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Temporary Immunity: Distinguishing Case Law Opinions for Executive Immunity and Privilege as the Supreme Court Tackles an Oxymoron

Glenn Todd Williams*

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"I do not believe that the meaning of the Constitution was forever fixed at the Philadelphia convention. The true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making."

–Supreme Court Justice
Thurgood Marshall[1]

1. THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 4 (Robert F. Tedeschi, Jr. ed., 1st ed. 1993).

I. INTRODUCTION

Immunity, by definition, is a permanent exemption from proceeding with a legal duty.[2] A maxim of law holds that words of exemption are not to be construed to import any liability.[3] However, privilege has been defined as a particular benefit or advantage enjoyed by a person or class, beyond the common advantages of ordinary citizens.[4] Additionally, a privilege is known as

> [a]n exemption from some burden or attendance, with which certain persons are indulged, from a supposition of law that the stations they fill, or the offices they are engaged in, are such as require all their time and care, and that, therefore, without this indulgence, it would be impracticable to execute such offices to that advantage which the public good requires.[5]

This broad definition of privilege is the basis of President Clinton's argument against Paula Jones. These differences between "immunity" and "privilege" will be apparent as the United States Supreme Court decisions and reasons for each are examined herein.

This article distinguishes the concepts of executive immunity from executive privilege, as interpreted by the United States Supreme Court, in an attempt to provide guidance for those interested in understanding the arguments advanced in *Jones v. Clinton*.[6] Part II of this article begins by examining the early arguments for executive immunity. Part II also conducts an in-depth review of the history of Supreme Court decisions and policy justifications affecting the executive immunity doctrine.

After reviewing the currently applicable Nixon immunity cases, this article examines the history of Supreme Court decisions involving executive privileges. Although few Supreme Court decisions have concerned executive privilege, the procedure of claiming an executive privilege parallels those arguments advanced in support of President Clinton's claim of a

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2. BLACK'S LAW DICTIONARY 751 (6th ed. 1990).
3. *Id.*
4. *Id.* at 1197.
5. BLACK'S LAW DICTIONARY 1077 (5th ed. 1979).
6. 72 F.3d 1354, 1363 (8th Cir.), *aff'd in part and rev'd in part*, 72 F.3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996) [hereinafter *Jones II*] (holding that President Clinton is not temporarily immune from civil process, from discovery through trial, during his tenure as President of the United States).

"temporary immunity." Part IV of this article presents the facts and arguments advanced in *Jones*, from the trial court to the Supreme Court. In addition, the holdings and rationales advanced in both the trial and appellate courts are surveyed.

After concluding that President Clinton does not have a constitutionally sound claim for presidential "immunity," Part IV of this article argues that the relief sought by President Clinton is more akin to the term *presidential privilege*. Finally, Part V examines the issues of whether the trial court has the discretion to stay the trial of the President, and whether the President or the plaintiff should bear any burden of proof.

II. THE HISTORY OF EXECUTIVE IMMUNITIES

Immunities are codified in both state and federal constitutions, statutes, and the common law.[7] First, a state or federal statute may provide a person immunity from prosecution, immunity from particular testimony, or immunity in exchange for incriminating testimony.[8] The most notable form of common law immunity is the doctrine of sovereign immunity, "which protects local, state, and federal governments from suit."[9] The historical roots of common law immunity can be traced back to the English maxim, 'the King can do no wrong.'[10] Second, the United States Constitution enumerates certain governmental immunities. Specifically, Article I, section 6 of the United States Constitution, which contains the Arrest Clause and Speech or Debate Clause, states that:

> The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.[11]

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7. *See* William F. Allen, Note: *President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air*, 11 J.L. & POL. 555, 558–60 (1995).

8. *Id.* at 558–60.

9. *Id.* at 558.

10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984) (citations omitted); *see e.g.* R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 311 (1959).

11. U.S. CONST. art. I, § 6.

Although immunity has been granted to the legislative[12] and judicial[13] branches of government, this paper is confined to the examination of immunities extended to the executive branch.

