1997

Suspending the Rule of Law - Temporary Immunity as Violative of Montesquieu's Republican Virtue as Embodied in George Washington

Joseph P. Rodgers

SUSPENDING THE RULE OF LAW? TEMPORARY IMMUNITY AS VIOLATIVE OF MONTESQUIEU'S REPUBLICAN VIRTUE AS EMBODIED IN GEORGE WASHINGTON

I. INTRODUCTION

Institutional mechanisms, in the form of immunities, have gradually evolved to shield those who occupy the Oval Office from civil suits.[1]

[1] *See generally* Theodore P. Stein, Note, Nixon v. Fitzgerald: *Presidential Immunity as a Constitutional Imperative*, 32 CATH. U.L. REV. 759 (1983). Stein summarizes that the Supreme Court has recognized two types of official immunity—absolute and qualified. Absolute immunity operates as a complete bar to relief, regardless of the official's motive for taking a challenged action. Qualified immunity offers more limited protection. To obtain qualified immunity, officials must first demonstrate that they acted without malice and in the reasonable belief that the conduct was legal. The presence of either bad faith or knowledge of wrongdoing bars an official from raising the defense of qualified immunity.

Historically, these immunities were only available to those who could demonstrate that certain behavior fell within the scope of their official duties.[2] More recently, however, a court has been willing to extend a presidential temporary immunity to actions that indisputably occurred outside the scope of official obligations.[3]

This Note offers a somewhat unique perspective on the notion of clemency. This inquiry contemplates the merit of temporary immunity from civil suits for acts which eventuated outside the scope of one's official responsibilities and argues that such an unprecedented expansion of civil immunity is antithetical to Montesquieu's conception of public virtue as evinced in *The Spirit of Laws*,[4] which "was the political Bible of Jefferson and a primer to Washington, Madison, and Hamilton."[5] This Note also reflects on the iconic role of Washington at the Constitutional Convention as emblematic of quintessential republican virtue.[6]

> Once granted, however, qualified immunity, like absolute immunity, precludes a plaintiff's recovery.

Id. at 760. *See generally* REXFORD G. TUGWELL, THE ENLARGEMENT OF THE PRESIDENCY 18 (1960)(discussing the precipitous aggrandizement of presidential power); ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY x (1973). Schlesinger articulated that

> [t]he first concern is that the pivotal institution of the American government, the presidency, has got out of control and badly needs new definition and restraint . . . . The problem is to devise means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control . . . . [W]e need a strong Presidency . . . *within the Constitution*.

Id.

[2] *See, e.g.*, Aviva Orenstein, *Presidential Immunity From Civil Liability:* Nixon v. Fritzgerald, 68 CORNELL L. REV. 236, 236 (1983); *See also* Jerrold L. Mallory, Note, *Resolving The Confusion Over Head of State Immunity: The Defined Right of Kings*, 86 COLUM. LAW REV. 169, 196 (1986)(analyzing head-of-state immunity from a historical perspective and concluding that "[t]he law of head of state immunity is undeveloped and confused.").

[3] *See* Jones v. Clinton, 869 F.Supp. 690 (1994), *rev'd* 72 F.3d 1354 (8th Cir. 1996); *see generally* Laurier Beaupre, Note, *Birth of Third Immunity? President Bill Clinton Secures Temporary Immunity from Trial*, 36 B.C. L. REV. 725, 767 (1995)("The great weight of precedent and history, however, counsels that Presidents should be amenable to suits based on private conduct, unless a compelling national priority demands the Chief Executive's full and immediate attention."); Michael Matraia, Note, *Running for Cover Behind Presidential Immunity: The Oval Office as Safe Haven From Civil Suits*, 29 SUFFOLK U. L. REV. 195 (1995) (arguing, *inter alia*, that the creation of a presidential temporary immunity weakens democracy because officials are less accountable to the public).

[4] BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., G. Bell and Sons, Ltd. 1914).

[5] PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA: 1760-1801 10 (1969); *see also infra* Part III.B.

[6] *See infra* notes 140-179 and accompanying text.

The rationale for both absolute and qualified immunity is "to shield them [political officials] from undue interference with their duties and from potentially disabling threats of liability."[7] Conversely, temporary immunity patently encourages the political establishment to be utilized, not primarily for the promotion of public good, but rather for one's own parsimonious ends; ends which the Framers of the Constitution perpetually feared and attempted to obviate.[8] Consistent with Montesquieu, such a clemency[9] should be reserved for kings. The Founding Fathers, fearing such a usurpation of privilege and attempting to emulate and encourage Washingtonian virtue, would never have considered institutionalizing, or even tacitly sanctioning, a temporary sovereign immunity. Unlike the presidential pardon, which is expressly memorialized in the Constitution and is the manifestation of legislative processes, temporary immunity for alleged private immorality is lacking any such explicit historical antecedents.[10]

Part II briefly traces the evolution of absolute, qualified, and temporary immunity from an historical perspective.[11] This section is in no way meant to provide a holistic analysis of case law, but merely paints a portrait of the additional protections which have gradually been extended to the Head-of-State. Part III acclimates the reader to Montesquieu and analyzes his influence on the American Constitution.[12] Part IV examines Montesquieu's philosophy on the role of fear in a despotic state, honor in a monarchy, and virtue in a republic.[13] Part V explores the embodiment of republican virtue in George Washington and the Framers' perhaps chimerical hope that future Executives would be likewise unconditionally devoted to republican virtue.[14] Finally, Part VI summarizes the aforementioned sections and concludes that a temporary sovereign immunity for unofficial actions is not welcomed in a state

---

[7] Harlow v. Fitzgerald, 457 U.S. 800, 805 (1982). See *supra* Part VI which reiterates that certain immunity for acts which occurred within one's official obligations are reasonablely sensible, unlike a temporary immunity.

[8] *See generally* RICHARD B. MORRIS, THE FRAMING OF THE CONSTITUTION 24-32 (1986)(discussing the doctrinal views of the Framers).

[9] "Clemency" can be defined as actions which "moderate the severity of punishment" or "an act or instance of leniency." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 213 (10th ed. 1993). "Immunity," by definition, is congruent to a grant of clemency and denotes actions which "free" or "exempt" one of responsibility or to extend to an individual some semblance of additional protection. *See id.* at 580.

[10] *See* U.S. CONST. art. II, § 2. This section reads in pertinent part that the President "shall have power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

[11] *See infra* notes 18-54 and accompanying text.

[12] *See infra* notes 55-94 and accompanying text.

[13] *See infra* notes 95-130 and accompanying text; *see generally* MONTESQUIEU, *supra* note 4, at 20-31 (outlining the nature and principles of governments).

[14] *See infra* notes 140-79 and accompanying text.

which venerates the ideal of virtue in the public square.[15] Save "imperious circumstances,"[16] fashioning a new, potentially pretextual immunity for unofficial, purely private actions may redefine the notion of immunity and be utilized to protect the honor of the President as is warranted only in a traditional monarchical form of government.[17]

II. HISTORICAL ANALYSIS OF ABSOLUTE, QUALIFIED, AND TEMPORARY IMMUNITY[18]

In *United States v. Lee*, Justice Miller articulated the hallowed ideal that

> [n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[19]

However, an exception to the venerable axiom that "no man is above the law" was devised in *Spalding v. Vilas*.[20] The *Spalding* Court deliberated whether an Executive Department official was immune from suit for actions which were evidenced within his official duties[21] and held absolute immunity extended to Executive Department officials regardless of the motive compelling the agent.[22] The Court also maintained that both public policy and convenience weigh

---

[15] *See infra* notes 180-200 and accompanying text.

