlike the previous cases challenging presidential conduct, *Fitzgerald* was an action for civil damages arising from the plaintiff's removal from his position as a management analyst for the Department of the Air Force. Fitzgerald, who had testified before Congress concerning cost-overruns on the C-5A transport plane, claimed that the subsequent elimination of his position as part of a departmental reorganization by the Nixon administration was in fact a reprisal for his testimony in violation of two federal statutes and his constitutional rights under the First Amendment.[193] After the district court rejected Nixon's claim of absolute immunity and the court of appeals dismissed his collateral appeal, the Supreme Court granted certiorari to resolve the issue of presidential immunity.[194]

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[189] 457 U.S. 731 (1982).

[190] *Id.*

[191] The six were Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, and Powell.

[192] Justice Powell's majority opinion was joined by the Chief Justice and Justices Rehnquist, Stevens, and O'Connor. The Chief Justice wrote a concurring opinion. Justice White wrote a lengthy dissent joined by all the dissenters; Justice Blackmun's separate dissent was joined by Justices Brennan and Marshall. *See* Nixon v. Fitzgerald, 457 U.S. 731, 733.(1982).

[193] *See id.* at 730-40.

[194] *See id.* at 740-41. The court of appeals based its dismissal on the "collateral order" doctrine, which precludes review of an interlocutory order unless it presents an unresolved question of law. Because the court of appeals had earlier denied the claim of absolute

The Court resolved that issue squarely in favor of the former President by affording him absolute immunity from civil damages for presidential conduct. Writing for the majority, Justice Powell drew heavily on two themes from *United States v. Nixon*: the unique nature of the President's office and judicial deference to presidential prerogative. Thus, the opinion identifies immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[195] The word "unique" appears four times in less than three pages,[196] each time distinguishing the demands of the President's office from those of other executive officials granted only qualified immunity by earlier decisions of the Court.[197]

Powell also turned to *United States v. Nixon* for a balancing test based on separation of powers doctrine to determine under which circumstances a court may exercise jurisdiction over the President. The test balances "the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."[198] Applying the test to what the Court terms "this merely private suit for damages," it strikes the balance in favor of presidential immunity.[199] When the Court moves beyond the particular facts of the case to establish general guidelines, it extends absolute immunity to all acts within the "outer perimeter" of the President's official duties.[200]

Fitzgerald makes explicit what remained implicit in *United States v. Nixon*, an interpretation of constitutional history that finds deference to presidential prerogatives in the drafting of the Constitution and in the prior decisions of the Court. Although Powell concedes that his historical evidence, relegated to a footnote, is

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presidential immunity in Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd in part by an equally divided Court*, 452 U.S. 713 (1981), it reasoned that no such question existed. The Supreme Court rejected this reasoning, noting that at the time of dismissal it had not yet addressed the question of presidential immunity. The Court also invoked "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Fitzgerald*, 457 U.S. at 742-43.

[195] *Fitzgerald*, 457 U.S. at 749.

[196] *See id.* at 749-51.

[197] *See, e.g.*, Butz v. Economou, 438 U.S. 478, 479 (1978) ("In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity . . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.").

[198] *Fitzgerald*, 457 U.S. at 754.

[199] *See id.*

[200] *See id.* at 765.

fragmentary, he derives from the silence of the convention debates confirmation for his view that the Framers intended to provide presidential immunity from civil litigation.[201] To strengthen his arguments Powell also cites *Johnson*, unmentioned by the Court in *United States v. Nixon*, as part of a tradition of deference to presidential conduct.[202] For the majority, history and policy converge to dictate the same result, a deference to the President that is essential to the effective performance of his executive duties.

The difference between *United States v. Nixon* and *Fitzgerald* is not simply that the balancing tests produced opposite outcomes or that Richard Nixon lost the first decision and won the second.[203] Rather, in *Fitzgerald*, for the first time a majority of the Court articulated an expansive view of presidential prerogative, a view that looked to nonlegal remedies to control the excesses of unauthorized executive conduct.[204] Although the Court confidently asserts that "absolute immunity will not place the President 'above the law,'"[205] its opinion in fact goes well beyond any prior case law to confer on the President an unqualified exemption from the ordinary legal process for remedying the wrongs done by one person to another.[206] In constructing a tradition of deference, the Court at the same time casts a new light on its earlier decision compelling presidential compliance with a subpoena, a decision that in retrospect seems itself to be an exception to that newly crafted tradition.

The concurring opinion by Chief Justice Burger seeks to anchor the Court's opinion more firmly in the constitutional authority of

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[201] "But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." *Id.* at 751 n.31. Powell also relies on Justice Story's Commentaries and on President Jefferson's resistance to the *Burr* subpoena. *See id.*

[202] *See id.* at 753 n.34. The note also cites Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), as support for that tradition.

[203] For a comparison of the two cases attributing the different results to changes in public opinion toward Richard Nixon, see Anne Y. Shields, Note, *The Supreme Court Under Pressure: A Comparative Analysis of United States v. Nixon and Nixon v. Fitzgerald*, 57 ST. JOHN'S L. REV. 750 (1983).

[204] The opinion lists such alternate remedies as impeachment, congressional oversight, a vigilant press, the desire for re-election, and a concern for historical reputation. *See Fitzgerald*, 457 U.S. at 757.

[205] *Id.* at 758.

[206] Stephen L. Carter has argued that the Court reached the correct result in Fitzgerald because the constitutional system of checks and balances provides the appropriate political remedies for an "evil President." *See* Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1398-99 (1983).

separation of powers doctrine and in the historical authority of tradition. Burger asserts, without demonstration, that presidential immunity "has been taken for granted for nearly two centuries,"[207] and he is at great pains to distinguish both *Burr* and his own opinion in *United States v. Nixon* as criminal subpoena cases irrelevant to the issue of civil immunity from damages.[208] In his view, his earlier opinion stands for restraint by the judiciary on questions of presidential decision making "absent imperative constitutional necessity"[209] for intervention by the courts.

Burger offers two concessions to the principle of presidential accountability under the law. He emphasizes the limitation of the Court's decision to civil damage actions,[210] and he acknowledges that litigants may question whether a presidential action falls within the scope of official duties.[211] He is, however, willing to go even further than the majority by asserting that Congress may not affirmatively establish presidential liability by statute,[212] an issue expressly reserved by the Court's opinion. As the author of *United States v. Nixon*, Burger removes that opinion and its chief authority, *Burr*, from the central line of authority that he identifies as supporting the constitutional necessity for presidential immunity from judicial control except in the most compelling circumstances.

In his elaborate dissent, Justice White, like the other three dissenters a member of the unanimous Court of *United States v. Nixon*, offers a dramatically different context for resolving the problem of presidential immunity. For White, the grant of absolute immunity to the presidential office rather than to a *function* of that office is a return to the discredited tradition of royal prerogatives:

> Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. . . . Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.[213]

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[207] *Fitzgerald*, 457 U.S. at 758 (Burger, C.J., concurring).
[208] *See id.* at 760.
[209] *Id.* at 761.
[210] *See id.* at 759.
[211] *See id.* at 761 n.4.
[212] *See id.* at 763-64 n.7.
[213] *Id.* at 766-67 (White, J., dissenting).

In opposition to the majority view, White presents an alternative history that emphasizes the importance of both presidential accountability and the courts' ability to provide a remedy for individual harms as fundamental to the American legal system. White notes in passing the irony of releasing on the tenth anniversary of the Watergate episode a Court decision that calls into question the President's subjection to the rule of law.[214] For him, *Fitzgerald* is the anomaly, a decision that departs from precedent, from history, and from constitutional design.

White identifies two distinct lines of precedent that compel presidential accountability. The first, including *Youngstown*, establishes the authority of the courts to enjoin presidential conduct.[215] The second, beginning with *Burr* and reinforced by *United States v. Nixon*, establishes the authority of the courts to serve the President with judicial process.[216] White argues that the majority's constitutional argument cannot be reconciled with these precedents, that there is no constitutional principle that affords the President immunity from civil damages while exposing him to injunctive remedies and criminal process.[217] In White's view, any separation of powers problem originates not from the specially protected nature of the President's office but from impermissible judicial interference with a particular presidential duty; the proper judicial approach must be the same one applied by the Court to questions of immunity for other government officials, that is, a functional analysis of the claimed intrusion to determine whether the President is prevented by the threat of civil litigation from properly performing the duties of his office.[218] Nothing in the constitutional history offered by the majority persuades White that the Framers intended to provide absolute immunity for the President, and his opinion is at some pains to refute the evidence on which the Court relies.[219]

The second part of the dissent's analysis looks to the plaintiff's interest in securing relief. White selects an imposing antecedent for this interest, Chief Justice Marshall's language in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the

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[214] *See id.* at 767 n.2.

[215] *Id.* at 780. White also cites Korematsu v. United States, 323 U.S. 214 (1944), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[216] *Fitzgerald*, 457 U.S. at 781-82 (White, J., dissenting).

[217] *See id.* at 780.

[218] *Id.* at 784, 790-91 ("In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.").

[219] *See id.* at 771-79.

right of every individual to claim the protection of the laws, whenever he receives an injury."[220] The plaintiff's interest is further advanced by the Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*,[221] which created a federal cause of action for constitutional violations by government officials. From these precedents the dissent concludes that the wrongdoer, whether President or lesser official, should be spared the costs of the wrong only when immunity is necessary to the operation of government.[222] It is here that White's two arguments intersect in the doctrine of functional immunity, which rejects an absolute privilege for the President at the expense of his victim.

For the dissent, then, there is no support in either constitutional history or case law for "a special jurisprudence of the Presidency."[223] In White's view, *United States v. Nixon* stands not for deference to the President but for the presumption that, except in compelling situations, the President's official acts are subject to the rule of law.

In his brief dissent, Justice Blackmun endorses White's view that the Court's decision is itself an aberration from a basic tenet of American law:

> For me, the Court leaves unanswered [Justice White's] unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law. . . . Until today, I had thought this principle was the foundation of our national jurisprudence. It now appears that it is not.[224]

The fundamental differences between the majority and dissent in *Fitzgerald* suggest the limited range of common ground supporting the unanimity of *United States v. Nixon*. In perspective as well as result, the two cases offer irreconcilable visions of the President's place within the judicial system.