The roots of executive immunity can be found in the English common law and the doctrine of sovereign immunity.[14] "While the latter doctrine — that the 'King can do no wrong' — did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability."[15] "In general, there is no executive immunity — common law or otherwise — from criminal prosecution."[16]

Some commentators argue "that the Constitution's provision of impeachment as a means of removing 'civil Officers' bars any indictment or prosecution of impeachable officials until after their removal."[17] Regardless, in *Marbury v. Madison*,[18] Chief Justice John Marshall authored the most often cited rule that "[t]he very effence [sic] of civil liberty certainly confifts [sic] in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to

12. *See* Gravel v. United States, 408 U.S. 606, 628–29 (1972) (holding both congressional aides and members of Congress immune under the Speech or Debate Clause for actions which lead to illegal resolutions); United States v. Johnson, 383 U.S. 169, 184–85 (1966) (holding that judicial inquiry into the substance and motivation of a congressman's speech was in violation of the Speech or Debate Clause); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (holding that the civil rights statute did not create civil liability for acts by committee and individual members of Congress during their legitimate legislative activities).

13. *See* Stump v. Sparkman, 435 U.S. 349, 362–63 (1978) (holding that informal proceeding does not deprive a judge of absolute immunity from damages liability); Pierson v. Ray, 386 U.S. 547, 554 (1967) (holding state court judges absolutely immune from civil suits based on constitutional grounds pursuant to 42 U.S.C. § 1983 claims); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 357 (1871) (holding that judges are absolutely immune for acts committed within their judicial jurisdiction).

14. Laurier W. Beaupre, Note, *Birth of a Third Immunity: President Bill Clinton Secures Temporary Immunity From Trial*, 36 B.C. L. REV. 725, 729 (1995); Jennifer L. Long, Note, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 VAL. U. L. REV. 283, 292 (1995); Michael T. Matraia, Note, *Running For Cover Behind Presidential Immunity: The Oval Office as Safe Haven from Civil Suits*, 29 SUFFOLK U. L. REV. 195, 199 (1995); Theodore P. Stein, *Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 762 (1983); *Gray*, *supra* note 10, at 305.

15. Scheuer v. Rhodes, 416 U.S. 232, 239 (1974) (citations omitted).

16. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-14, at 268 (2d ed. 1988).

17. *Id.*

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

afford that protection."[19] Consequently, "[t]he Supreme Court has long recognized a federal common law immunity protecting executive officials, in the absence of congressionally–created exceptions, from civil liability to private plaintiffs arising out of acts performed 'in the discharge of duties imposed upon [such officials] by law.'"[20] Initially, two public policy arguments were established for extending immunity to executive officials. This immunity,

> apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[21]

A. *The Supreme Court's Early Immunity Cases*

Although the United States Constitution enumerates executive powers and duties vested in the President, it fails to specifically impart any special privileges or immunities upon the executive.[22] Although "presidential immunity is mentioned neither in the Constitution nor in any statute, it did prove a topic for debate among early statesmen."[23] "John Adams and Oliver Ellsworth argued that 'the President, personally, was not the subject to any process whatsoever,' reasoning that to do otherwise would allow the courts to 'stop the whole machine of Government.'"[24] Nonetheless, "Charles Pinckney argued that the framers deliberately chose *not* to grant the President immunity because they 'well knew how oppressively the power of undefined privileges has been exercised in Great Britain, and were determined no such authority should ever be exercised here.'"[25] "The absence of

19. *Id.* at 163.
20. TRIBE, *supra* note 16, at 269 (quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896)).
21. *Scheuer*, 416 U.S. at 240 (citations omitted).
22. *See generally* U.S. CONST. art. II (memorializing the President's powers and duties).
23. Beaupre, *supra* note 14, at 731.
24. *Id.* (quoting Nixon v. Fitzgerald, 457 U.S. 731, 750 n.31 (1982) (citing W. MACLAY, THE JOURNAL OF WILLIAM MACLAY 167 (1890 ed.))).
25. *Id.* at 732 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 777 (1982) (White, J., dissenting) (citing 10 ANNALS OF CONG. 72 (1800))).