[16] *See infra* notes 172, 192, 197 and accompanying text.

[17] MONTESQUIEU, *supra* note 4, at 26. *See also infra* notes 185-88 and accompanying text.

[18] *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 7.2 (5th ed. 1995)(analyzing absolute and qualified immunity when civil cases are brought against the Head- of-State).

[19] United States v. Lee, 106 U.S. 196, 261 (1882).

[20] Spalding v. Vilas, 161 U.S. 483 (1896).

[21] *Id.* at 492.

[22] *Id.* at 497.

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. . . . In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority . . . [and] the motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial.

Id. at 498-99.

heavily in favor of granting an absolute immunity to both judges and Executive Department officials.[23]

The rule of law promulgated in *Spalding* was augmented in *Barr v. Matteo*[24] where the court was "called upon . . . to weigh two considerations of high importance . . . the protection of the individual citizen" and the interest in immunizing government officials from damage suits which occurred during the exercise of their official duties.[25] Underscoring the importance of encouraging fearless, vigorous and effective administration of an official's responsibilities,[26] the *Barr* Court stated that "[t]he privilege is not a badge or emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government."[27]

Although the concept of immunity was slowly gaining potency on the Court, the apparent ubiquitous support for advancing broad immunity to federal Executive Department officials waned in *Butz v. Economou*.[28] The Court was disinclined to extend absolute immunity to Executive officials under all circumstances[29] and instead asserted that federal officials, who advance a claim predicated on absolute immunity, bear the burden of evincing that public policy mandates an exemption of that scope.[30] Nonetheless, the Court did not foreclose the potentiality of granting absolute immunity in some contexts. Rather, the majority annunciated that although qualified immunity from damages would be the general rule,[31] "there are some officials whose special

---

[23] *Id.* at 498.

[24] Barr v. Matteo, 360 U.S. 564 (1959).

[25] *Id.* at 564.

[26] *Id.* at 571.

[27] *Id.* at 572-573. The Court noted that its holding might result in injustice toward those who advance meritorious claims, but suggested that it is a necessary price to pay for the greater good. *Id.* at 575.

[28] Butz v. Economou, 438 U.S. 478 (1978).

[29] *Id.* at 505.

[30] *Id.* at 506; The Court concluded:

> Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding, as the United States would have us do, that executive officers may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule.

Id. at 507; *see also Spalding*, 161 U.S. at 499 (stating that the motive behind such actions is immaterial).

[31] *See also* Harlow v. Fitzgerald, 457 U.S. 800 (1982). Justice Powell held:

> Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials

functions require a full exemption from liability."[32] The *Butz* Court did exhort that unofficial actions were not entitled to the benefit of immunity, protesting:

> The liability of officials who have exceeded constitutional limits was not confronted in either *Barr* or *Spalding*. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officials for actions manifestly beyond the line of duty[.][33]

It was not until 1982, in *Nixon v. Fitzgerald* that the Court seemed to formally endorse absolute immunity as a viable mechanism to insulate Executive Department officials.[34] In *Nixon*,[35] the petitioner sued President Nixon and alleged that he was dismissed as a management analyst with the Department of the Air Force for testifying before a congressional subcommittee about cost overruns.[36] The Court, per Justice Powell, held that the President was absolutely immune from civil damages liability,[37] and explained, "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."[38] To allay concerns that the holding of the Court was too broad, Powell addressed the potential implication that such a rule would precariously situate the President above the law.[39] In addition to the possibility of impeachment,

---

> performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 817-18.

[32] *Butz*, 438 U.S. at 508. Justice Rehnquist, who concurred in part and dissented in part, expressed a view that would later be adopted in *Nixon*, *infra* note 34. Namely, executive department officials should be afforded absolute immunity, even when arguably acting outside the direct scope of their official duties.

[33] *Id.* at 495. *See also infra* note 193 and accompanying text.

[34] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[35] *See generally* Orenstein, *supra* note 2, at 255 (arguing that "the Court should have granted the President qualified immunity from civil suits, while providing absolute immunity only for certain highly sensitive functions."); Stein, *supra* note 1, at 785 (stating that the holding in *Nixon v. Fitzgerald* "departed abruptly from nearly two hundred years of precedent on the official immunity issue and separation of powers doctrine.").

[36] *Nixon*, 457 U.S. at 734.

[37] *Id.* at 748.

[38] *Id.* at 756.

[39] *Id.* at 757 (citation omitted).

Powell counseled that scrutiny by the press and the desire for reelection were sufficient checks on an unscrupulous Chief Executive.[40]

The most recent expansion of presidential immunity in civil suits occurred in *Jones v. Clinton*.[41] This suit arose when Paula Corbin Jones filed suit against President Clinton and Danny Ferguson alleging sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985.[42] In defense, the President "asserted that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office."[43] Although the court rejected the President's plea for absolute immunity,[44] the court held that he was entitled to a "limited or temporary immunity from immediate trial . . . ."[45] In support of the grant of temporary immunity, the majority underscored the need to protect the President from harm arising out of unfettered litigation and to effectuate the separation of powers doctrine communicated by Montesquieu and implicit in the Constitution.[46]

The Eighth Circuit Court of Appeals[47] subsequently reversed the decision of the lower court, holding that

---

[40] *Id.* The dissent, written by Justice White, argued that a President, knowing that he is immune from all civil suits, can seriously harm a substantial number of citizens even though it is clear that his actions are in violation of a statute and trample constitutional rights. *Id.* at 764 (White, J., dissenting).

[41] Jones v. Clinton, 869 F. Supp. 690 (1994), *rev'd* 72 F.3d 1354 (8th Cir. 1996); *see generally* Akhil Reed Amar and Neil Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 701 (1995)("Bill Clinton's claim for immunity is actually much stronger than Richard Nixon's—supported by crisper arguments . . . historical evidence . . . and by better modern-day policy arguments."). For a critique of the District Court opinion, *see infra* notes 134-39 and accompanying text.

[42] *Jones*, 869 F. Supp. at 690. The President requested that the suit be dismissed at the present time while preserving the statute of limitations so that Jones could sue him civilly upon leaving office. *Id.* at 691.

[43] *Id.* at 692.

[44] *Id.* at 697. In rejecting the absolute immunity argument, the Court pronounced:

> This Court recognizes the reasoning of Justice Powell and his thin majority in *Nixon v. Fitzgerald* that the President has absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. . . . It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Id. at 698.

[45] *Jones*, 869 F. Supp. at 700.

[46] *Id.*

[47] Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996), *aff'd* 117 S. Ct. 1636 (1997).

> a sitting President is not immune from suit for his unofficial acts. In this case it is undisputed that most of the acts alleged by Mrs. Jones clearly fall outside the zone of official presidential responsibility, given that they occurred while Mr. Clinton was still governor of Arkansas.[48]

Emphasizing the lack of precedent, the court stated, "[w]e are unaware, however, of any case in which any public official ever has been granted any immunity from suit for his unofficial acts . . . ."[49] A temporary immunity is also not explicitly delineated in the Constitution and therefore only "flows by implication from the separation of powers doctrine."[50] In defending her right to sue a sitting President, Jones argued, *inter alia*, that no one is above that law and that the Constitution did not construct a monarchy.[51]

Justice Stevens, speaking for a unanimous Supreme Court,[52] also held that there was "no support for an immunity for unofficial conduct," going on to underscore that the Court has "never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity."[53] The Court agreed with Jones that "not a single privilege is annexed to [the President's] character; far from being above the laws, he is

---

[48] *Id.* at 1359.