II. LITIGATION AND THE PRESIDENT: THE LOWER COURTS RESPOND

As *Nixon v. Fitzgerald* demonstrates, lower courts faced with litigation against the President could draw two opposite messages

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[220] *Id.* at 783, 789 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

[221] 403 U.S. 388 (1971), *cited in Fitzgerald*, 457 U.S. at 783, 789 (White, J., dissenting).

[222] *See Fitzgerald*, 457 U.S. at 783, 784 (White, J., dissenting).

[223] *Id.* at 793.

[224] *Id.* at 797-98 (Blackmun, J., dissenting) (citations omitted). The second point made in Blackmun's dissent is that the settlement reached by the parties before oral argument rendered the case inappropriate for review. *See id.* at 798-99.

from the authority of *United States v. Nixon*. The result of the case, both jurisprudentially and politically, was the assertion of judicial control over presidential conduct; the language of the case, however, suggested the special nature of the presidency and the deference it merited. Further, because the Court had declined to rule on the relation of civil litigation to the President, courts could either extend by analogy or distinguish the holding expressly limited to subpoenas issued in the context of a criminal prosecution.

In the years before the Nixon presidency, the lower courts had few occasions to worry about their treatment of the President. As both Justices Powell and White noted in *Fitzgerald*, until the Court created a federal cause of action against government officials for constitutional violations through *Bivens v. Six Unknown Federal Narcotics Agents*,[225] lawsuits against the President were almost nonexistent.[226] The few exceptions—a suit against President Eisenhower for reduction of the national debt and immediate desegregation,[227] a suit against President Johnson for a declaration of the unconstitutionality of the Vietnam War[228]—were quickly dismissed by the lower courts and denied certiorari by the Supreme Court. In the early years of the first Nixon administration, however, even before *Bivens* and the resolution of the Watergate litigation, a number of suits were filed against the President for injunctive and

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[225] 403 U.S. 388 (1971).

[226] "Prior to the litigation explosion commencing with this Court's 1971 *Bivens* decision, fewer than a handful of damages actions ever were filed against the President. None appears to have proceeded to judgment on the merits." Nixon v. Fitzgerald, 457 U.S. 731, 752 n.31 (1982). Justice White qualified the majority's vision of a post-*Bivens* litigation explosion: "Even granting that a *Bivens* cause of action did not become available until 1971, in the 11 years since then there have been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department." *Id.* at 795-96 (White, J., dissenting).

[227] *See* Easter v. Eisenhower, 351 U.S. 908 (1956) (denying certiorari). For a brief account of the case, see SCHUBERT, *supra* note 3, at 342 n.24.

[228] Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968) (dismissing suit for lack of standing, presence of a nonjusticiable political question, and lack of consent by United States to suit), *aff'd on other grounds sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). The Secretaries of State and Defense were also named as defendants; the President was not served with process. For a suit against President Johnson seeking compensation for damage done by the American military abroad, see Eminente v. Johnson, 361 F.2d 73 (D.C. Cir. 1966) (dismissing for lack of consent by United States to suit), *cert. denied*, 385 U.S. 929 (1966). *See also* Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970) (dismissing taxpayer suit alleging unconstitutional use of revenue from tax surcharge to finance Vietnam war). For another suit by the same plaintiff in connection with a later war, see Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y. 1991), *aff'd*, 935 F.2d 1278, *cert. denied*, 112 S. Ct. 316 (1991).

declaratory relief.[229] These suits were generally ambitious in scope, challenging administration policies concerning the war in Southeast Asia,[230] seeking compliance with federal statutes,[231] or demanding the allotment of funds appropriated by Congress.[232] They reflected an increased confidence, following years of successful civil rights litigation, in the legal process as an appropriate corrective to national problems. The suits also reflected the tendency of the Nixon administration, by its disregard for congressional prerogatives, to establish what Arthur Schlesinger, Jr. has termed an "imperial presidency."[233]

In resolving these early cases without the guidance of *United States v. Nixon*, the lower courts relied on a variety of approaches and reached a surprising variety of results. Some courts were certain that separation of powers doctrine precluded them from exercising any jurisdiction over the President and therefore dismissed the complaints before them.[234] Others relied on the distinc-

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[229] For an early damage action against President Nixon, see Reese v. Nixon, 347 F. Supp. 314 (C.D. Cal. 1972) (seeking damages for violation of civil rights from federal, state, and local government officials). In 1959, one district court set forth in dictum the accepted position without offering any authority: "[T]he courts may not enjoin or restrain the President, or compel him by means of a mandatory injunction or a writ of mandamus, to perform some act. It is recognized that he may not be required to respond to a subpoena." Trimble v. Johnston, 173 F. Supp. 651, 653 (D.D.C. 1959). The case, a journalist's action seeking an injunction to permit inspection of government documents, did not name the President.

[230] *See, e.g.*, Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972) (seeking to enjoin the President from ordering military personnel to conduct operations in Cambodia in the absence of a declaration of war); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973) (seeking declaratory judgment that aerial combat operations in Cambodia were illegal); Meyers v. Nixon, 339 F. Supp. 1388 (S.D.N.Y. 1972) (seeking to enjoin expenditure of funds for war in Southeast Asia); Atlee v. Nixon, 336 F. Supp. 790 (E.D. Pa. 1972) (seeking to enjoin expenditure of funds for war in Southeast Asia); Suskin v. Nixon, 304 F. Supp. 71 (N.D. Ill. 1969) (seeking declaration that draft laws were unconstitutionally discriminatory in favor of women and clergy).

[231] *See, e.g.*, National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974) (seeking writ of mandamus to compel the President to make pay adjustments under statute); Minnesota Chippewa Tribe v. Carlucci, 358 F. Supp. 973 (D.D.C. 1973) (seeking to compel the President to appoint members of National Advisory Council on Indian Education under statute); National Ass'n of Internal Revenue Employees v. Nixon, 349 F. Supp. 18 (D.D.C. 1972) (seeking declaratory and injunctive relief to compel pay adjustments under statute).

[232] *See* San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971) (seeking writ of mandamus to compel the President to allot appropriated funds to executive agencies).

[233] SCHLESINGER, *supra* note 3, at vii.

[234] *See National Ass'n of Internal Revenue Employees*, 349 F. Supp. at 21; *Reese*, 347 F. Supp. at 316-17. Both cases cite Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1868).

tion in *Mississippi v. Johnson* between discretionary and ministerial conduct,[235] on the avoidance of confrontation between branches of government,[236] or on the political question doctrine[237] to support their dismissals. Several courts, however, anticipated the Supreme Court by rejecting the absolute position that they lacked jurisdiction over the President in all circumstances. Early in 1972, in a suit alleging the unconstitutionality of the war in Southeast Asia, Judge Lord, citing *United States v. Burr*,[238] flatly "reject[ed] the notion that defendant Nixon is completely immune from judicial process because he is the President of the United States,"[239] although he went on to dismiss the suit against Nixon on the ground that relief was available from the remaining defendant, the Secretary of Defense.[240] Another district court, citing Judge Lord's decision, declined to dismiss a suit seeking to compel appointments entrusted to the President by the Indian Education Act on the ground that the language of the statute made the substitution of another defendant impossible.[241]

The most elaborate of these early decisions, *National Treasury Employees Union v. Nixon*,[242] considered the complaint of federal employees seeking to compel the President to implement a pay adjustment pursuant to the Federal Pay Comparability Act.[243] The Court of Appeals for the District of Columbia Circuit ruled that

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[235] *See Suskin*, 304 F. Supp. at 72.

[236] *See San Francisco Redevelopment Agency*, 329 F. Supp. at 672. The court finds it "clear, therefore, that a long standing policy, if not a positive rule, has avoided such an intragovernmental confrontation. The plaintiffs have failed to show this Court any good cause why this long standing forbearance should now be abrogated." *Id.* The court granted the motion to quash service to the President.

[237] *See Meyers*, 339 F. Supp. at 1391 (citing Flast v. Cohen, 392 U.S. 83, 95, 98 (1968)). The court also found the absence of a justiciable controversy and lack of standing. *See id.* Although the court found it unnecessary to reach the issue of presidential immunity from suit, it indicated its agreement with the court in *Atlee*, 336 F. Supp. 790.

[238] 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

[239] *Atlee*, 336 F. Supp. at 791.

[240] *See id.* at 792. The court relied on Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Its dismissal of the suit against the President was, however, explicitly without prejudice to the plaintiffs' right to reinstate their claim in the event that the conduct at issue was alleged to be "entirely unilateral." *Atlee*, 336 F. Supp. at 792. When the suit was refiled and heard by a three judge court, a majority dismissed it as a nonjusticiable political question; Judge Lord dissented from the dismissal. *See* Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973).

[241] *See Minnesota Chippewa Tribe*, 358 F. Supp. at 975-76. The case against the President was subsequently dismissed as moot. *See id.* at 973.

[242] 492 F.2d 587 (D.C. Cir. 1974).

[243] *See id.* at 591-92. The plaintiff union sought declaratory and injunctive relief and a writ of mandamus.

"no immunity established under any case known to this Court bars every suit against the President for injunctive, declaratory or mandamus relief."[244] After opening its opinion with a long quotation from *Marbury v. Madison* on the scope of judicial review of executive conduct[245], the court carefully distinguished *Mississippi v. Johnson* on the ground that the case before it, unlike *Johnson*, raised a clear instance of ministerial conduct appropriately within the court's sphere of action.[246] *National Treasury Employees Union*, decided between the same court's own opinion in *Nixon v. Sirica*[247] and the Supreme Court's opinion in *United States v. Nixon*,[248] reveals the shift in judicial attitude toward presidential conduct from deference to skepticism, from reluctance to act to reluctance to refrain from acting:

> Thus, in the circumstances of this case, this Court should be extremely reluctant in light of the fundamental constitutional reasons for subjecting Executive actions to the purview of judicial scrutiny to hold that the federal judiciary lacks power to compel the President to perform a ministerial duty in accordance with the law.[249]

Although the court declined to issue a writ of mandamus, choosing instead to grant only declaratory relief, its decision made clear its conviction that federal courts possessed both the jurisdiction and the authority to compel ministerial acts by the President.[250]

In the wake of *United States v. Nixon*, some plaintiffs were encouraged to file extravagant claims against the President. It is

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[244] *Id.* at 609.

[245] *See id.* at 589-91.

[246] *See id.* at 606-07, 613-14.

[247] 487 F.2d 700 (D.C. Cir. 1973).