Constitutional authority left the creation of an American immunity doctrine where it had been in England: in the courts."[26]

In 1866, in *Mississippi v. Johnson*,[27] the United States Supreme Court faced the issue of whether an injunction could restrain the President from carrying into effect an act of Congress alleged to be unconstitutional.[28] The State of Mississippi filed a bill to enjoin Andrew Johnson and his officers from executing two acts of Congress, commonly called the Reconstruction Acts.[29] In President Andrew Johnson's defense, Attorney General Stanbery argued that, due to the office which the President holds, the President is immune from service of process or the jurisdiction of any court.[30] Stanbery continued:

> There is only one court or *quasi* court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.[31]

Writing for the Court, Chief Justice Salmon P. Chase distinguished the performance of a ministerial duty from the exercise of discretion.[32] The Court concluded that "the duty of the President in the exercise of the power to see that the laws are faithfully executed . . . is in no just sense ministerial. It is purely executive and political."[33] The Court held that, "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."[34] Although the Court never addressed the issue of whether the

26. *Id.* at 732–33 (citations omitted).
27. 71 U.S. (4 Wall.) 475 (1866).
28. *Id.* at 498.
29. *Id.* at 475.
30. *Id.* at 484.
31. *Id.* at 484–85.
32. *Johnson*, 71 U.S. (4 Wall.) at 498–99.
33. *Id.* at 499.
34. *Id.* at 501.

President is immune from service of process or jurisdiction, "some commentators broadly interpreted *Johnson* to mean that the President is immune from legal process when performing what he deems to be his constitutional duties."[35]

In *United States v. Lee*,[36] the issue concerned whether an action could be maintained against the defendants, who were military officers and executive officials of the United States, for the possession of approximately 1000 acres, known as Arlington estate.[37] George W. P. C. Lee, the original plaintiff, devised this land to his daughter, the wife of General Robert E. Lee, for life, and after her death to the plaintiff. The United States purchased the land in controversy at a tax sale and retained possession of the property for more than ten years. Frederick Kaufman and Richard P. Strong, defendants, were tax commissioners in charge of the certificate of sale to Arlington estate, and both defendants were under orders from the secretary of war. The orders included that part of the property was to be used for a military station, and the rest, for a national cemetery to bury deceased soldiers and sailors, today known as the Arlington Cemetery.[38] The case was first decided in the Circuit Court of the United States for the Eastern District of Virginia, and the jury found the tax certificate and sale did not divest the plaintiff of his title to the property.[39] Attorney General Devens argued on appeal that the courts had no jurisdiction over the subject in controversy, by reason of official immunity, and that "all the proceedings be stayed and dismissed . . . ."[40]

Writing for the United States Supreme Court, Justice Samuel F. Miller stated:

> The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government . . . .
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> . . . .
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> [However,] [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

35. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 7.1, at 235 (5th ed. 1995).
36. 106 U.S. 196 (1882).
37. *Id.* at 199.
38. *Id.* at 198.
39. *Id.* at 199.
40. *Id.* at 198.

> impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.[41]

The Court went on to affirm the decision of the circuit court, further stating that a court's "power and influence rest[s] solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land . . . ."[42]

The arguments advanced in these early immunity cases laid the foundation for a judicially–created executive immunity doctrine. "Understanding the importance of the immunity doctrine as applied to the President requires an analysis of currently existing immunity law and its historical foundations."[43]

B. *Supreme Court Development of Executive Immunity*

The scope of the immunities extended to the executive branch were "traditionally quite broad and protected the defendant even in cases that undoubtedly involved tortious behavior."[44] Federal courts granted immunity to the executive branch based on the judicial immunity developed in *Bradley v. Fisher*.[45] "Just as the judicial system could not function if judges feared lawsuits . . . the executive branch could not function if officials could not act in the public interest without fearing liability."[46]