[49] *Id.* at 1358.

[50] *Id.* The Court was in no way reversing the decision handed down in *Nixon v. Fitzgerald*. Rather, the Court recognized that the immunity requested under these circumstances was simply different from that supported in *Nixon*:

> The rationale of the *Fitzgerald* majority is that, without protection from civil liability for his official acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability. This rationale is inapposite where only personal, private conduct by a President is at issue.

Id. at 1360.

[51] *See* Michael Hedges, *Review Sums Up Sexual Harassment Case Against Clinton*, THE PLAIN DEALER, November 8, 1996, at 18-A; *see also* Editorial, *Too Much Immunity in the Jones Case*, THE N.Y TIMES, December 30, 1994, at A30 ("[t]he fundamental value to protect here is the right of a citizen to get timely justice, even if the defendant is the President.").

[52] Justice Breyer delivered a concurring opinion and expressed concern, stating:

> I agree with the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I believe to be an understatement of the "danger." And I believe that ordinary case-management priciples are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based requirement that district courts schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities.

Clinton v. Jones, 117 S. Ct. 1636, 1658 (1997).

[53] *Id.* at 1644.

amenable to them in his private character as a citizen, and in his public character by impeachment."[54]

III. BARON DE MONTESQUIEU AND THE SPIRIT OF LAWS

A. General Background

Baron De Montesquieu[55] was born in 1689 in England[56] "into a society based upon inequality and hierarchy."[57] "[His] family . . . boasted of two centuries and a half of nobility."[58] Educated at home until age eleven, his father eventually sent him away to school at the renowned College de Juille in 1700.[59] Despite often intense pressure,[60] the education that Montesquieu received at Juille was invaluable and "impressed him with the value of civic virtue and Stoicism."[61] Upon returning from Juille, Montesquieu pursued the study of law at the University of Bordeaux from 1709 to 1713.[62]

Soon after marrying in 1715, "a great change took place in the fortunes of Montesquieu."[63] When his uncle died childless, Montesquieu received his estate, his title, and the office of president in the Parliament of Bordeaux.[64] It was during this period that Montesquieu began to compose his first published work, *The Persian Letters*,[65] which was an enormous success.[66]

Montesquieu eventually departed France in 1728 and traveled throughout Austria, Hungary, Italy, and Germany.[67] However, "[t]he two years that he

---

[54] *Id.* at 1645 (citing 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863) (emphasis omitted)).

[55] Originally named Charles-Louise, Montesquieu inherited the title of Baron de La Brede when his mother died while giving birth in 1696. *See* ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 4 (1961).

[56] MELVIN RICHTER, THE POLITICAL THEORY OF MONTESQUIEU 9 (1977).

[57] *Id.* at 10.

[58] MONTESQUIEU, *supra* note 4, at xix.

[59] SHACKLETON, *supra* note 55, at 5.

[60] *Id.* at 6.

[61] RICHTER, *supra* note 56, at 13.

[62] SHACKLETON, *supra* note 55, at 8.

[63] *Id.* at 14.

[64] *Id.* Montesquieu was able to inherit this high judicial office from his uncle because at the time such a position was considered property "that could be sold or bequeathed." RICHTER, *supra* note 56, at 13. This position was an "ancient judicial organization that by this time had come to assume political importance as well." *Id.* at 14.

[65] *Id.* at 15.

[66] SHACKLETON, *supra* note 55, at 27.

[67] *See* RICHTER, *supra* note 56, at 15.

spent in England were the most significant of all. There he made distinguished friends, who taught him to view the English Constitution through the eyes of the opposition . . . [and] when Montesquieu returned to France, he was in many regards a different person."[68] As an independent scholar and assiduous writer,[69] he was devoted to producing two great books, namely, *The Spirit of Laws*.[70]

Possibly the most important contribution of Montesquieu was the political and legal philosophies embodied in *The Spirit of Laws*[71]:

> *The Spirit of Laws* is a work which began but did not end within the traditions of comparative and natural law. . . . Montesquieu's declared intention in it was to determine by what standards laws ought to be judged. His data were drawn from that unrivaled body of evidence available in the recorded laws of all nations, not just those of modern Europe and classical antiquity. . . . It was Montesquieu's legal training that led him to his life's work and to the materials he was to organize in his own way. From his study of law, he derived his conviction that any good government must be subject to legal restraints.[72]

Montesquieu contended that "laws ought to be consistent with the nature and principles of the government."[73] The structure of the government, argued Montesquieu, and the concomitant spirit of the nation, helped fashion the rule of law.[74] By "law" Montesquieu meant a rule of action derivative of an authority

---

[68] *Id.*

[69] Montesquieu's first writing endeavor occurred at age twenty when he composed a treatise on theology which was never published. MONTESQUIEU, *supra* note 4, at xx.

[70] RICHTER, *supra* note 56, at 15-16.

[71] *See id.* at 57-58.

[72] *Id.* at 57.

[73] *Id.* at 59.

[74] According to one Memoir, *The Spirit of Laws* is

> [h]istory explained by laws and laws by customs; the secret of these customs sought for in the hidden instincts of human nature, in the mode of development of each society, in the influence of climate, and in the particular needs created for each nation by its geographical position; all the differences of race, genius, and legislation ranged in harmonious order; the science of government, which embraces morals, religion, commerce, and industry, and, withal, order, method, and perspicuity, joined to an ever-present consciousness of the moral grandeur of man, of the responsibility of the powerful, of the rights of the oppressed, and a vigorous love of justice and right - these are some of the merits which won public favour, and obliged the contemporaries of Montesquieu to judge "*The Spirit of Laws*" as worthy of posterity.

J.V. Prichard, *Introduction* to MONTESQUIEU, *supra* note 4, at xxiii-xxiv.

that had both the power and the right to pass such a law.[75] If one has no such right to pass a law, "the rule is no longer a law, but an arbitrary command, an act of violence and usurpation."[76]

B. Montesquieu's Influence on the American Constitution

Montesquieu's *The Spirit of Laws* had a pivotal impact on the thoughts, ideas, and philosophies which were integrated into the Constitution.[77] It has been argued that "[t]he book which had the greatest influence upon the members of the Constitutional Convention was . . . *The Spirit of Laws* . . . ."[78] In addition, "Montesquieu was the most persistently cited philosopher when the federal Constitution came to be written and ratified."[79]

The "vast influence" that Montesquieu had on the American Constitution is apparent in light of his penetrating effect on eighteenth-century constitutional thinkers.[80] James Madison,[81] who studied *The Spirit of Laws* as a textbook when

---

[75] ANTOINE LOUIS CLAUDE DESTUTT DE TRANCY, A COMMENTARY AND REVIEW OF MONTESQUIEU'S THE SPIRIT OF LAWS 5 (1969).

[76] *Id.*

[77] See MORRIS, *supra* note 8, at 30, for a discussion on the philosophic underpinnings of the Constitution; *see also* RICHARD B. BERNSTEIN, ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION 123 (1987)("Ultimately, Americans turned to the great French judge and philosopher Montesquieu for a definitive and systematic analysis of government.").

[78] SOL BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 127 (1968). Bloom went on to point out that "[t]he great French philosopher had, however, in turn borrowed much of his doctrine from the Englishman, John Locke, with whose writings various members of the Convention were also familiar." *Id.*; *see also* ANNE M. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM 1 (1988) ("Montesquieu's *The Spirit of Laws* is acknowledged to have had a direct influence on the shape of the United States Constitution."); EDWARD MCWHINNEY, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE 69 (1981) (stating that Montequieu's thoughts were directly incorporated into the Constitution, especially his triadic division and separation of powers).