[248] 418 U.S. 683 (1974). *National Treasury Employees Union* was decided on January 25, 1974, *Nixon v. Sirica* on October 12, 1973, and *United States v. Nixon* on July 24, 1974.

[249] *National Treasury Employees Union*, 492 F.2d at 612.

[250] *See id.* at 616. The court found it "more appropriate" to resolve the case under the Federal Declaratory Judgment Act. *See id.* For an earlier case in which Judge Sirica found that the court lacked subject matter jurisdiction to grant, *inter alia*, a writ of mandamus to compel President Nixon to respond to a subpoena *duces tecum* issued by a Senate committee, see Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 57 (D.D.C. 1973). At a later stage of the proceedings, though several months before *United States v. Nixon*, the court ruled the matter justiciable but denied relief on the basis of the Committee's inadequate showing of entitlement in light of likely prejudicial pretrial publicity. *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521, 524 (D.D.C. 1974).

worth noting that the courts handling these cases generally continued to dismiss them without relying on or even invoking the malleable authority of the new Supreme Court precedent. Thus, when the Committee to Establish the Gold Standard sued President Ford to enjoin the sale of gold by the Treasury, the district court dismissed the case against the President sua sponte on the ground that the injunction sought would "affect the performance of the non-ministerial duties of his office."[251] In an even more ambitious suit brought by a pro se plaintiff to nullify the 1972 presidential election and compel a new election, the Second Circuit based its dismissal on defective service of process.[252]

Of greater moment were two suits seeking damages from former President Nixon for allegedly illegal surveillance activities. In *Halperin v. Kissinger*,[253] decided two years before *Nixon v. Fitzgerald* settled the issue, the Court of Appeals for the District of Columbia Circuit ruled that neither separation of powers doctrine nor prudential concerns entitled the President to absolute immunity from suit.[254] The court cited three precedents for the exercise of judicial authority over presidential conduct—*Youngstown*, *National Treasury Employees Union*, and *United States v. Nixon*—but the more recent Supreme Court case came last, and all three case names appeared only in footnotes.[255] The court's ringing conclusion sounded the theme of presidential subjection to the rule of law:

> Finally, we think the application of qualified immunity to defendant Nixon is mandated by our tradition of equal justice under law. The President is the elected chief executive of our government, not an omniscient leader cloaked in mystical powers.[256]

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[251] Committee to Establish the Gold Standard v. United States, 392 F. Supp. 504, 506 (S.D.N.Y. 1975).

[252] *See* Griffith v. Nixon, 518 F.2d 1195, 1196 (2d Cir. 1975); *see also* Sloan v. Nixon, 60 F.R.D. 228, 230 (S.D.N.Y. 1973), *aff'd*, 493 F.2d 1398 (2d Cir.), *aff'd*, 419 U.S. 958 (1974). In *Sloan*, the district court dismissed on standing grounds a pro se action to enjoin the President and Vice President from remaining in office and to annul the appointments of the Chief Justice of the United States and three Associate Justices of the Supreme Court. The judge was sufficiently provoked to observe: "The complaint is utterly without legal foundation, and, while over a lifetime I have seen many misguided lawsuits, this must be the nadir." *Id.* at 229. The judge also, however, acknowledged that "[a]lthough such actions represent an uneconomic waste of judicial time, it is important for our country that every citizen know that a day in court is his even where the highest officers of the nation are the subjects of his complaint." *Id.* at 230.

[253] 606 F.2d 1192 (D.C. Cir. 1979).

[254] *See id.* at 1211-13.

[255] *See id.* at 1211 & nn.133-135.

[256] *Id.* at 1213.

It is striking that the authority cited by the court for this view is its own decision in *Nixon v. Sirica*,[257] not the Supreme Court's decision in *United States v. Nixon*. A few months later a district court relied on *Halperin* in denying Nixon's motion to dismiss a similar claim for damages; the court found that Nixon had failed to show "any reason why the elevated rank of his office distinguishes his case from that of other high level federal officials,"[258] a point on which it apparently found *United States v. Nixon* of no precedential value. For the lower courts, then, the Supreme Court's unanimous decision did not provide the jurisprudential foundation on which to build their own structures accommodating presidential prerogatives and the demands of the judicial process.[259]

In the administrations that followed Nixon, lawsuits naming the President as defendant became increasingly common. Many of these suits used litigation as a means of challenging broadly based executive policies or actions; others sought reversal of narrower and more personal executive decisions. Some of these suits were brought by members of Congress, others by citizens outside the government establishment; some were resolved on the merits, others dismissed under a variety of legal theories. In virtually all of these cases, however, the issue of the amenability of the President to suit was neither raised by the defendants nor discussed by the court. Without any express direction from the Supreme Court, the lower courts accepted as established the right of any plaintiff, government official or private citizen, to sue the President for injunctive or declaratory relief. Of course, after 1981 *Nixon v. Fitzgerald* precluded any claims for damages against the President. But all areas of presidential conduct, including those expressly excluded from the reach of *United States v. Nixon*, became open to challenge in the courts.

In the immediate aftermath of Watergate, President Ford was relatively sheltered from the onslaught of litigation that followed

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[257] *See id.* at 1213 n.147.

[258] Clark v. United States, 481 F. Supp. 1086, 1092 (S.D.N.Y. 1979) (paraphrasing *Halperin*, 606 F.2d at 1210).

[259] One district court, faced with an executive privilege defense by former President Nixon to a subpoena *duces tecum* for White House tapes and transcripts of conversations concerning demonstrations on May Day of 1971, cited *United States v. Nixon* and noted in dictum that "the rationale underlying the refusal of the Supreme Court to find an absolute executive privilege in criminal cases applies with very considerable force to the present civil case." Dellums v. Powell, 70 F.R.D. 648, 649-50 (D.D.C. 1976). The court went on to deny Nixon's motion to quash the subpoena by distinguishing between the strength of executive privilege claims by incumbent and former Presidents. *See id.* at 650.

his time in office. Of the handful of cases filed against him, most were resolved in his favor. Two cases challenging decisions made by his administration—the first, the awarding of military grants to Israel under the Emergency Security Assistance Act;[260] the second, a denial of the plaintiff's request for military records[261]—were both dismissed, neither on the issue of presidential amenability to suit.[262] The most interesting challenge came in *Murphy v. Ford*,[263] a suit by an attorney seeking a declaration that Ford's pardon of Nixon was unconstitutional.[264] The district court entertained the suit and ruled on the merits, finding the pardon a legitimate exercise of executive power "to end the divisions caused by Watergate and to shift the focus of attention from the immediate problem of Mr. Nixon to the hard social and economic problems which were of more lasting significance."[265] Only in *Committee to Establish the Gold Standard v. United States* did a court dismiss an action against Ford on the ground that as President he was not amenable to an injunctive action seeking to compel performance of a non-ministerial duty.[266] From this point on, courts looked to the nature of the claim rather than the office of the defendant in determining whether dismissal was appropriate.

During President Carter's single term of office, over thirty suits were filed naming him as defendant. Although a number of these suits were dismissed, none of the courts relied on the special nature of the presidency to support dismissal. Instead, courts dismissed on a variety of grounds including failure to state a claim on which relief could be granted,[267] lack of standing,[268] presentation of a nonjusticiable political question,[269] and filing in an incorrect court.[270]

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[260] *See* Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975) (dismissing suit as a nonjusticiable political question concerning the conduct of foreign affairs).

[261] *See* Rivera v. Ford, 440 F. Supp. 732 (D.P.R. 1977) (dismissing suit for failure to allege exhaustion of administrative remedies).

[262] For a case awarding summary judgment to the plaintiffs in a class action Civil Rights Act suit claiming sex discrimination in appointments to the Board of Veterans Appeals, see Krenzer v. Ford, 429 F. Supp. 499 (D.D.C. 1977). Although President Ford was one of the named defendants, the district court dismissed the complaint against him without explanation. *See id.* at 503.

[263] 390 F. Supp. 1372 (W.D. Mich. 1975).

[264] *See* Murphy v. Ford, 390 F. Supp. 1372 (W.D. Mich. 1975).

[265] *Id.* at 1374.

[266] *See Committee to Establish the Gold Standard*, 392 F. Supp. at 506.

[267] *See* Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978).

[268] *See* McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981).

[269] *See* Freiberg v. Muskie, 651 F.2d 608 (8th Cir. 1981) (seeking to compel intervention

More often, however, suits were resolved on the merits. Such suits included a challenge to the procedure by which a serviceman's status was changed from missing in action to killed in action,[271] a shipowner liability case,[272] and cases seeking injunctions against the President.[273] The courts addressed the substantive issues, deciding at times for the President and at times against him.

One interesting consequence of the courts' willingness to entertain actions against the President appeared in the Carter administration, when members of Congress filed suit challenging presidential conduct undertaken without congressional participation. Four legislative suits were filed against President Carter: a suit by sixty members of the House of Representatives seeking a declaratory judgment that President Carter lacked authority to return the Panama Canal Zone to Panama without congressional approval;[274] a suit by members of Congress for injunctive and declaratory relief to prevent the President from terminating a defense treaty with Nationalist China in the absence of congressional approval;[275] a suit by Senator McClure challenging the legality of former Congressman Abner J. Mikva's appointment to the United States Court of Appeals by the President on the ground that federal judicial salaries had been increased by the Congress of which Mikva was

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by the Department of State on behalf of the plaintiff with the government of West Germany).

[270] *See* Barclay Indus. v. Carter, 494 F. Supp. 912 (D.D.C. 1980) (involving suit alleging improper revocation of duty-free treatment of Brazilian hardwood within exclusive jurisdiction of the Customs Court).

[271] *See* Townsend v. Carter, 476 F. Supp. 1070 (N.D. Tex. 1979) (granting the defendants' summary judgment motion on the ground that the status hearing had afforded the plaintiff due process). For a case with similar facts and result, see Darr v. Carter, 640 F.2d 163 (8th Cir. 1981) (granting the defendants' summary judgment motion on the ground that the administrative process was not yet complete and the plaintiff had not demonstrated irreparable injury). The Secretaries of Defense and of the Air Force were also named as defendants in both cases.

[272] *See* Lusson v. Carter, 599 F. Supp. 8 (D.P.R. 1983) (determining that defendant shipowner was immune from suit under federal statute). The court did not discuss the President's role as a named defendant.