1. Absolute Immunity

Originally, the federal courts took a broad, liberal view of immunity when executive officers were sued under state law claims, "holding that in such cases the federal officers held an absolute immunity for acts within the scope of their discretion."[47] This tolerant approach to the executive immunity doctrine extended protection, "even for malicious actions if those actions were deemed to be within the 'outer perimeter' of the federal duty."[48]

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41. *Lee*, 106 U.S. at 220.
42. *Id.* at 223.
43. Long, *supra* note 14, at 292.
44. KEETON ET AL., *supra* note 10, § 131, at 1032. "The idea was that . . . social values of great importance required that the defendant escape liability. The immunity thus might be thought to differ from a privilege. . . ." *Id.*
45. 80 U.S. (13 Wall.) 335 (1871).
46. Beaupre, *supra* note 14, at 734.
47. KEETON ET AL., *supra* note 10, § 132, at 1060.
48. *Id.*

Thus, absolute immunity permanently bars a plaintiff's civil damages claim regardless of the official's underlying motive.[49] Originally, "[h]igh-ranking executive branch officials donned the judge's absolute immunity cloak in 1896."[50]

In *Spalding v. Vilas*,[51] the issue was whether the head of an executive department, here the Postmaster General, was liable for damages on account of official communications made within his authority, pursuant to an act of Congress, due to the personal or malicious motive which prompted his action.[52] An attorney representing local postmasters in a salary dispute alleged that the Postmaster General maliciously sent letters to the attorney's clients with the intent to circumvent and prevent the attorney from recovering his fees.[53]

Writing for the Court, Justice John M. Harlan proclaimed:

> We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.[54]

As with judicial immunity, the Court continued to distinguish between actions taken by an executive department head which are "manifestly or palpably beyond his authority" and actions taken within the executive's discretion or authority under the law.[55] The Court went on to hold that an executive department head was not liable for a civil suit predicated on actions taken within the official's authority.[56] The Court reasoned that, in

49. Matraia, *supra* note 14, at 204.
50. Beaupre, *supra* note 14, at 734.
51. 161 U.S. 483 (1896).
52. *Id.* at 484. *See also* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871) (holding that judges of courts of general jurisdiction are absolutely immune from civil suits for judicial actions within the court's jurisdiction, and, therefore, any exercise of that jurisdiction cannot be affected by any consideration of the motives with which the acts are done).
53. *Spalding*, 161 U.S. at 487–88.
54. *Id.* at 498.
55. *Id.*
56. *Id.*

keeping within the limits of one's authority, an executive department head "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," because to do so would "cripple the proper and effective administration of public affairs as entrusted to the executive branch . . . ."[57] The preceding policy argument was the underlying proposition and main justification for the Supreme Court's extension of immunity to executive branch officials.

In *Barr v. Matteo*,[58] the issue was whether the absolute immunity granted to executive department heads should be extended to lower ranking executive officials.[59] Two employees from the Office of Rent Stabilization sued the Acting Director, William Barr, for defamation based on the issuance of a press release in which its publication and terms originated by reason of the Acting Director's malice.[60] Linda A. Matteo and John J. Madigan, the two employees, devised a plan to spend $2,600,000 of agency funds earmarked for terminal-leave payments, whereby agency employees would be discharged, paid their terminal-leave, rehired immediately as temporary employees, and later restored to permanent status.[61] The text of the press release included comments that William Barr would demand the resignations of employees who took cash leave settlements because he violently opposed it. He charged that his first official act as director would be to ferret out and suspend these employees.[62]

Writing for a plurality, Justice John M. Harlan reasoned that Barr's action was within the "outer perimeter of . . . [his] line of duty," and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively."[63] Thus, the Court extended absolute immunity beyond executive department heads to executive officers generally.[64] While applying this functional approach to immunity, Justice Harlan added a third policy argument for extending immunity to

57. *Id.*

58. 360 U.S. 564 (1959).