[79] MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE 77 (1988); *see also* TUGWELL, *supra* note 1, at 140 ("Montesquieu's *Esprit des Lois* is very generally credited with the central structural idea of the Constitution. . . . [T]he admirable expositions of *The Federalist* read like thoughtful applications of Montesquieu."); WILLIAM GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 49 (1974)("[t]here is considerable evidence that the leading figures at the Constitutional Convention had read [*The Spirit of Laws*] and were won over to its central doctrine."); *see generally* J. HERBERT ALTSCHULL, FROM MILTON TO MCLUHAN: THE IDEAS BEHIND AMERICAN JOURNALISM 72-76 (1990)(discussing Montesquieu's *The Spirit of Laws* and its uncommon bearing on the Framers).

[80] *See* PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA: 1760-1801 11 (1969)(citation omitted). According to Spurlin:

> Of French thinkers by far the strongest influence exerted on American theory was that of Montesquieu. . . . Max Farrand thought that the writings of the French publicist were accepted by the [F]ramers as "political gospel." And . . . "[t]he importance of Montesquieu in the

he was a student at Princeton,[82] utilized Montesquieu "[t]o convince his fellow delegates . . . that [the Constitution] was consistent with the principles of republican liberty."[83] In a letter written to Jefferson in 1793, Madison sanguinely remarked, "I use Montesquieu, also, from memory, tho', I believe, without inaccuracy."[84]

John Adams was likewise a prodigious reader of *The Spirit of Laws*:

> In 1760, at the age of twenty-four, John Adams made this entry in his diary: "I have begun to read *[T]he Spirit of Laws*, and have resolved to read that work through in order and with attention. I have hit upon a project that will secure my attention to it, which is to write, in the margin, a sort of index of every paragraph."[85]

Recognizing the cogency of Montesquieu's thoughts, Adams directly incorporated many of the philosopher's ideas into his 1787 political writing, *A Defence of the Constitution of Government of the United States of America*.[86]

> intellectual life of eighteenth-century America is too well established to require comment."

Id. at 12-13 (citations omitted).

[81] Madison was considered to be "[t]he most erudite member of the virginia delegation . . . ." MORRIS, *supra* note 8, at 48. In the words of one delegate Madison was the "best informed Man [sic] at any point in debate." *Id.* at 44.

[82] GOLDSMITH, *supra* note 79, at 49. Madison, as well as nine other Constitutional Convention delegates, attended Princeton. *Id.*

[83] PAUL RAHE, REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION 582 (1992); see ALTSCHULL, *supra* note 79, at 72 for additional information on Madison's use of *The Spirit of Laws*.

[84] SPURLIN, *supra* note 80, at 90 (citation omitted). Regardless of his tenacious reading of *The Spirit of Laws*, Madison thought that Montesquieu manifested too great a regard for the English Constitution. *Id.* at 241. According to Madison, such admiration on the part of Montesquieu was nothing more than "idolatry." *Id.*

[85] *Id.* at 88 (quoting THE WORKS OF JOHN ADAMS II 93 (Charles Francis Adams ed. 1850-56)).

[86] *Id.* at 88-89. Montesquieu's views were not blindly accepted and were often criticized. Thomas Jefferson, for instance, strongly attacked Montesquieu's philosophies and even considered many of his viewpoints to be heresy. SPURLIN, note 80 at 240 (citation omitted). According to Jefferson, "[t]he worst of these was the idea that a republic could exist only in a small territory . . . . Another reflected Montesquieu's class bias: his adherence to hierarchical society and to aristocratic 'honor' as the impulse of liberty." MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 62 (1970). Montesquieu believed that a republican government could only effectively work in a small territoty, unlike America. *See, e.g.*, BERNSTEIN, *supra* note 77, at 123. "He maintained that, for such a government to function, all the citizens of a republic had to know and have regular contact with one another." *Id.*

Although Jefferson became somewhat critical of Montesquieu, he "filled 20 pages of his *Commonplace Book* with passages from *Spirit*." ALTSCHULL, *supra* note 79, at 72; *see also* MERRILL D. PETERSON, THOMAS JEFFERSON WRITINGS 1229-31 (1984)("I infer with confidence that we shall find the work generally worthy of our high approbation . . . ."). Generally, however, "[i]n the years between 1789 and 1801, the French writer was

The political theories of Montesquieu were similarly influential to James Wilson, Samuel Adams, and Alexander Hamilton. Wilson, of Pennsylvania, accumulated Montesquieu's works in his library and read them daily.[87] Adams studied Montesquieu and even included reference to him in his Inaugural Address as Governor of Massachusetts.[88] "Hamilton . . . relied on Montesquieu in [his] defense of the Constitution in the *Federalist Papers*."[89]

George Washington was also acclimated to Montesquieu's works. Although Washington's library did not contain any works by Montesquieu,[90] there is a wealth of evidence that Washington employed Montesquieu's ideas at the Constitutional Convention and developed a distinctive admiration for his political insights:

> When [Madison] was preparing materials for General Washington to study before embarking for the Convention, he relied heavily on Montesquieu. References to *L'Esprit des Lois* are also contained in his handwriting in his own notes, and he made use of them at the Convention. James Wilson was also familiar with the book, as was Hamilton, and they made references to Montesquieu or his theories when they spoke at the sessions.[91]

Notwithstanding the difficulty in ascertaining the precise extent to which Montesquieu's writings influenced the Framers of the Constitution, "[t]he *Spirit of Laws* (1748) played the largest part in the Founding Fathers' creation of American Institutions."[92] It is also without question that certain portions of *The Spirit of Laws* were particularly significant in their effect on the Framers. The entire notion of separation of powers, depicted in *The Spirit of Laws*, is especially attributable to Montesquieu,[93] as were his discussions on virtuous republican government.[94]

---

generally considered a prime political authority. Jefferson was his only real detractor." SPURLIN, *supra* note 80, at 255. Montesquieu's *The Spirit of Laws* also permeated other aspects of eighteenth-century American life. For instance, it was used as a textbook at Yale and the University of North Carolina, and could be found in many private libraries. *Id.* at 66, 253. "In the last half of the eighteenth century, New York and Philadelphia booksellers found a ready market for the works of Montesquieu . . . ." ALTSCHULL, *supra* note 79, at 72.

[87] SPURLIN, note 80, at 91 (citation omitted).

[88] *Id.* at 89. John Marshall also bought a copy of *The Spirit of Laws* in 1785. *Id.* at 259.

[89] ALTSCHULL, *supra* note 79, at 72.

[90] SPURLIN, *supra* note 80, at 90.

[91] GOLDSMITH, *supra* note 79, at 49; *see also* SPURLIN, *supra* note 80, at 90 (stating that Madison gave Washington a handwritten copy of germane sections of *The Spirit of Laws*).

[92] ALTSCHULL, *supra* note 79, at 72.

[93] *See* MCWHINNEY, *supra* note 78, at 69.