[273] *See, e.g.*, Punnett v. Carter, 621 F.2d 578 (3d Cir. 1980) (denying preliminary injunction compelling government to warn members of military of potential side effects of exposure to radiation from nuclear test on grounds that plaintiffs failed to show likelihood of success on the merits or to establish irreparable harm); Hopper v. Carter, 572 F.2d 87 (2d Cir. 1978) (denying preliminary injunction to prevent serviceman's change in status from missing in action to dead on grounds that plaintiff failed to show likelihood of success on the merits or to establish irreparable harm).

[274] *See* Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978).

[275] *See* Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

a member;[276] and a suit by Senator Dole to enjoin the President from returning property to the Hungarian government without the consent of the Senate.[277] Three of these cases were dismissed—one as a nonjusticiable political question,[278] one for failure to state a claim,[279] and one for lack of standing[280]—but one was resolved on the merits by the District of Columbia Circuit, which ruled that the President possessed the power to terminate the treaty independently.[281] All of these cases accept the use by the legislative branch of the judicial branch to question the legitimacy of conduct by the executive branch. In such decisions the idea of a complete separation of the branches of government, endorsed in *Mississippi v. Johnson*, is replaced with a more flexible approach. Although the courts were not eager to hear these challenges to presidential action and dismissed them when possible, none of the courts rejected as improper the institutional role imposed upon them by the legislator-plaintiffs.

Several other cases filed against President Carter make clear as well that courts were willing to consider issuing injunctions directed to the President rather than a subordinate designated to implement presidential orders. In one case, the district court found the Pres-

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[276] *See* McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981).

[277] *See* Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977).

[278] *See id.* at 1110-11. The court rejected Senator Dole's claim that the agreement between the President and the government of Hungary was a bilateral treaty concluded without Senate approval, finding instead that the President's conduct of foreign relations raised a nonjusticiable issue and denying the request for a preliminary injunction. *See id.*

[279] *See Edwards*, 580 F.2d at 1056.

[280] *See McClure*, 513 F. Supp. at 271.

[281] *See Goldwater*, 617 F.2d at 708-09. The Supreme Court subsequently granted certiorari and issued an order vacating the judgment below and remanding the case with directions to dismiss. *See Goldwater v. Carter*, 444 U.S. 996 (1979). There was no opinion for the Court, but there were four separate opinions representing the views of eight members of the Court; only Justice Marshall concurred in the result without opinion. Writing for himself and concurring in the judgment, Justice Powell thought that the case should be dismissed as unripe because Congress had not yet acted, and "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." *Id.* at 997. Also concurring in the judgment and joined by Chief Justice Burger and Justices Stewart and Stevens, Justice Rehnquist thought that dismissal should be based on the political question doctrine "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." *Id.* at 1002. Justice Blackmun, joined by Justice White, dissented in part because he thought the case should have been given plenary consideration. *See id.* at 1006. Dissenting alone, Justice Brennan would have affirmed on the merits the decision of the court of appeals based on the President's power to terminate recognition of foreign governments. *See id.*

ident's actions—raising the retail price of gasoline—to be beyond the bounds of his statutory authority and therefore unlawful.[282] In another injunction action, the First Circuit vacated an injunction issued by the district court to prevent the government from relocating Cuban and Haitian refugees without securing an environmental impact statement.[283] The court of appeals did not question its ability to enjoin the President; instead, it relied on congressional intent under the relevant statute to afford the President discretion in making such determinations.[284] Although only the *Independent Gasoline Marketer's Council v. Duncan*[285] court quoted *Youngstown* as authority for its scrutiny of presidential conduct,[286] both cases demonstrate the ease with which, following Watergate, the lower courts adapted *Youngstown's* treatment of a cabinet officer to the President. For courts asked to issue injunctions against President Carter, the question was no longer whether a President could be enjoined but instead whether the plaintiff could meet the generally accepted standards for the remedy sought.

By the time of the Reagan presidency, a court of appeals could refer to the current "era of widespread resort to the judiciary to compel executive action."[287] Members of Congress continued to bring suit to challenge executive action, and increasingly, private litigants used the courts as a forum for their opposition to presidential policies. There were also, however, a substantial number of suits brought by individuals or entities claiming immediate and

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[282] *See* Independent Gasoline Marketer's Council v. Duncan, 492 F. Supp. 614, 620-21 (D.D.C. 1980) (consolidated with *Marathon Oil Corporation v. Carter*). For a case granting a preliminary injunction compelling review of census records to correct an alleged undercount of New York residents, see Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980). President Carter was a named defendant. For a Second Circuit decision finding importers' challenge to trade agreements reached under the Trade Act of 1974 to be justiciable, see Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977); *see also* No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981) (granting defendants partial summary judgment but retaining for trial issue of whether oil pipeline violated Indian treaty rights); Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978) (denying preliminary injunction on ground that President's conduct was not an abuse of statutory discretion).

[283] *See* Colon v. Carter, 633 F.2d 964 (1st Cir. 1980), *rev'g* 507 F. Supp. 1026 (D.P.R. 1980).

[284] *See id.* at 967. For a case refusing to enjoin the President on the ground that his termination of the plaintiff's active duty status fell within the range of his statutory discretion, see Cinciarelli v. Carter, 662 F.2d 73 (D.C. Cir. 1981).

[285] 492 F. Supp. 614 (D.D.C. 1980).

[286] *See id.* at 619-20; *see also* Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 782 (relying on *Youngstown* for authority to determine whether President followed specific statutory procedures).

[287] Smith v. Reagan, 844 F.2d 195, 201 (4th Cir. 1988).

direct harm caused by presidential acts, sometimes in conjunction with the acts of other executive officials and sometimes in isolation. Several suits from this period seem to be frivolous in nature;[288] many others represent serious challenges to the legality of executive conduct and received the serious attention of the courts.

The suits brought by members of Congress cover some of the most controversial policies of the Reagan administration: the American presence in El Salvador and the provision of military aid to that country;[289] the use of American ships as escort vessels in the Persian Gulf without a formal declaration of war;[290] the support provided to the Nicaraguan Contras;[291] the invasion of Grenada;[292] and the administration's conduct of intelligence activities.[293] All these cases were dismissed: one based on the political question doctrine,[294] one based on mootness,[295] one based on ripeness,[296] one based on standing,[297] and two based both on the political question doctrine and on a doctrine developed specifically by the Court of Appeals for the District of Columbia Circuit in response to con-

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[288] *See, e.g.*, Komasinski v. I.R.S., 588 F. Supp. 974 (N.D. Ind. 1984) (dismissing suit for failure to state a cause of action and for bad faith in using a complaint to express political views). In *Komasinski*, the taxpayer plaintiff sought $300,000,000 in compensatory damages for seizure of his 1972 Ford van to pay a tax penalty and $200,000,000 in punitive damages. Although President Reagan was a named defendant, he was not served with process. *See id.* at 988 n.5; *see also* Miller v. United States, No. 89 CO737 (N.D. Ill. Feb. 8, 1989) (dismissing pro se complaint against 70 defendants, including President Reagan, as frivolous); Ledbetter v. Richmond, No. 86-1394 (E.D. Pa. July 18, 1986) (dismissing pro se complaint against President Reagan, the Department of the Treasury, Congress, and the Speaker of the House as unintelligible).

[289] *See* Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983).

[290] *See* Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).

[291] *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985). The plaintiffs included members of Congress, citizens and residents of Nicaragua, and residents of Florida.

[292] *See* Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *appeal dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985).

[293] *See* Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985); United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984). Both cases were brought by private as well as congressional plaintiffs.

[294] *See Sanchez-Espinoza*, 770 F.2d at 210. A second cause of action by the congressional plaintiffs based on violation of the Boland Amendment was dismissed as moot. *See id.* All claims by private plaintiffs were also dismissed.

[295] *See Conyers*, 765 F.2d at 1129.

[296] *See Greenham*, 755 F.2d at 37.

[297] *See United Presbyterian Church*, 738 F.2d at 1382. The district court had dismissed the action brought by Representative Dellums on equitable discretion grounds; then Judge Scalia, writing for the court and questioning the wisdom of the doctrine, affirmed the court below "on the ground that the reasons it gave for declining to exercise remedial discretion demonstrate a lack of standing." *Id.* The claims of the private plaintiffs were dismissed for lack of standing. *See id.* at 1381.

gressional litigation.[298] Under the equitable or remedial discretion doctrine,[299] courts exercise "judicial restraint where a congressional plaintiff's dispute is primarily with his or her fellow legislators."[300] In *Lowry v. Reagan*,[301] the district court noted that members of Congress themselves disagreed about the applicability of the War Powers Resolution to the President's actions in the Persian Gulf and declined to "impose a consensus on Congress" by resolving an internal dispute.[302] The court specified, however, that its refusal to hear the claim was not based on any reluctance to adjudicate differences between the executive and legislative branches: "A true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review."[303] Thus, by the 1980s, the issue for the courts facing these congressional challenges had become not intrusion on presidential prerogatives but rather intrusion on the internal decisionmaking of the legislative branch.

Suits brought by private litigants against President Reagan may be loosely divided into two categories: those questioning broad administration policies and those seeking relief for specific personal harm. Suits in the first category challenged the deployment of missiles,[304] funding for the Contras,[305] the resumption of diplomatic relations with the Vatican,[306] and the designation of 1983 as the

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[298] *See Crockett*, 720 F.2d at 1356-57; *Lowry*, 676 F. Supp. at 337-40. For an analysis of the problem of congressional suits by Judge McGowan of the District of Columbia Circuit, see Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); *see also* Tapia et al., *supra* note 3.

[299] The doctrine originated in Riegle v. Federal Open Market Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). The court in *Lowry*, citing Vander Jagt v. O'Neill, 699 F.2d 1166, 1175 & n.25 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983), explained that the term "remedial discretion" is used when the plaintiff seeks both declaratory and injunctive relief, "equitable discretion" when the plaintiff seeks only equitable relief. *See Lowry*, 676 F. Supp. at 337 n.27.

[300] *Crockett*, 720 F.2d at 1357.

[301] 676 F. Supp. 333 (D.D.C. 1987).

[302] *See id.* at 338-39.

[303] *Id.* at 339.

[304] *See* Romer v. Carlucci, 847 F.2d 445 (8th Cir. 1988) (ruling justiciable a challenge by the State of Colorado and environmental groups to the adequacy of the Air Force's environmental impact statement); *Greenham*, 755 F.2d 34 (involving a suit by private and congressional plaintiffs challenging deployment of Cruise missiles).