59. *Id.* at 569.

60. *Id.* at 565.

61. *Id.* at 565–56. Various senators referred to the plan as "'a highly questionable procedure,' a 'raid on the Federal Treasury,' 'a conspiracy to defraud the Government of funds,' and as 'definitely involv[ing] criminal action.'" *Id.* at 567 n.4 (citation omitted).

62. *Matteo*, 360 U.S. at 567 n.5.

63. *Id.* at 575.

64. *Id.* at 574; *see also* TRIBE, *supra* note 16, at 269 n.5 (explaining that immunity rules extend beyond "'executive officers of cabinet rank,'" protecting executive officers generally).

executive officials when he stated that damage suits "would consume time and energies which would otherwise be devoted to governmental service . . . ."[65] This policy argument is the main trust of President Clinton's justification for extending presidential immunity to protect an incumbent President from most civil legal process, from discovery through trial.

2. Qualified Immunity

Beginning in the 1970s, many immunity cases involved allegations of state and federal officers violating federal laws.[66] The Civil Rights Act was the main source for claims alleging violations of constitutional rights.[67] When an officer violated a federal constitutional right, the Supreme Court provided protection for the officer but qualified the immunity granted.[68] Originally, qualified immunity had a subjective element. Today, the plaintiff is required to establish a violation of "statutory or constitutional rights of which a reasonable person would have known."[69]

In *Pierson v. Ray*,[70] three policemen of the City of Jackson arrested and charged ministers, who were members of a group of fifteen white and Negro Episcopal clergymen, with violating Mississippi law for "attempt[ing] to use segregated facilities at an interstate bus terminal."[71] The ministers were eventually convicted of the offense by Judge Spencer.[72] Following their convictions, the ministers instituted a lawsuit alleging that the police officers and the judge had violated the Civil Rights Act and the common law of Mississippi for false arrest and imprisonment.[73] At issue was whether the police officers and judges were immune from liability for damages actions under the Civil Rights Act.[74]

Writing for the Court, Chief Justice Earl Warren reasoned that Congress never indicated that 42 U.S.C. § 1983, which effects all people who under color of law deprive another of his civil rights, would "abolish wholesale all

65. *Matteo*, 360 U.S. at 571; *see also* Stein, *supra* note 14, at 764 (adding a third policy justification for extending the immunity doctrine to federal executive officials generally).
66. KEETON ET AL., *supra* note 10, at 1060–61.
67. *Id.* at 1061.
68. *Id.*
69. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
70. 386 U.S. 547 (1967).
71. *Id.* at 549.
72. *Id.*
73. *Id.* at 550.
74. *Id.* at 548.

common-law immunities."[75] Writing on judicial immunity, Warren further reasoned,

> [T]his Court held in *Tenney v. Brandhove*, . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.[76]

Consequently, the Court held Judge Spencer absolutely immune from damages liability for his role in these convictions.[77] Nevertheless, the Court stated that "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ."[78]

The police officers argued that they should not be liable for acting in good faith and with probable cause while making an arrest under a statute that they believed to be valid.[79] The Court reasoned that "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."[80] For the first time in the Supreme Court, police officers were afforded a qualified immunity in actions alleging constitutional violations.

> [T]he defense of good faith and probable cause . . . available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under [42 U.S.C.] § 1983. . . . We agree that a police officer is not charged with predicting the future course of constitutional law.[81]

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[82] the issue concerned whether a violation of the Fourth Amendment by a federal agent acting under color of law gives rise to a damages cause of action.[83] Allegedly, agents of the Federal Bureau of Narcotics carried out an arrest of Webster Bivens and a search of his apartment,

75. *Ray*, 386 U.S. at 554.
76. *Id.* at 554–55 (citations omitted).
77. *Id.* at 553.
78. *Id.* at 555.
79. *Id.*
80. *Ray*, 386 U.S. at 556–57.
81. *Id.* at 557.
82. 403 U.S. 388 (1971).
83. *Id.* at 389.