[94] *See* SPURLIN, *supra* note 80, at 246 ("It has been remarked that prior to the Constitutional Convention [Montesquieu] was occasionally cited on these springs

IV. MONTESQUIEU'S THREE PRINCIPLES OF GOVERNMENT

A. Overview of Despotism, Monarchy, and the Republic According to Montesquieu

Montesquieu's principal objective for writing *The Spirit of Laws* was to peruse the relationship between law and government.[95] Montesquieu pronounced:

> This is what I have undertaken to perform in the following work. These relations I shall examine, since all these together constitute what I call the spirit of the laws . . . I shall first examine the relations which laws bear to the nature and principle of each government; and as this principle has a strong influence on laws, I shall make it my study to understand it thoroughly . . . .[96]

Summarily, "Montesquieu has argued that there were three forms of government - pure despotism founded on fear, regular monarchies animated by honor, and republics maintained by aristocratic moderation or by democratic virtue."[97] Montesquieu surmised that all sociopolitical environments maintain a certain "nature" and are thusly guided by a particular "principle" to effectuate that nature.[98]

[principles of government], particularly on virtue."). Spurlin went on to explain:

> In addition to the subjects of separation of powers and political liberty, which were emphasized in his treatment of the English Constitution, Montesquieu was apparently cited most on confederate republics and virtue . . . . He was often quoted on the necessity of virtue in a democracy . . . . Therefore, on the subject of virtue also, Montesquieu continued to serve as guide and mentor to a free and proud people essaying a new form of government.

Id. at 261-62.

[95] MONTESQUIEU, *supra* note 4, at 7.

[96] *Id.*

[97] RAHE, *supra* note 83, at 722. *See, e.g.*, MONTESQUIEU, *supra* note 4, at 8. Montesquieu succinctly evinced his understanding of these three incongruent manners of government:

> There are three species of government; republican, monarchical, and despotic. In order to discover their nature it is sufficient to recollect the common notion, which supposes three definitions, or rather three facts: *that a republican government is that which the body, or only a part of the people, is possessed of the supreme power; monarchy, that in which a single person governs by fixed and established laws; a despotic government, that in which a single person directs everything by his own will and caprice.*

Id. at 8. *See generally* LAWRENCE MEYER LEVIN, THE POLITICAL DOCTRINE OF MONTESQUIEU'S ESPRIT DES LOIS: ITS CLASSICAL BACKGROUND 61-112 (1936)(examining Montesquieu's disparate species of government).

[98] THOMAS PANGLE, MONTESQUIEU'S PHILOSOPHY OF LIBERALISM: A COMMENTARY ON *The Spirit of Laws* 44 (1973); *see also* MONTESQUIEU, *supra* note 4, at 8. It is important, however, to distinguish "nature" from "principle." Montesquieu noted that "[t]here is a difference between the nature and the principle of government, that the former is that

B. Despotism

In a despotic environment, Montesquieu apprised that fear is the governing principle.[99] Because a despotic state empowers a single individual without any restraint,[100] "[f]orce and will alone are a ground for rule because they inescapably produce fear[.]"[101] Montesquieu propounded that fear on the part of the citizenry was absolutely essential or "[p]ersons capable of setting a value upon themselves would be likely to create disturbances."[102] "In despotic states, the nature of government requires the most passive obedience; and when once the prince's will is made known, it ought infallibly to produce its effect . . . [and] man is a creature that blindly submits to the absolute will of a sovereign."[103]

C. Monarchy

Conversely, in a monarchy "[h]onour . . . supplies the place of political virtue."[104] Montesquieu contemplated that honor is the "prejudice of every person of rank."[105] The government exists, not primarily to foster the well-being of the state, but rather to defend the reputation of the ruling class. Although the good of the community may be concomitantly perpetuated, it will be the byproduct of a sovereign "promoting his own interest."[106] This point was captured by Montesquieu when he explained:

> Hence, in well-regulated monarchies, they are almost all good subjects, and very few good men; for to be a good man, a good intention is necessary, and we should love our country, not so much on our own account, as out of regard to the community.[107]

---

by which it is constituted, the latter by which it is made to act. One is its particular structure, and the other the human passions which set it in motion." *Id.* at 20.

[99] *Id.* at 28.

[100] COHLER, *supra* note 78, at 71.

[101] *Id.* at 73.

[102] MONTESQUIEU, *supra* note 4, at 28.

[103] *Id.* at 29.

[104] *Id.* at 26.

[105] *Id.*

[106] *Id.* at 27.

[107] MONTESQUIEU, *supra* note 4, at 26; *see also* RAHE, *supra* note 83, at 440-41:

> The King and his nobles might rarely be virtuous, but that hardly matters: for public spiritedness is generally inadequate as a restraint, and the nobility's sense of its own self-importance and the pursuit of "false honor" inspired in all by the artificial orders, ranks, and distinctions typical of this polity make it difficult and almost unthinkable for the monarch to exercise arbitrary power and transgress the law.

Id.

Put simply, a putative monarchy can only successfully exist in an environment in which the sovereign is quite literally understood to be above his subjects and of a noble descent.[108] Honor is not necessarily the result of devotion to community or love of country. Quite the contrary, "it is the nature of honour to aspire to preferments and titles, [and] it is properly placed in this government."[109] It is expected that these individuals will work to institutionalize mechanisms to continually protect their own honor and privilege. Without privilege, a monarchy sacrifices its nature.[110]

Consonant with the belief that a monarch is quintessential nobility, Montesquieu theorized that the sovereign will expect certain privileges, not extended to his subjects,[111] to preserve this honor:

> As honor is the principle of a monarchical government, the laws ought to be in relation to this principle. They should endeavor to support the nobility, in respect to whom honour may be, in some measure, deemed both child and parent . . . . All these privileges must be peculiar to the nobility, and incommunicable to the people, unless we intend to act contrary to the principle of government . . . .[112]

Not surprisingly, Montesquieu signified that clemency is integral only in a monarchy, declaring:

> Clemency is the characteristic of monarchs . . . . It is more necessary in monarchies, where they are governed by honour, which frequently requires what the very law forbids. Disgrace is here equivalent to chastisement; and even the forms of justice are punishments. This is because particular kinds of penalty are formed by shame, which on every side invades the delinquent . . . . So many are the advantages which monarchs gain by their clemency, so greatly does it raise their fame, and endear them to their subjects, that it is generally happy for them to have an opportunity of displaying it; which in this part of the world is seldom wanting.[113]

As this passage succinctly elucidates, because the efficacy of monarchy presupposes the honor of the sovereign, clemency is indispensable to maintain honor, regardless of the dictates of positive law;[114] the nature of this government mandates the availability of such unilateral privileges.[115]

---

[108] *Cf.* MONTESQUIEU, *supra* note 4, at 27; *see also id.* at 20 (stating that a monarch thinks of himself as above the laws).

[109] *Id.*

[110] *See* COHLER, *supra* note 78, at 86.

[111] *See* MONTESQUIEU, *supra* note 4, at 59.

[112] *Id.* at 58-59.

[113] *Id.* at 101.

[114] *See id.*

D. The Republic

Montesquieu's final species of government is the republic, which subsumes both democracy and aristocracy.[116] "When the body of the people is possessed of the supreme power, it is called a *democracy*. When the power is lodged in the hands of a part of the people, it is then an *aristocracy*."[117] Both were comparatively apposite in that virtue was the governing principle.[118] Montesquieu stipulated that virtue was a "love of the laws and of [the] country. As such [this] love requires a constant preference of public to private interest[s]."[119] Considering that republics are premised on respect for law, "[t]he nearer a government approaches toward a republic, the more the manner of judging becomes settled and fixed . . . otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life is concerned."[120] The cogency of a republic diminishes when laws are not fixed but instead become relative to particular individuals.

Montesquieu sedulously defended the absolute need for virtue in a democratic republic. Although laws may not always be respected by a monarch in pursuit of perpetual honour, republican leaders are afforded no such luxury. "[W]hen, in a popular government, there is a suspension of the laws . . . the state is certainly undone."[121] Montesquieu continued:

> [W]hen virtue is banished, ambition invades the minds of those who are disposed to receive it, and avarice possesses the whole community. The objects of their desires are changed; what they were fond of before has become indifferent; they were free while they were under the

---

[115] *See id.* at 54.