[305] *See* Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (dismissing action for injunctive and declaratory relief against continued funding of Contras).

[306] *See* Americans United for Separation of Church and State v. Reagan, 786 F.2d 194 (3d Cir.) (involving suit by 103 organizations and individuals claiming violations of Article II, the Establishment Clause, and the Equal Protection Clause), *cert. denied*, 479 U.S. 914 (1986).

Year of the Bible.[307] Although most of the suits were dismissed, the courts did show an increasing tendency to take seriously the merits of these quasi-political enterprises and an uneasiness with prior bases for quick disposition. Thus, even though the District of Columbia Circuit, reviewing a challenge to Contra funding in *Committee of United States Citizens Living in Nicaragua v. Reagan*,[308] ruled that the plaintiffs had failed to state a claim under either international law or the Fifth Amendment,[309] it reversed the district court's blanket application of the political question doctrine to all of the plaintiffs' claims.[310] In *Romer v. Carlucci*,[311] the Eighth Circuit also reversed a district court ruling that challenges to deployment of MX missiles based on the adequacy of the Air Force's environmental impact statement constituted a political question; it ordered the court below "to review these claims with all the rigor and scrutiny required by law" under the Department of Defense Authorization Act.[312] Even the district court declining to enjoin the President from designating 1983 as the Year of the Bible agreed that the plaintiff had standing to seek an injunction and based its decision on the uncertainty of the President's future conduct.[313]

The suits by plaintiffs seeking relief for more specific harm demonstrate even more clearly the courts' acceptance of the President as an appropriate defendant for a wide range of executive branch conduct. In some of these suits the conduct at issue was markedly presidential: an executive order transferring to an arbitration tribunal pending suits against Iran as part of the hostage release agreement,[314] or the removal of an incumbent from the District of Columbia Judicial Nomination Commission.[315] The courts

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[307] *See* Zwerling v. Reagan, 576 F. Supp. 1373 (C.D. Cal. 1983) (claiming Establishment Clause violation); Gaylor v. Reagan, 553 F. Supp. 356 (W.D. Wis. 1982) (denying motion for preliminary injunction to prevent designation of Year of the Bible).

[308] 859 F.2d 929 (D.C. Cir. 1988).

[309] *See id.* at 933-35.

[310] *See id.* at 933.

[311] 847 F.2d 445 (8th Cir. 1988).

[312] *See id.* at 447. The court ruled that additional claims by the plaintiffs were not covered by the statute and were therefore beyond the power of the court to review. *See id.*

[313] *See Gaylor*, 553 F. Supp. at 361.

[314] *See* Chas. T. Main Int'l v. United States, 509 F. Supp. 1162 (D. Mass. 1981) (dismissing action for declaratory and injunctive relief and a writ of mandamus). For another challenge to an executive order, see American Federation of Government Employees v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (challenging exclusion of certain members of Marshals Service from terms of Federal Service Labor-Management Relations Act).

[315] *See* Borders v. Reagan, 518 F. Supp. 250 (D.D.C. 1981).

decided in favor of the President in the first case[316] and against him in the second,[317] but both results were based on analysis of the limits of presidential power under the relevant statutes and the Constitution; neither opinion questioned the propriety of requesting injunctive relief against the President. In other suits, the President was linked as a defendant with executive officials or agencies having more direct responsibility for the challenged activities: the Secretary of State for his refusal to issue visas to aliens invited to speak on public matters,[318] or the Department of Commerce for the methodology of the census.[319] The courts hearing these and similar cases seemed untroubled by the inclusion of the President, who frequently went unmentioned in the text of their opinions, and proceeded to analyze the issues in terms of the rights and authority of the non-presidential defendants.[320] Although courts continued to dismiss some cases on familiar grounds like standing and political question doctrine,[321] they now frequently relied on detailed statutory analysis in determining that suits should not go

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[316] *See Main*, 509 F. Supp. at 1166 (finding presidential authority under Article II and International Emergency Economic Powers Act).

[317] *See Borders*, 518 F. Supp. at 268 (finding no removal authority under the District of Columbia Self-Government and Governmental Reorganization Act and no violation of separation of powers in restriction of the President's right of removal).

[318] *See* Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

[319] *See* City of New York v. United States Dept. of Commerce, 713 F. Supp. 48 (E.D.N.Y. 1989) (denying defendants' motions to dismiss and for summary judgment); *see also* Cuomo v. Baldrige, 674 F. Supp. 1089 (S.D.N.Y. 1987) (dismissing complaint seeking statistical adjustment of 1980 census).

[320] *See Abourezk*, 785 F.2d 1043 (finding subject matter jurisdiction and remanding for review in light of statutory analysis); City of New York, 713 F. Supp. 48 (finding that plaintiffs had standing and the court had authority to review the government's methodology). For other cases naming both the President and other members of the executive branch as defendants, see, for example, Smith v. Reagan, 844 F.2d 195 (4th Cir.) (including as defendants Secretaries of Defense and State and Director of United States Defense Intelligence Agency), *cert. denied*, 488 U.S. 954 (1988); Jones v. Reagan, 748 F.2d 1331 (9th Cir. 1984) (including as defendants Secretary of Health and Human Services, Surgeon General, and Acting Director of Bureau of Medical Services), *cert. denied*, 472 U.S. 1029 (1985); Arakawa v. Reagan, 666 F. Supp. 254 (D.D.C. 1987) (including as defendants the Federal Aviation Administration, Office of Personnel Management, Merit Systems Protection Board, and Federal Circuit).

[321] *See, e.g.*, Arjay Assocs. v. Reagan, 707 F. Supp. 1346 (Ct. Int'l Trade) (noting lack of standing to challenge Omnibus Trade Bill as bill of attainder), *aff'd*, 891 F.2d 894 (Fed. Cir. 1989); Smith v. Reagan, 844 F.2d 195 (holding suit by families of missing Vietnam veterans to compel the President to investigate under Hostage Act nonjusticiable based on the President's conduct of foreign affairs).

forward.[322] Most striking, courts without fanfare now ordered relief for plaintiffs against the President and other government defendants. Thus, a district court awarded summary judgment to plaintiffs claiming that the Department of Energy had failed to publish notices required by its own regulations; the court specifically noted that the President was also required to follow procedures established by law.[323] Even when presidential activities were at issue, a district court granted a preliminary injunction to news organizations seeking to block implementation of a policy announced by the President and his press secretary excluding television media from "limited coverage" White House events.[324] Throughout the opinion the court spoke diplomatically of the "White House Defendants," but the result was unmistakable: the President was enjoined from carrying out a policy governing press coverage of his own official activities.[325]

The Reagan presidency was also the occasion for the return to the courts of a variant of the issue in *United States v. Burr* and *United States v. Nixon*, the amenability of the President to a subpoena issued in connection with a criminal prosecution. The issue had surfaced earlier, during President Ford's administration, when a district court upheld a subpoena of the President as a defense witness in Lynette "Squeaky" Fromme's trial for attempted presidential assassination.[326] Although the court acknowledged that the subpoena of an incumbent President as a witness in a criminal trial was without precedent, it cited *Burr*, *Sirica*, and

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[322] *See* Gary Steel Supply Co. v. Reagan, 711 F. Supp. 471 (N.D. Ill. 1989) (dismissing suit for reimbursement for costs of environmental cleanup because amendments to CERCLA relied on by plaintiff became effective after cleanup order was issued); Briggs & Stratton Corp. v. Baldrige, 539 F. Supp. 1307 (E.D. Wis. 1982) (granting summary judgment to defendants on ground that challenged Commerce Department regulations were authorized by Export Administration Act), *aff'd*, 728 F.2d 915 (7th Cir.), *cert. denied*, 469 U.S. 826 (1984).

[323] *See* Texaco v. Department of Energy, 604 F. Supp. 1493, 1498-99 (D. Del. 1985) (citing Metzenbaum v. Edwards, 510 F. Supp. 609, 611 (D.D.C. 1981), *rev'd*, 795 F.2d 1021 (Temp. Emer. Ct. App.), *cert. denied*, 478 U.S. 1030 (1986)). Reagan was the named defendant in a consolidated case, *Pennzoil Co. v. Reagan*.

[324] *See* Cable News Network v. American Broadcasting Companies, 518 F. Supp. 1238 (N.D. Ga. 1981).

[325] *See id.* at 1246.

[326] United States v. Fromme, 405 F. Supp. 578 (E.D. Cal. 1975). A year earlier, the district court granted Richard Nixon's motion to quash a subpoena for a deposition on the ground of the risk to Nixon's health. *See* United States v. Mitchell, 385 F. Supp. 1190, 1191-92 (D.D.C. 1974), *aff'd sub nom* United States v. Haldeman, 559 F.2d 31, 85-88 (D.C. Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 933 (1977). Both courts relied as well on the limited value of Nixon's testimony to the defendants.

United States v. Nixon for the proposition that "where the President himself is a percipient witness to an alleged criminal act, the President must be amenable to subpoena as any other person would be."[327] Because the President could furnish testimony relevant to the defendant's criminal intent, the court agreed to issue the subpoena. Recognizing, however, the burden that the subpoena would impose on the President, the court authorized the taking of his testimony by means of a videotaped deposition,[328] an unprecedented response to an unprecedented situation.

The Ford subpoena had successors more notable than itself. In the aftermath of the Iran-Contra affair, two national security officials in the Reagan White House, John Poindexter and Oliver North, were prosecuted for criminal conduct arising from their positions within the administration; both subpoenaed former President Reagan to testify at their trials. One district court dealt handily with the North subpoena, first asserting the court's "power to enforce its compulsory process" but then finding that the defendant had failed to demonstrate that the Reagan testimony was "essential to assure the defendant a fair trial."[329] The second court, in a series of decisions, explored in greater detail the complexities of subpoenas to a former President for documents and testimony concerning matters with potential national security implications.

The district court hearing motions in Poindexter's case took a straightforward course in resolving a Reagan motion to quash a subpoena *duces tecum* that called for numerous entries from a presidential diary.[330] After reviewing the entries requested *in camera*, the court ordered those it deemed relevant to be turned over by the former President to the defendant.[331] The court anticipated a claim of executive privilege and explained that it would respond by following the procedures outlined in *United States v. Nixon*, but it never questioned the propriety of the subpoena or the former President's willingness to submit the requested entries to judicial examination.[332] After the anticipated claim was made, the court

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[327] *Fromme*, 405 F. Supp. at 582.