without a warrant and using unreasonable force.[84] The Court reiterated that the "Fourth Amendment operates as a limitation upon the exercise of federal power . . . ."[85] Although the United States Supreme Court never ruled on the immunity issue, the Court repeated the declaration made in *Marbury v. Madison*, that "'[t]he very effence [sic] of civil liberty certainly confifts [sic] in the right of every individual to claim the protection of the laws, whenever he receives an injury.'"[86] The Court held that an alleged violation of the Fourth Amendment by federal officials gives rise to a cause of action for damages.[87]

The case was remanded to the United States Court of Appeals for the Second Circuit, where the appellate court fashioned a two-step test to determine whether official actions were within the established immunity doctrine.[88] First, it must be determined whether the officials were acting "within the outer perimeter of [their] line of duty."[89] If so, were they "performing the type of 'discretionary' function that entitles them to immunity from suit[?]"[90] The court of appeals determined that the agents were acting within the scope of their duty, but rejected the claim of immunity because the agents were not engaged in the performance of a discretionary act.[91]

Writing for the court, circuit Judge Medina went further and established a partly subjective, partly objective defense to claims against officers charged with violating one's constitutional rights.[92] Subjectively, the officials must allege and prove that they acted in good faith.[93] Objectively, officials must have a reasonable belief in the validity of their actions.[94] "By asserting violations of constitutional rights as the basis for their suits, litigants stripped the absolute immunity defense from executive officials . . . [,]" spawning a new era for the doctrine of immunity, titled qualified immunity.[95]

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84. *Id.*
85. *Id.* at 392.
86. *Id.* at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).
87. *Bivens*, 403 U.S. at 397.
88. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1343 (2d Cir. 1972).
89. *Id.* at 1343.
90. *Id.*
91. *Id.*
92. *Id.* at 1348.
93. *Bivens*, 456 F.2d at 1348.
94. *Id.*
95. Beaupre, *supra* note 14, at 736.

In *Scheuer v. Rhodes*,[96] the personal representatives of the estates of three students who died on the campus of Kent State University brought various damage actions under the Civil Rights Act against the Governor of Ohio, the Adjutant General of the Ohio National Guard, various other National Guard officers, and the University president.[97] These officials were charged with allegedly acting under color of state law by intentionally causing the deployment of the National Guard with orders to perform illegal acts.[98]

Writing for the Court, Chief Justice Burger stated:

> *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."[99]

After an analysis and rejection of the common law absolute immunity afforded officials, Chief Justice Burger went on to say:

> [Q]ualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[100]

Chief Justice Burger supplied a three-step analysis for courts to apply when addressing issues of qualified immunity for state officials.[101] First, a

96. 416 U.S. 232 (1974).
97. *Id.* at 234.
98. *Id.* at 235.
99. *Id.* at 237 (citing *Ex parte* Young, 209 U.S. 123, 159–60 (1908)). "*Ex parte Young* . . . involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages." *Id.* at 237–38.
100. *Scheuer*, 416 U.S. at 247–48.
101. *Id.* at 250.

court must determine whether the official was acting within the scope of his duties.[102] Second, the court must decide whether the official acted within the "range of discretion permitted [to] the holders of such office . . ." under the law.[103] Finally, the fact-finder must determine whether the official acted in the good faith belief that his actions were within the law.[104]

In the instant case, the Court ordered that the case be reversed and remanded so the lower court could make a finding of good faith.[105] But, "after *Scheuer*, lower federal courts applied varying standards, unsure of whether a government official must satisfy an objective test, a subjective test, or both."[106] *Scheuer* represents the first time the Supreme Court departed from the all-or-nothing approach under absolute immunity, seeking a more balanced approach, by weighing the competing policy interests affecting executive immunity, with the recognition of qualified immunity. According to Justice Lewis F. Powell, Jr.:

> *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in 'good faith.' This 'functional' approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity.[107]

In *Butz v. Economou*,[108] the plaintiffs filed suit against federal officials within the Department of Agriculture claiming that the investigation and administrative proceeding, to revoke or suspend plaintiffs' registration, was in retaliation for criticism of the Department and in violation of federal constitutional rights.[109] The defendants moved to dismiss the action on the

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102. *Id.*
103. *Id.*
104. *Id. See also* Matraia, *supra* note 14, at 210 (reciting the holding that qualified immunity applies if the official acted in good faith and believed that the actions taken were within the law).
105. *Scheuer*, 416 U.S. at 250.
106. Matraia, *supra* note 14, at 210.
107. Nixon v. Fitzgerald, 457 U.S. 731, 746 (1982).
108. 438 U.S. 478 (1978), *aff'd sub nom.* Economou v. United States Dep't of Agric., 633 F.2d 203 (2d Cir. 1980).
109. *Id.* at 480.

grounds of official immunity arguing that all federal officials are absolutely immune from any liability for damages, even if in the course of enforcing the law, they violated the plaintiffs' constitutional rights.[110] Writing for the Court, Justice Byron R. White reexamined the history of immunity. Justice White stated that "[t]he immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law."[111] The Court distinguished *Barr*[112] and *Spalding*[113] on the ground that neither suit involved the liability of officials who had exceeded their constitutional limits, as was the case here.[114] Justice White stated the opinion of the Court:

> We agree . . . that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983 . . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head . . . . If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs.[115]

The Court clarified another element for courts to analyze when the litigation involves an alleged constitutional violation. First, courts should determine whether the plaintiff is entitled to a damages remedy for the particular constitutional violation.[116] Then, courts should "address how best to reconcile the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department."[117] Although, the Supreme Court held that federal executive officials are only entitled to a qualified immunity for constitutional violations, absolute immunity will be recognized for those "officials whose special functions require a full exemp-

110. *Id.* at 483.
111. *Id.* at 489.
112. Barr v. Matteo, 360 U.S. 564 (1959).
113. Spalding v. Vilas, 161 U.S. 483 (1896).
114. *Economou*, 438 U.S. at 495.
115. *Id.* at 500, 504–05.
116. *Id.* at 503.
117. *Id.*

tion from liability."[118] In so holding, the Court first ruled that persons performing adjudicatory functions within federal agencies are entitled to absolute immunity for their quasi-judicial acts.[119] Second, agency officials who perform functions analogous to those of a prosecutor were determined to be entitled to absolute immunity from damages liability for their decisions to initiate or continue proceedings.[120] Finally, an agency attorney who arranges for presentation of evidence in the course of proceedings was entitled to absolute immunity from suit based on the introduction of such evidence.[121] The Court remanded the case for further proceedings consistent with its opinion.[122]

The preceding case law illustrates the extent to which the Supreme Court rationalized the scope and need for executive immunity. As a result, the United States Supreme Court has drawn the line of executive immunity between those acts which fall within a particular official's discretion and functional responsibilities. In the Nixon immunity cases,[123] however, the Supreme Court expanded the scope of immunity for the President of the United States. Presidential immunity continues to apply to civil actions for damages, but the Court consciously avoided any application of the functional approach for the Presidency. Although presidential immunity is limited for those acts taken within the zone of a President's constitutional duties, the zone of constitutional responsibilities are interpreted rather broadly. Besides granting an absolute immunity for President Nixon, the Supreme Court stated its willingness to extend absolute immunity for certain functions exercised by executive branch officials.

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118. *Id.* at 508.

119. *Economou*, 438 U.S. at 514. *See also* Pierson v. Ray, 386 U.S. 547, 554 (1967) (holding state court judges absolutely immune from civil suits based on constitutional grounds pursuant to 42 U.S.C. § 1983 claims); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1872) (holding judges absolutely immune from civil suit "for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction . . . .").