[116] MONTESQUIEU, *supra* note 4, at 8.

[117] *Id.* Montesquieu noted that aristocratic republics were governed by particular families while a genuine democracy was governed by the collective body. *Id.* at 21.

[118] *Id.* at 24. Although aristocracies required the presence of virtue, this was less essential than in a democratic republic. Because an aristocracy consists of nobles, Montesquieu noted that moderation, founded on virtue, was the soul of this form of government. *Id.*

[119] MONTESQUIEU, *supra* note 4, at 37. Montesquieu suggested that "virtue is self-renunciation, which is ever arduous and painful." *Id.* at 36. It appears that Montesquieu's understanding of virtue was widely accepted, especially in American courts of law. For instance, in 1794, Judge Richard Paters of the United States Court for the District of Pennsylvania instructed the grand jury, saying, "[h]ow shameful it would be . . . if the satellites of despotism should outdo, in zeal for the personal interests or aggrandizement of a monarch, republicans in their attachment to their laws." SPURLIN, *supra* note 80, at 232 (citation omitted).

[120] MONTESQUIEU, *supra* note 4, at 81.

[121] *Id.* at 21.

> restraint of laws, but they would fain now be free to act against the law . . . .[122]

In full view of Montesquieu's understanding of virtue within a republic, unilateral privileges, which were plausibly sanctioned in a monarchy,[123] are positively anathema to republican principles. First, a democratic republic requires that all individuals enjoy the same advantages and pleasures.[124] Second, because virtue requires an immutable love of the laws, an individual hoping to exculpate himself from the restraints of those laws would necessarily lack virtue and hence betray the very idealism which defines republicanism.[125] Third, honor is only a constitutive element in a monarchy; thus a plea for clemency under the rule of law to preclude potential shame is also invidious to republican virtue.[126] Accenting this credence, Montesquieu advised that "[c]lemency . . . [i]n republics, whose principle is virtue . . . is not so necessary."[127] Finally, republican virtue always commands that public interests precede private ambition[128] vis-a-vis a monarchy where "it is extremely difficult for the people to be virtuous."[129] Despite Montesquieu's pragmatic assertion that virtue might be deficient in some ostensible republics, he opined that if such a state came to fruition, the government would be "imperfect."[130]

E. Private Immorality and the Rule of Law

Montesquieu's understanding of republican virtue permeated the Constitutional Convention[131] and because of its influence on eighteenth-century political thought[132] *The Spirit of Laws* provided the road map for constructing a union with republican virtue as the governing principle.

---

[122] *Id.* at 22.

[123] *Cf. id.* at 106. Montesquieu also iterated that luxuries should progressively wax and wane relative to one's status in society, explaining:

> Hence, it is that for the preservation of the monarchical state, luxury ought continually to increase, and to grow more extensive, as it rises from the laborer to the artificer, to the merchant, to the magistrate, to the nobility, to the great officers of the state, up to the prince; otherwise the nation will be undone.

Id.

[124] MONTESQUIEU, *supra* note 4, at 44.

[125] *Cf. id.* at 37.

[126] *Id.* at 101.

[127] *Id.*

[128] *See id.* at 36.

[129] MONTESQUIEU, *supra* note 4, at 25.

[130] *Id.* at 30.

[131] *See* SPURLIN, *supra* note 80, at 262.

[132] *See id.* at 10.

Nothing would have been more repugnant to republican virtue than the institutionalization of a temporary immunity from suit for private, often narcissistic, acts committed by a sovereign for which other citizens would be immediately held accountable for.[133] Although Judge Wright's District Court opinion in *Jones v. Clinton*[134] averred that "[t]his is not a case in which any necessity exists to rush to trial," such an observance unfortunately begs the ultimate question[135] and borders on fatuity. Rather, the inquiry should be directed at the historical prerogative of a sovereign to suspend the rule of law with respect to unofficial actions for any reason;[136] not autonomous judicial assessments of temporal necessity or the lack thereof. I believe that such a right was never meant to exist constitutionally and was incessantly feared. As previously noted, Montesquieu articulated that any attempt to suspend the law in a republic portended the incipient corruption of the state.[137] The delegates to the Constitutional Convention generally adhered to such wisdom.[138] Accordingly, "[i]n republican communities the law was binding on all. The law was not just an obligation of subjects to obey an unfettered monarch whose own actions were to be judged by different criteria . . . ."[139]

---

[133]One could logically argue that the Framers "did not believe that it was the function of a Constitution to control personal habits or behavior." J.A.C. CHANDLER, GENESIS AND BIRTH OF THE FEDERAL CONSTITUTION 24 (1924)(quoting Hampton L. Carson in his address before the American Bar Association in 1920). However, the Constitution was not constructed with the expectation that officials could avariciously use it to inoculate themselves from accountability before the rule of law.

[134]*See supra* notes 41-46 and accompanying text.

[135]*Jones*, 868 F. Supp. at 697. Judge Wright seemed to imply that a temporary immunity was not absolute. For instance, her opinion emphasized that such a rule might not apply in a situation where a person was "terribly injured in an accident through the alleged negligence of the President and desperately needs to recover . . . ." *Id.* at 699. Judge Wright also stated that

> [i]t is not a divorce action, or a child custody or child support case, in which immediate personal needs of the other party are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an in rem foreclosure by a lending institution.

Id. at 688-89.

[136]*See Jones*, 72 F.3d at 1361. The Eighth Circuit Court of Appeals held that the *Fitzgerald* and *Nixon* cases were inapposite precisely because of the nature of the actions involved:

> [T]he Court in *Fitzgerald* was troubled by the potential impact of private civil suits arising out of the President's performance of his official duties on the future performance of those duties, not by whether the President qua individual citizen would have the time to be a defendant in a lawsuit.

Id. at 1360.

[137]*See* MONTESQUIEU, *supra* note 4, at 21.

[138]*Cf.* Washington's Ubiquitous Appeal *infra* Part V.B.

[139]GLENN PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 125 (1993).

The Framers' desire to inculcate virtue was not an illusory ambition. Rather, they envisioned General Washington as emblematic of such virtuous potential in the kind of republic depicted by Montesquieu.

V. WASHINGTON'S INFLUENCE AT THE CONSTITUTIONAL CONVENTION

A. Washington as Iconic of Montesquieu's Republican Virtue

The Spirit of Laws had a profound impact on General Washington.[140] Washington actively utilized *The Spirit of Laws* in his preparation for the Constitutional Convention in 1789.[141] Moreover, he appears to have incorporated many of Montesquieu's thoughts and ideas into several influential speeches that he delivered. For instance, in his celebrated Farewell Address[142] to his cabinet on September 17, 1796, Washington specified that it is "substantially true that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government."[143] This is perceptively similar to words uttered by Montesquieu in *The Spirit of Laws* when he proclaimed, "[b]ut in a popular state, one spring more is necessary, namely, *virtue*"[144] and that "[t]here are three species of government . . . ."[145] In that same address, Washington declared that with respect to political prosperity, "religion and morality are indepensible supports."[146] This again reflects Montesquieu's belief that "[t]here is no nation . . . that has longer been uncorrupted than the Romans" because "Rome was a ship held by two anchors, religion and morality . . . ."[147]

Among the many notable figures present at the Constitutional Convention, George Washington, a deputy from Virginia and Convention president,[148] was by far the most influential,[149] and exhibited an celestial persona. "Washingtonton yet invested everything he touched with a kind of sacred-

---

[140] *See* SPURLIN, *supra* note 80, at 10.