[328] *See id.* at 583.

[329] United States v. North, 713 F. Supp. 1448, 1449 (D.D.C. 1989), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2235 (1991).

[330] *See* United States v. Poindexter, 732 F. Supp. 135 (D.D.C. 1990). The only authority cited by the court was United States v. Nixon, for the limited purpose of authorizing *in camera* review of subpoenaed documents. *See id.* at 138.

[331] *See id.* at 141.

[332] *See id.*

made a significant concession to the former President. Noting that "the protection of the prerogatives of the Presidency presents such a special and countervailing circumstance," the court ruled that counsel for Reagan was entitled to review the defendant's *ex parte* filings supporting his discovery plan and revealing his defense strategy.[333] Both opinions, however, avoided any discussion of the larger issues surrounding presidential subpoenas.

The court found Poindexter's subpoena *ad testificandum* a good deal more problematical than his subpoena *duces tecum*. Although the court regarded as "settled that a President, whether former or incumbent, may be subpoenaed to be a witness in judicial proceedings in an appropriate case,"[334] it was left with the task of formulating the standard by which to evaluate such subpoenas. Troubled by the ambiguity of the history of presidential immunity, the court nonetheless selected a rule it considered "sympathetic"[335] to the President even in the absence of a claim of executive privilege:

> [H]e will only be compelled to testify at the trial of this case if the Court is satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and persuasive source of evidence than alternatives that might be suggested.[336]

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[333] *See* United States v. Poindexter, 732 F. Supp. 163, 164 (D.D.C. 1990). The court believed that access to the defendant's filings would "assist in enabling the President to make his presentation to the Court regarding the balance to be struck between the defendant's need for the Presidential documents and the legitimate prerogatives of the Presidency." *Id.*

[334] United States v. Poindexter, 732 F. Supp. 142, 146 (D.D.C. 1990). After reviewing the history of presidential testimony, the court found the issue settled by *United States v. Nixon* but noted that courts in the past had attempted "to exercise this power in a way that would be least damaging to the Presidency or onerous to the particular individual occupying the Office, to the extent that this was possible and consistent with the rights of the litigant who was in need of such testimony." *Id.*

[335] *Id.* at 147.

[336] *Id.* In a footnote, the court cited with approval Judge Gesell's standard in *United States v. North*. *See supra* text accompanying note 329. It also cited its own earlier decision rejecting the "defendant's demand for the appearance of President George Bush" and noted that the defendant had not renewed the demand. *See Poindexter*, 732 F. Supp. at 144-45 n.1 (citing United States v. Poindexter, 725 F. Supp. 13, 30-31 (D.D.C. 1989)). In the earlier decision, the court noted that the former Vice President's evidence might be cumulative and also relied on "the deference due the incumbent President." *Poindexter*, 725 F. Supp. at 30. The court commented further that "respect for the Chief Executive and head of a branch of government co-equal to the Judiciary dictates that the production of evidence from a sitting President not be coerced, by subpoena or otherwise, unless such evidence is necessary to the defense and just resolution of the cause." *Id.* n.26.

After examining the questions that the defendant planned to ask at trial and determining that most met its rigorous standard,[337] the court faced the final difficulty, the proper means of taking presidential testimony. Here the court weighed the conflicting claims of the defendant and the former President and rejected the means preferred by each side, in-court testimony sought by the defendant and written interrogatories sought by Reagan. Like the *United States v. Fromme*[338] court, Judge Greene ruled that the former President should give a videotaped deposition, a procedure that would offer the defendant the spontaneity of live testimony while providing safeguards for the disclosure of sensitive national security matters and the invocation of executive privilege.[339] As a further accommodation to the unusual circumstances, the court announced that it would be present at the deposition to make immediate rulings on disputed issues.[340] The court thus struck a balance between two fundamental principles: the view that excusing Reagan from testifying "would be inconceivable—in a Republic that subscribes neither to the ancient doctrine of the divine right of kings nor to the more modern conceit of dictators that they are not accountable to the people whom they claim to represent or to their courts of law," and the view that "the Court has the obligation to protect the rights of the former President and the privileges of the Presidency from the risk of unnecessary disclosures of confidential deliberations or national security subjects."[341] Judge Greene's painstaking response to the Reagan subpoena suggests how many uncertainties remained in the wake of *United States v. Nixon* and how little guidance the district courts found in that opinion for the delicate task of applying its generalities to the new situation of presidential testimony at trial.

In less than a term, the Bush presidency has attracted a substantial number of suits naming the President as a defendant. Several of these suits have been dismissed as frivolous.[342] These

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[337] *See Poindexter*, 732 F. Supp. at 153.

[338] 405 F. Supp. 578 (E.D. Cal. 1975).

[339] *See Poindexter*, 732 F. Supp. at 158.

[340] *See id.* at 159.

[341] *Id.* at 160. In two subsequent opinions, the court ruled that the news media were not entitled to attend the videotaping of the deposition, *see* United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990), and that, although able to view the videotape, the news media were not entitled to receive copies of it prior to trial, *see* United States v. Poindexter, 732 F. Supp. 170 (D.D.C. 1990).

[342] In cases filed in forma pauperis, the federal court may dismiss the case "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1988).

dismissals were generally of pro se civil rights complaints which the courts found had failed to offer any facts linking the President to the sometimes bizarre events or harm alleged.[343] Other cases reflected the passage of new statutes and the efforts of plaintiffs to claim their benefits. Thus, after the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 was amended to provide compensation for environmental cleanups, several companies that had performed such cleanups under orders from the Environmental Protection Agency sued the President and other executive branch defendants for reimbursement; these suits were dismissed by courts declining to apply the statute retroactively.[344]

In suits raising substantial claims based on performance of constitutional or statutory duties by the executive branch, a few courts showed a surprising reluctance to approach the merits. When four members of the House of Representatives sued to invalidate an agreement between the Executive Branch and the congressional leadership that funds appropriated for the Nicaraguan Contras would not be expended without consultation, the district court shied away from the claim that the agreement represented an unconstitutional distortion of the lawmaking process.[345] Reading prior case law from the District of Columbia Circuit to discourage all suits by legislators,[346] the court avoided the complexities of prior

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[343] *See, e.g.*, Zatko v. Baker, No. 91-451, 1991 U.S. Dist. LEXIS 2819 (D.D.C. Mar. 11, 1991) (claiming incarceration in violation of diplomatic status); Gudknect v. Bush, No. 90-7935, 1991 U.S. Dist. LEXIS 380 (E.D. Pa. Jan. 11, 1991) (seeking collection of alleged damage award against the President and freedom for others from death sentence); Carvajal v. United States, No. 89-8277, 1989 U.S. Dist. LEXIS 14,741 (E.D. Pa. Dec. 7, 1989) (claiming discriminatory treatment by court and correctional systems); Dollar v. Bush, No. 89-4996, 1989 U.S. Dist. LEXIS 8574 (E.D. Pa. July 24, 1989) (claiming, *inter alia*, membership of President and Vice President in Mexican Mafia and their participation in the assassination of President Kennedy). For a damage action dismissed on immunity grounds, see Schloegel v. United States, No. C-89-3913, 1990 U.S. Dist. LEXIS 17,657 (N.D. Cal. Dec. 4, 1990) (claiming compulsion by government to serve in intelligence activities for twelve years without pay).

[344] *See* Chicago Steel & Pickling Corp. v. Bush, No. 88 C 5941, 1989 U.S. Dist. LEXIS 14560 (N.D. Ill. Dec. 1, 1989); Bethlehem Steel Corp. v. Bush, 736 F. Supp. 945 (N.D. Ind. 1989); Wagner Seed Co. v. Bush, 709 F. Supp. 249 (D.D.C. 1989).

[345] *See* Burton v. Baker, 723 F. Supp. 1550 (D.D.C. 1989). Under the Bipartisan Accord, funds would not be released "except in the context of consultation among the Executive, the Senate Majority and Minority leaders, the Speaker of the House of Representatives and the Minority leader, and the relevant authorization and appropriation committees." *Id.* at 1551 (quoting H.R. REP. No. 23, 101st Cong., 1st Sess., pt. 2, at 4).

[346] *See id.* at 1552-54. The court offered no citations in support of its interpretation and failed to distinguish prior cases by members of Congress in which the federal courts

decisions and relied instead on an imprecise blending of two theories to support dismissal:

> If standing is now the ground of decision of choice in such cases, the Court finds that the plaintiffs have no standing here. They have a collegial remedy: they can persuade a majority of their fellows to change the law or abandon the "side agreement." Alternatively, because the subject matter of both the Bipartisan Accord and the Act involves issues of national defense and foreign policy, the Court finds it to have been committed to the political branches by the Constitution.[347]

In a challenge to the accuracy of the 1990 census, a district court in Illinois followed a tortuous path before dismissing the class action filed by the "chronically undercounted" to secure proper political representation and allocation of federal funds.[348] After first declining to certify the class,[349] the court acknowledged its divergence from New York courts[350] that found the issue justiciable[351] and lamented its inability to refer the case to the Panel on Multidistrict Litigation.[352] Consoling itself with the argument that those undercounted by the census were not "without any political remedy whatsoever,"[353] the court found their claim to be a nonjusticiable policy question.[354]

In both of these cases the courts' discomfort with their task is apparent. Both seem to recognize the seriousness of the issues

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showed a willingness under some circumstances to reach the merits. *See supra* notes 274-81, 289-303 and accompanying text. It concluded: "It is less important that district courts correctly identify the more academically respectable reason for declining to decide such disputes than that they do decline them." *Burton*, 723 F. Supp. at 1553-54.

[347] *Id.* at 1554.

[348] *See* Tucker v. United States Department of Commerce, 135 F.R.D. 175 (N.D. Ill. 1991). The "chronically undercounted" were "racial and ethnic minorities including African-Americans and Hispanics; documented and undocumented aliens; homeless people; people who do not read or speak English well; and people living in poverty or in high-crime areas in both urban and rural communities." *Id.* at 476.

[349] *See id.* at 178.

[350] "The adjudication of this case presents the very real and substantial risk of inconsistent judgments. The Census Bureau could very likely be required to do one thing in New York and quite another in Illinois." *Id.* at 179.

[351] *See infra* notes 356-57 and accompanying text.

[352] *See Tucker*, 135 F.R.D. at 179.

[353] *Id.* at 180.

[354] *See id.* at 182. Among other factors cited by the court were the delegation of the census to Congress (which it acknowledged did not "necessarily" take the case from its jurisdiction); the lack of manageable standards; the alternate courses of action available to the plaintiffs; and the risk of inconsistent judgments (another district court had already approved the plan). *See id.* at 181-82.

before them and the fact that other courts have dealt more sympathetically with similar cases, yet both seem determined to dispose of these matters as nonjusticiable. In straining for a rationale to support dismissal, neither court looks to the role of the President as a defendant; in fact, neither mentions the President's participation. Even for federal courts unhappy with public and private challenges to executive conduct, the distinction between the chief executive and his subordinate officials has for purposes of justiciability disappeared.[355]

Other courts showed a readiness to reach the merits of claims against the President as a routine part of their business. In a New York census case brought by representatives of urban areas and minorities, the district court, unlike its Illinois counterpart, found the plaintiffs' claims to fall outside the political question doctrine and to be ripe for resolution;[356] it granted the plaintiffs a declaratory judgment that a statistical adjustment of the 1990 census would not violate the Constitution.[357] When the Fifth Circuit was faced with a challenge to the constitutionality of an executive order for drug testing of federal employees, it too ruled on the merits, finding the order facially constitutional.[358] All of these cases link the President with other executive offices, and none of the courts spares even a mention of the distinction between the defendants. The ease with which the courts resolve these cases is in striking contrast to the convoluted logic of courts seeking to avoid cases testing the limits of executive conduct. The presence of the Presi-

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[355] For other suits dismissed as nonjusticiable, see Arjay Associates, Inc. v. Bush, 891 F.2d 894 (Fed. Cir. 1989) (dismissing suit by manufacturer's representatives challenging statutory exclusion of importation of manufacturer's products for lack of standing); International Labor Rights Education and Research Fund v. Bush, 752 F. Supp. 495 (D.D.C. 1990) (dismissing claim of failure to enforce worker rights provisions of Generalized System of Preferences of the Trade Act of 1974 for failure to state a claim and lack of adequate criteria for review). The court in *International Labor* recognized the plaintiffs' "genuine programmatic concerns" and specifically disclaimed any intention of limiting their pursuit of other remedies from the Customs Court or the United States Trade Representative. *See id.* at 499. For a case substituting President Bush for President Reagan before dismissing claims against the President on the ground that complete relief would in theory be available from other executive officials, see Huddle v. Reagan, No. 88-3130, 1991 U.S. Dist. LEXIS 7070 (D.D.C. May 24, 1991) (involving suit alleging conspiracy to deprive anti-nuclear demonstrators of their constitutional and statutory rights).

[356] *See* City of New York v. United States Dep't of Commerce, 739 F. Supp. 761, 764-68 (E.D.N.Y. 1990).

[357] *See id.* at 767.

[358] National Treasury Employees Union v. Bush, 891 F.2d 99 (5th Cir. 1989). The court directed that any specific challenges to drug testing be "brought against the individual plans implementing the Order." *Id.* at 102.

dent among the defendants in no way disturbs what has now become the norm, the willingness of courts to hear such cases unless they fall within an increasingly limited category of claims deemed nonjusticiable for reasons that stem from the identity of the issues or the plaintiffs rather than the defendants.

The most dramatic and revealing cases filed against President Bush not surprisingly arose from the most dramatic event of his tenure, the Persian Gulf War. Since the Nixon years the idea of a suit against the President has become an accepted form of principled protest against executive policy, and the President's decision to send military forces to the Persian Gulf without a formal declaration of war from Congress prompted legal challenges by public and private litigants. The responses of the courts to these challenges suggest the variety of approaches and attitudes still prevalent within the federal judiciary when the President is named as a defendant in a suit raising sensitive constitutional issues.

Shortly after President Bush announced his decision increasing military deployment to the Persian Gulf in order to provide a force capable of offensive action, fifty-four members of Congress filed suit to enjoin him from launching an attack against Iraq without congressional authorization.[359] The court carefully evaluated the defenses raised by the Department of Justice on behalf of the President before concluding that relief was not appropriate. In rejecting the defense of the political question doctrine, it characterized as "far too sweeping" the President's claim that only the executive branch may determine whether a military operation constitutes war[360] and ruled "that courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the War Clause."[361] The court also rejected the argument that it was precluded from hearing any case that involved the nation's foreign affairs; whether a case raised a political question was rather to be

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[359] *See* Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990). The President's announcement came on November 8, 1990, and the suit was filed on Nov. 19. *See id.* at 1143-44. Only one of the 54 plaintiffs was a member of the Senate. A group of law professors and the American Civil Liberties Union filed amicus briefs in support of the plaintiffs.

[360] *See id.* at 1145.

[361] *Id.* at 1146. The court did qualify its position somewhat: "That is not to say that, assuming that the issue is factually close or ambiguous or fraught with intricate technical military and diplomatic baggage, the courts would not defer to the political branches to determine whether or not particular hostilities might qualify as a 'war.'" *Id.* at 1145. On the record before it, the court found that offensive action by the current level of military forces would constitute war. *See id.*

determined by scrutiny of the particular issue before the court.[362] On the standing question, the court found without difficulty that "members of Congress plainly have an interest in protecting their right to vote on matters entrusted to their respective chambers by the Constitution."[363] And in reviewing the District of Columbia Circuit's doctrine of remedial discretion, the court found that because no remedy was available to members of Congress "by persuasion of their colleagues alone" the doctrine was inapplicable.[364] The court concluded that "in principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization."[365] What fell between principle and practice in this case was the doctrine of ripeness. Following Justice Powell's concurring opinion in *Goldwater v. Carter*,[366] the court imposed the additional requirement that in a suit claiming a violation of the legislative power to declare war the plaintiffs must represent a majority of Congress;[367] in the absence of a majority, the issue was not ripe for resolution. The court also suggested without deciding that the uncertain course of the President's future actions might render the suit unripe.[368] Although the court's decision was a defeat for the plaintiffs, its language offered a promising foundation for future litigation. The court's avowed willingness under appropriate circumstances to enjoin the President at the request of a unified Congress suggested its acceptance of a legal action by one branch against another as a valid means of restraining a President from exceeding the bounds of his constitutional authority.

In another case decided the same day by another judge of the same circuit, the district court showed itself to be considerably less hospitable toward suits against the President.[369] The plaintiff, a sergeant in the National Guard assigned to military duty in the Persian Gulf, claimed that such deployment exceeded the President's authority under the War Powers Clause of the Constitution

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[362] *Id.* at 1146.

[363] *Id.* at 1147.

[364] *See id.* at 1149.

[365] *Id.*

[366] 444 U.S. 996, 997 (1979) (Powell, J., concurring).

[367] *See Dellums*, 752 F. Supp. at 1150-51.

[368] *See id.* at 1152.

[369] *See* Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990). Both decisions were released on December 13, 1990. *Dellums* was heard by Judge Harold H. Greene, *Ange* by Judge Royce C. Lamberth.

and the War Powers Resolution and asked for an injunction ordering his return.[370] Unlike the court rendering the previous decision, the court here identified three distinct bases for its dismissal of this challenge: the political question, equitable discretion, and ripeness doctrines. The court first disclaimed either the authority or the ability to resolve issues concerning the foreign relations and war powers assigned by the Constitution to the two political branches of government.[371] Rejecting what it termed "[m]eddling by the judicial branch in determining the allocation of constitutional powers," the court relied on two aspects of separation of powers—the political question doctrine and equitable discretion—to support its refusal to decide whether the President's deployment of troops to the Persian Gulf constituted a war.[372] Where the first court had indicated its willingness to provide Congress with a forum for claims of presidential overreaching, this court directed Congress to the nonjudicial remedies of its own appropriations and impeachment powers.[373] On the ripeness issue, the court found that the President's future conduct in the Persian Gulf was simply too speculative to warrant judicial review [374] Only on the question of standing was the court receptive to the plaintiff's complaint. In a single footnote, the court conceded that the plaintiff had standing to bring his suit because the War Powers Resolution permitted a private cause of action.[375] Like the court hearing the congressional complaint,[376] this court could have based its denial of injunctive relief solely on the grounds of ripeness. Its decision to rely as well on separation of powers arguments indicates its discomfort with the use of the courts to settle disputes between the legislative and executive branches. Thus, two courts of the same circuit reached the same result but by the structure of their opinions expressed divergent views on the scope of judicial authority and capacity to resolve claims against the President.

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[370] *See id.* at 510. The plaintiff also claimed a Fifth Amendment due process violation in the procedures used by the Army to determine his medical fitness for deployment. Summary judgment was awarded to the defendants on that claim. *See id.* at 517-18.

[371] *See id.* at 513.

[372] *See id.* at 514.

[373] *See id.*

[374] *See id.* at 515.

[375] *See id.* at 511 n.1. The court employed the test set forth in Cort v. Ash, 422 U.S. 66 (1975), a test whose authority has been placed in serious doubt by recent decisions of the United States Supreme Court. *See, e.g.*, Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).

[376] *See Dellums*, 752 F Supp. 1141; *supra* notes 359-68 and accompanying text.

Both of the cases discussed above involved direct participants in the Persian Gulf drama. When private citizens challenged the war on the same constitutional theory, the courts were unanimous in dismissing their suits on the ground that they lacked injury in fact sufficient to support standing.[377] Even here, however, the courts expressed differing attitudes toward the suits before them. One court noted disapprovingly that the plaintiff "seeks to employ the federal courts as a platform for his political views,"[378] while another acknowledged the plaintiff's "altruistic purposes in bringing this lawsuit" and his "deep concern for the loss of life in any future military action."[379] The tension between the legal and political aspects of these suits is evident in the courts' divergent perspectives on the use of litigation as a means of criticizing presidential policy.[380]

One final case exhibits clearly the dilemma for courts reluctant either to distort justiciability doctrine or to review unnecessarily presidential conduct arising from military operations. In this case, members of the press challenged the regulations governing media coverage of the Persian Gulf War.[381] The court found that the plaintiffs had standing to bring their suit[382] and that judicial review

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[377] *See* Wallace v. Bush, No. C-91-0264-VRW, 1991 U.S. Dist. LEXIS 1068 (N.D. Cal. Jan. 29, 1991); Miller v. Bush, No. 90 C 6803, 1991 U.S. Dist. LEXIS 18,638 (N.D. Ill. Dec. 3, 1990); Pietsch, 755 F. Supp. 62. In addition to her constitutional claim, Miller sought $25,000,000 in damages; the court dismissed the damage claim as frivolous. For other examples of cases that challenged the war and were dismissed on standing grounds, see Farsaci v. Bush, 755 F. Supp. 22 (D. Me. 1991); Daly v. Bush, No. CV 4-91-15 (D. Minn. 1991).