[141] *See id.* at 90; *see also supra* note 91 and accompanying text.

[142] See MATTHEW SPALDING & PATRICK J. GARRITY, A SACRED UNION OF CITIZENS: GEORGE WASHINGTON'S FAREWELL ADDRESS AND THE AMERICAN CHARACTER (1996), for an in-depth analysis of the Farewell Address.

[143] GREGORY R. SURIANO, GREAT SPEECHES IN AMERICAN HISTORY 19 (1993).

[144] MONTESQUIEU, *supra* note 4, at 21.

[145] *Id.* at 8.

[146] SURIANO, *supra* note 143, at 19.

[147] MONTESQUIEU, *supra* note 4, at 129.

[148] BRECKENRIDGE LONG, GENESIS OF THE CONSTITUTION OF THE UNITED STATES 217 (1926).

[149] *See* TUGWELL, *supra* note 1, at 35.

ness."[150] In fact, the delegates to the Convention fashioned the Office of the President directly around the image of Washington[151] "who was not chosen because he represented certain views but because he was a towering symbol of national unity."[152] Washington

> was crucial to the success of the Constitutional Convention, and his personal support of the resulting document, more than anything else, assured its final approval. His election to the presidency, the office designed with him in mind, was absolutely essential to the establishment of the new nation. So dominant was this one figure that many spoke of the Founding era as nothing less than the "Age of Washington."[153]

For instance, in a letter to Jefferson, Monroe declared, "[b]e assured, his influence carried this government."[154] Other delegates found the prospect of a future inhabitant of the Office lacking Washingtonian virtue somewhat more vexing. One delegate expressed consternation that "[t]he first man put at the helm will be a good one. Nobody knows what sort may come afterwards. The Executive will be increasing here, as elsewhere, till it ends in monarchy."[155]

B. Washington's Ubiquitous Appeal

Considering the numerous enigmatic qualities which Washington evinced, he consummated such ubiquitous support primarily because he was the antithesis of a monarch.[156] Because of Washington's enchantment "it was

---

[150]1 H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 48 (1877).

[151]*See* TUGWELL, *supra* note 1, at 35.

[152]*Id.* at 25-26; *see also* PHELPS, *supra* note 139, at 123 (1993) ("George Washington inspired the nearest thing to a 'cult of personality' that this nation ever saw.")(citation omitted).

[153]SPALDING & GARRITY, *supra* note 142, at 9 (citation omitted). In a letter to Washington on October 30, 1787, Gouvernor Morris wrote, "I am convinced that if you had not attended the Convention . . . it would have met with a colder reception . . . and more strenuous opponents." CHARLES WARREN, THE MAKING OF THE CONSTITUTION 730 (1937)(citation omitted).

[154]JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 211 (1969).

[155]2 THE PAPERS OF JAMES MADISON 790 (1840). Tugwell commented that

> [t]he discussion ended with ratification. Once Washington was in office, offering his version of the Presidency, it seemed unthinkable that there could be an alternative; and soon the President seemed an expression of the very genius of American democracy.

TUGWELL, *supra* note 1, at 483.

[156]*See id.* at 32-33.

necessary to secure [him], for he held a place in the hearts of the people . . . ."[157] Most importantly, Washington had no kingly ambitions.[158] Instead, he sought to personify the republican principle, and thus garner support for the ratification of the Constitution.[159] To do so, however, required that he persuade delegates that the President would always be bound by the rule of law,[160] as Montesquieu zealously advocated. According to one author:

> [I]n republican communities the law was binding on all. The law was not just an obligation of subjects to obey an unfettered monarch whose own actions were to be judged by different criteria . . . Republican law bound lawmakers and citizens equally.
>
> . . . .
>
> Washington's strategy was, in his own mind, simple common sense. People would attach themselves to government and obey its constitution if they could be convinced that officers of that government were bound by the same constitution.[161]

By defending the ideal that the President was subordinate to the rule of law[162] and persistently underscoring the notion that officers of the government were similarly restrained by the Constitution,[163] Washington affixed support for its final passage. Gouverneur Morris,[164] member of the Constitutional Convention and Minister of the United States to France, in a letter to Chief Justice Marshall, apprised, "[i]n approving highly your character of Washington, permit me to add that few men of such steady, persevering industry ever existed, and perhaps no one who so completely commanded himself."[165]

Despite the prevailing acrimony that infused the Constitutional Convention, even the Anti-Federalists could not deny the appeal of Washington, who charismatically represented Montesquieu's republican virtue. Washington's popularity among the Anti-Federalists was manifested in a series of letters,

---

[157] 1 HOLST, *supra* note 150, at 48.

[158] TUGWELL, *supra* note 1, at 32.

[159] *See* PHELPS, *supra* note 139, at 126.

[160] *See id.*; *see also* MONTESQUIEU, *supra* note 4, at 36-37.

[161] PHELPS, *supra* note 139, at 125-26.

[162] *Id.* at 192.

[163] *See id.* at 126.

[164] According to one author, "[t]he witty and arrogant Gouvenor Morris flourished in the debates. He took the floor more than any other delegate, but saved his important speeches for the most timely moment. MORRIS, *supra* note 8, at 55.

[165] 2 ANNE CARY MORRIS, THE DIARY AND LETTERS OF GOUVERNEUR MORRIS 492 (1889).

published in the *Independent Gazetteer* between 1787 and 1788, by "An Old Whig,"[166] who wrote:

> [A]lthough we have seen one illustrious character in our own times resisting the possession of power when set in competition with his duty to his country, yet these instances are so very rare, that it would be worse than madness to trust to the chance of their being often repeated.[167]
>
> . . . .
>
> [s]o far from it is from its being improbable that the man who shall hereafter be in a situation to make the attempt to perpetuate his own power, should want the virtues of General Washington; that it is perhaps a chance of one hundred millions [sic] to one that the next age will not furnish an example of so disinterested a use of great power. . . . I would therefore advise my countrymen seriously to ask themselves this question;- Whether they are prepared TO RECEIVE A KING?[168]

An interminable problem for the Anti-Federalists was that their condemnation of the Chief-of-State was somewhat vacuous when their critique was directed at the figure of Washington. Mercy Warren, author of *History of the Rise, Progress and Termination of the American Revolution, Interspersed with Biological, Political and Moral Observations*, which was published in 1805,[169] avouched in retrospect that the Constitution was ratified because Washington appealed to all classes of people,[170] even those generally opposed to the Constitution. "Though some thought the executive vested with too great powers to be entrusted to the hand of any individual, Washington was an individual in whom they had the most unlimited confidence."[171] Regardless of their enduring anxiety of a latent monarchy, the vision of Washington assuaged many such fears. Washington himself continually declared that as long as the Head-of-State was always subject to the rule of law, the pernicious expansion of the Presidency would be precluded, thus intercepting many of the Anti-Federalists' apprehensions. Washington promised:

> The powers of the Executive of this country are more definite, and better understood, perhaps, than those of any other country; and my aim has been, and will continue to be, neither to stretch nor relax them

---

[166] 3 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 26 (1981).

[167] 3 *id.* at 23.

[168] 3 *id.* at 38 (alteration in the original).

[169] 6 *id.* at 195-249.

[170] *See* 6 *id.* at 212.

[171] 6 STORING, *supra* note 166, at 212.