[378] *Wallace*, No. C-91-0264-VRW, 1991 U.S. Dist. LEXIS 1068, at *2.

[379] *Pietsch*, 755 F. Supp. at 67. The court also recognized that the plaintiff had filed a similar challenge to the Vietnam War. *See id.*

[380] For a Persian Gulf War case in which the President was not named as a defendant but his authority was directly at issue, see Sherman v. United States, 755 F. Supp. 385 (M.D. Ga. 1991). In *Sherman*, a member of the Air Force sought by writ of habeas corpus to question the President's power to extend his term of enlistment. The district court resolved the case by finding statutory authority for the President's action but expressed its concern about a potential conflict between legal and practical consequences. Noting that the law did not support the plaintiff's claim, the court reflected that a decision for the plaintiff "would trigger lawsuits and claims by other military personnel similarly situated and bring chaos to orderly military planning." *Id.* at 388. The court insisted that "[i]f the law were clear that Petitioner is entitled to be discharged, then this court would order him discharged," but its relief at not being faced with such a dilemma was palpable. *See id.*

[381] *See* Nation Magazine v. U.S. Dept. of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991). The other named defendants were President Bush, Secretary of Defense Richard Cheney, Assistant Secretary of Defense for Public Affairs Peter Williams, and Chairman of the Joint Chiefs of Staff Colin Powell. An amicus brief supporting the plaintiffs was filed by thirteen members of Congress.

[382] *See id.* at 1556.

of regulations limiting press access to combat areas did not intrude on military operations and thus did not fall within the political question doctrine.[383] On the mootness issue, the court ruled that because the regulations had been lifted but not eliminated, the plaintiffs' claims for injunctive relief were moot but their claims for declaratory relief were not.[384] Although the court found no obstacles in any of these doctrines to review on the merits, it nonetheless decided in the exercise of its discretion to dismiss the plaintiffs' First and Fifth Amendment claims of limited access to military operations. The court was troubled by the fact that these were issues of first impression[385] and that "long-settled policy" required courts to "refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards."[386] In the absence of "a well focused controversy," the court found that prudence compelled dismissal.[387] Thus, the court dealt forthrightly with the standards of justiciability and found no doctrinal barrier to review. Its reluctance to proceed reflected instead an institutional caution in the face of difficult constitutional issues, a caution based in part on the fact that resolution of the case would require an evaluation of executive actions in time of war. The court spoke of the lack of Supreme Court guidelines on the First Amendment issues, but its decision also reflected the uncertainty of other federal courts asked to adjudicate the constitutional limits of presidential conduct.

CONCLUSION

In the years following *Mississippi v. Johnson*, the law has shifted from the idea that the President of the United States could not be sued to the idea that the President is accountable in the courts for his official conduct. Since *Nixon v. Fitzgerald*, the President has enjoyed absolute immunity from suits for damages, but the history of post-Watergate litigation against the President is a history of increasing acceptance among courts and plaintiffs of the use of suits to prevent or compel a broad spectrum of

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[383] *See id.* at 1567-68. The court rejected the position of the Department of Defense that any claim concerning the United States military falls within the political question doctrine. *Id.* at 1568.

[384] *See id.* at 1570.

[385] *See id.* at 1571.

[386] *Id.* at 1572.

[387] *See id.* at 1575.

presidential conduct. What is conspicuously missing from this history is the voice of the Supreme Court. In *United States v. Nixon* a unanimous Court sent mixed signals: that the President could not withhold relevant evidence from a criminal prosecution, but that the Constitution afforded the President a loosely defined executive privilege from some of the ordinary demands of the judicial process. In *Fitzgerald*, a divided court amplified those signals to a serious dissonance over the way in which the President, as defendant, should be treated within the judicial system, and the Justices favoring a special exemption prevailed. Since that time, the Court has acted chiefly to deny certiorari to cases involving the President, or, as in *Goldwater v. Carter*, to offer a result without a rationale.[388]

In the absence of any clear direction from the Supreme Court, the lower federal courts have developed their own strategies for handling suits against the President. The courts no longer question the propriety of naming the President as a defendant. Instead, they deflect their concern onto the other elements of the suits before them. They question whether the plaintiff has standing, whether the case raises a political question, whether an issue is moot or ripe, or whether prudence counsels the exercise of judicial restraint.[389] Doctrine in all of these areas of the law is imprecise, and it is hardly surprising that courts reach different conclusions for similar cases. There is no Supreme Court precedent for the courts to cite; *United States v. Nixon* is almost never mentioned, and *Nixon v. Fitzgerald* is useful only when a misguided plaintiff asks for damages from the President.

The courts have, however, reached a loose consensus regarding certain situations. When the President is joined with other executive branch officials as a defendant in a suit challenging the application of a federal statute, the courts generally ignore his presence and resolve the case as an ordinary matter of statutory interpretation.[390]

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[388] The Court vacated the decision on the merits below and directed dismissal of the case without opinion. For an account of the separate opinions filed by four members of the Court, see *supra* note 281.

[389] For an article suggesting that such bases for resolving cases should be replaced by a special court authorized to issue advisory opinions, see Wallach, *supra* note 3.

[390] *See* Bruff, *supra* note 3, at 59-60 (suggesting that courts reviewing presidential decisions apply an "explanation requirement"). Although Bruff regards as a disadvantage the fact that such a requirement would compel courts to set aside some decisions by the President, he notes that "it would have the compensating advantage of ensuring his political accountability for the rationale finally adopted." *Id.* at 60.

If injunctive relief is awarded in such cases, the courts no longer pause to distinguish between ministerial and discretionary presidential conduct; instead, they tend to leave unspoken the fact that the injunction may run to the President as well as his subordinates. The situation is somewhat more problematical when the challenged statutory conduct flows more directly from the President, but even here, when other defendants are present, the courts seem comfortable reviewing the cases on the merits. The most troubling cases are those raising constitutional challenges to presidential actions, and it is here that the lower courts have been unable to find common ground. As the Persian Gulf War cases demonstrated, the political question doctrine accommodates disparate viewpoints, and one district court may feel constrained from adjudicating an issue that another feels compelled to reach. Yet the constitutional cases present the most significant and delicate questions of the division of authority among the branches of government, and inconsistency in the lower courts makes the resolution of such questions a disturbingly arbitrary process.

Underlying some of the differences among the lower courts is the concern that suits against the President may politicize the legal process. The District of Columbia Circuit, which hears the cases filed by members of Congress, has responded by creating its own doctrine of discretionary restraint. In citizen suits against the recent war, courts again revealed conflicting attitudes toward private plaintiffs using litigation as a means of challenging the policies of the political branches. Although these courts agreed that standing doctrine clearly barred taxpayer suits against the war, such easy solutions are not always available. When the consequences of a policy are widespread, it may be difficult to deny standing to those clearly suffering injury in fact. Even when standing doctrine provides no barrier to suit, other adaptable doctrines exist to permit dismissal by skeptical courts. It may be difficult to distinguish between a court's institutional distaste for the nature of a suit and its application of amorphous doctrines of justiciability to avoid review on the merits.

If the lower courts have learned to adapt existing doctrines to the special circumstances of presidential litigation, why does it matter that the Supreme Court has not spoken on the subject for a decade? Is the naming of the President as defendant a purely formal gesture of little substantive concern? There are two related answers, one based on the nature of the presidency itself and the other on the role of the Court. As John Marshall made clear in

Marbury v. Madison and in *United States v. Burr*, the essence of the American system of government is the accountability of the executive branch for its official acts. A President who enjoys special dispensations from the obligations of all citizens and protection from the consequences of his conduct is a creature of privilege rather than of law. The approach proposed by Marshall balances the accountability of the President with the practical demands of his office; it gives courts the discretion to evaluate a President's claims of hardship in the context of particular demands and to adjust his ordinary obligations to the legal system in light of those hardships. Marshall insisted, however, on treating the President as one citizen among many and rejected any preferences that granted to the presidency the prerogatives of the British crown.

United States v. Nixon cited *Burr* repeatedly without fully capturing its meaning. The Court ordered the President to comply with the district court's subpoena, but it linked that order with an unprecedented and undocumented recognition of executive privilege. The immediate result of the opinion was a triumph for the rule of law: a recalcitrant President bowed to the Court's mandate. The subsequent effect of the opinion is less clear. In the rush of suits against the President that followed, the lower courts found little sustenance in *United States v. Nixon* as they approached their new task of determining which suits were proper and which were not. *Nixon v. Fitzgerald* further complicated the issue by granting the President absolute immunity from tort liability in the face of a powerful dissent arguing against such special protection. Neither case adopted Marshall's position that the President is not above the law although circumstances may dictate special accommodation to presidential demands. Read together, the two cases offer an inconsistent and incomplete framework for evaluating litigation against the President.

If accountability is the hallmark of the executive branch, then principled adjudication is the hallmark of the judicial branch, and it is here that the Supreme Court's reticence leaves an unfortunate lacuna. The lower courts have performed creditably, finding practical responses to the suits brought before them, adapting old doctrines to new uses, or creating new doctrine to meet new situations. They have performed, however, without the guidance of the Supreme Court and therefore most often without an articulated basis for their resolutions. The story of post-Watergate presidential accountability has been one of improvisation by the lower courts rather than leadership by the Supreme Court. What is missing from

the record is any clear perspective on an issue of central importance to the nature of American government and the role of the courts in its preservation; the Court has failed to meet its institutional obligation to define for the lower courts and for the country the contours of the relationship of presidential power to the legal process. To find Supreme Court language illuminating the President's accountability, it is necessary to look beyond the *Nixon* cases to one of the Court's most eloquent members, Justice Jackson, writing in concurrence two decades before Watergate: "With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law."[391]

[391] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952).