> in any instance whatever, unless compelled to it by imperious circumstances.[172]

A Head-of-State impervious to select laws or generally applicable rules was one quality which Montesquieu conceived as defining monarchs[173] and a privilege that the Anti-Federalists believed might virulently become endemic within the Executive after the tenure of Washington.[174] This was particularly on the mind of George Clinton, Governor of New York, who referred to Montesquieu and predicted that "rulers in all governments will erect an interest separate from the ruled . . . ."[175] However, the sight of Washington as President pacified these fears and the weight of this figure provided one of the Anti-Federalists' major rhetorical problems.[176] Using the media to accentuate the appeal of Washington, a Federalist letter in the *Independent Gazetteer* on October 15, 1787 reminded the public to remember "the illustrious American hero, whose name has ennobled human nature - I mean our beloved WASHINGTON."[177]

Both the Federalists and Anti-Federalists agreed, however, that virtue was a *sine qua non* of a republican government; they merely disagreed on whether the American Constitution would perennially encourage such virtue after Washington.[178] James Madison, emphasizing the need for virtue in a republic, poignantly inquired, "[i]s there no virtue among us? If there be not, we are in a wretched situation."[179]

VI. CONCLUSION

> No our values are false, and because our values in this age of speed and superficiality are false that constitutes the great danger to an instrument of lasting value like the Constitution of our country.[180]

When the Constitution was devised, the Framers conceptualized a President who would be devoted to republican virtue. According to Montesquieu, whose *The Spirit of Laws* was avidly read by the Framers, and whose thoughts were

---

[172] TUGWELL, *supra* note 1, at 41 (quoting JARED SPARKS, LIFE AND WRITINGS OF WASHINGTON 69 (1839)).

[173] *See* MONTESQUIEU, *supra* note 4, at 21 ("For it is clear that in a monarchy, where he who commands the execution of the laws generally thinks of himself above them . . . .").

[174] *See* CECELIA M. KENYON, THE ANTI-FEDERALISTS cii (1966).

[175] *Id.* at 321.

[176] 2 STORING, *supra* note 166, at 207 n. 2.

[177] 2 *id.* (alteration in the original).

[178] *See* 1 *id.* at 73.

[179] 1 *id.* at 72 (citation omitted).

[180] CHANDLER, *supra* note 133, at 346.

disseminated throughout the Constitutional Convention,[181] this virtue was synonymous with a love of the laws of the country[182] and an appreciation that a sovereign in a democratic republic was not above any law.[183] George Washington both symbolically and pragmatically represented and embodied quintessential republican virtue and was a prototype for the Framers as they developed an understanding of the Presidency and designed the Office itself.[184] This is considerably at variance with a monarchical state in which honor is the governing principle[185] and positing one's self above the law is often requisite to protect such honor.[186]

The American Constitution was constructed upon a bedrock of republican virtue, not monarchical honor. A temporary sovereign immunity for unofficial, purely private actions is only necessary in a state that wishes to perpetually safeguard the honor of the sovereign instead of safeguarding, and encouraging, the hallowed tenets of republican virtue.[187] The two are simply inapposite.[188]

The notion of absolute and qualified immunity is quite defensible[189] and was devised to encourage public officials to make decisions, *while in office*, without fear of liability[190] - not to protect the honor of any singular individual or to inoculate political officials from accountability for their private conduct. Montesquieu further postulated that there was an indispensable nexus between private morality and public virtue, declaring, "[v]irtue in a republic is simple; it is a love of the republic . . . [t]he love of our country is conducive to a purity of morals . . . [t]he less we are able to satisfy our private passions, the more we abandon ourselves to those of a general nature."[191] A temporary immunity for actions wholly unrelated to official responsibilities abrogates the integral relationship between public and private morality and invites an

---

[181] *See supra* notes 77-94 and accompanying text.

[182] MONTESQUIEU, *supra* note 4, at 37.

[183] *See id.* at 21.

[184] *See supra* notes 140-179 and accompanying text.

[185] *See* MONTESQUIEU, *supra* note 4, at 27.

[186] *See id.* at 58 (stating that laws in a monarchy "should endeavor to support the nobility, in respect to whom honour may be, in some measure, deemed both child and parent."); *see also supra* notes 104-115 and accompanying text.

[187] This Note does not argue that symptoms of monarchy do not infiltrate the American Presidency. However, the authentication of a temporary sovereign immunity for acts markedly unrelated to official functions is iconoclastic and a radical departure from the generalized understanding that the one who executes the laws must also live by them.

[188] *But see supra* note 41.

[189] *See supra* note 1 and accompanying text.

[190] *See Jones*, 72 F.3d at 1360.

[191] MONTESQUIEU, *supra* note 4, at 43, 44.

individual to elude the potential repercussions of private, actionable immorality under the umbrella of temporary presidential immunity. Absent "imperious circumstances,"[192] the power of immunity should not be trivialized to protect a President for actions "manifestly beyond the scope of [his] dut[ies]."[193]

In *Jones v. Clinton*, the court intimated that "[s]ub Deo et lege is our law as well as the law of Great Britain. No one, be he King or President, is above the law."[194] Unfortunately, Judge Wright's subsequent holding and concomitant logic implies that her wisdom was mere dictum. By extending to President Clinton a temporary immunity from suit, the court fashioned a rule which would situate the President above the law for the remainder of his term. This is inimical to the republic depicted by Montesquieu who believed that the rule of law should be "fixed" under all circumstances.[195] Such a surreptitious aggrandizement of presidential power further vitiates the ideal, perpetuated by Montesquieu, accepted by Washington, and endemic within the original understanding of the presidency, that a republican governor should not erect interests separate from the governed.[196]

This Note should not be read as seeking to provide a simple, affirmative answer to an issue that animates such vociferous debate. Issues such as defining "imperious circumstances"[197] and obviating frivolous lawsuits,[198] albeit provocative, are clearly beyond the scope of this Note, deserve more diligent reflection, and are appropriately reserved for another day. The author merely cautions that although it may be convenient to extend such a temporary immunity to a sitting President for alleged private, actionable immorality, such a quixotic expansion of immunity is constitutionally suspect and patently de-

---

[192] *See supra* note 172 and accompanying text.

[193] *Butz*, 438 U.S. at 495.

[194] *Jones*, 868 F. Supp. at 699.

[195] *See supra* note 120 and accompanying text.

[196] *See supra* note 175 and accompanying text.

[197] *See supra* notes 172, 192 and accompanying text.

[198] Notwithstanding the importance of filtering frivolous lawsuits, many have come to the conclusion that Jones's claims are too factually detailed and specific to be frivolous. *See generally* Stuart Taylor, Jr., *Her Case Against Clinton*, THE AMERICAN LAWYER, Nov. 1996, at 56 (evaluating the merits of the case). Taylor, who was initially skeptical, *see id.* at 58, claimed, "[g]enerally overlooked, meanwhile, has been the fact that the evidence supporting Paula Jones's allegations of predatory, if not depraved, behavior by Bill Clinton is far stronger than the evidence supporting Anita Hill's allegations of far less serious conduct by Clarence Thomas." *Id.* at 57.

structive to the Presidency - an institution that Montesquieu helped define[199] and Washington so eloquently incarnated.[200]

JOSEPH P. RODGERS[201]

---

[199] *See supra* notes 77-94 and accompanying text.

[200] *See supra* notes 140-55 and accompanying text.

[201] The author would like to express his considerable thanks to Professor David Forte of the Cleveland-Marshall College of Law as well as Leslie Pardo and Michelle Morrow of the Cleveland-Marshall College of Law Library. Thanks especially to Francis and Marie Rodgers to whom this Note is dedicated. Words cannot fully capture their perpetual encouragement and unconditional support.