120. *Economou*, 438 U.S. at 516. *See also* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (extending absolute immunity to state prosecutors and holding a state prosecutor immune from suits pursuant to 42 U.S.C. § 1983 claims). The *Pachtman* Court reasoned that "[i]t is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Id.* at 423 n.20.

121. *Economou*, 438 U.S. at 517. The *Economou* Court saw no difference between a prosecutor's function in presenting evidence in a judicial proceeding from that of the agency attorney presenting evidence in an administrative proceeding. *Id.* at 516.

122. *Id.* at 517.

123. The phrase "Nixon immunity cases" refers to *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

3. The Nixon Immunity Cases

On June 24, 1982, in *Nixon v. Fitzgerald*,[124] an intensely divided Supreme Court granted the President absolute immunity from all civil damage claims alleging acts within the "outer perimeter" of the President's official duties and responsibilities.[125] That same day, the Supreme Court handed down *Harlow v. Fitzgerald*,[126] in which the Court declined to extend absolute immunity to presidential aides.[127] These Nixon immunity cases introduce the current law applicable to disputes involving both the absolute and qualified immunities available to the President and all other executive officials in general.

The *Harlow* case actually began in January of 1970, when A. Earnest Fitzgerald, a management analyst with the Air Force Department, lost his job during a "departmental reorganization and reduction in force . . . ."[128] Back in November of 1968, Fitzgerald "attained national prominence" while testifying before a Congressional Subcommittee that there were approximately $2,000,000,000 in cost overruns on a new transport airplane.[129] "Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the [Congressional] Subcommittee . . . convened public hearings on Fitzgerald's dismissal."[130] After a flurry of media questions concerning Fitzgerald's termination, President Nixon attempted to reassign Fitzgerald to the Bureau of the Budget.[131] In reality, "Fitzgerald's proposed reassignment encountered resistance within the administration" because of Fitzgerald's poor loyalty.[132] As a result, his position was abolished.[133] Fitzgerald complained to the Civil Service Commission ("Commission") which, after a highly publicized closed hearing, concluded that Fitzgerald's dismissal was grounded on "'reasons purely personal,'" thus the reasons for his termination were an "impermissible basis for a reduction in force . . . ."[134]

124. 457 U.S. 731 (1982).
125. *Id.* at 757.
126. 457 U.S. 800 (1982).
127. *Id.* at 817–18.
128. *Nixon*, 457 U.S. at 733.
129. *Id.* at 734.
130. *Id.*
131. *Id.* at 735.
132. *Id.* at 735–36.
133. *Nixon*, 457 U.S. at 736–37.
134. *Id.* at 738 (citation omitted).

The Commission awarded Fitzgerald back pay and recommended that he be ordered a new position within the Defense Department.[135]

Consequently, "Fitzgerald filed a suit for damages in the United States District Court . . . rais[ing] essentially the same claims presented to" the Commission.[136] The complaint was dismissed for all defendants based upon the statutes of limitations, except for White House aide Alexander Butterfield.[137] More than eight years after Fitzgerald's initial discharge, Fitzgerald amended the complaint to include former President Nixon and another White House aide Bryce Harlow.[138] The district court denied the defendant's motion for summary judgment and ruled that President Nixon was not entitled to absolute immunity.[139] The United States Supreme Court granted certiorari after the appellate court summarily dismissed the appeal.[140]

Writing for a plurality, Justice Lewis F. Powell, Jr. reasoned that since "[c]onsiderations of 'public policy and convenience'" justified "judicial recognition of immunity from suits arising from official acts," with cases involving the President, the inquiries into history essentially involve "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."[141] Justice Powell focused on two policy issues that raised "unique risks to the effective functioning of government."[142] First, "[b]ecause of the singular importance of the President's duties . . . there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office."[143] Second,

> [i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public du-

135. *Id.* at 738–39 n.17.
136. *Id.* at 739.
137. *Id.*
138. *Nixon*, 457 U.S. at 740.
139. *Id.* at 740–41.
140. *Id.* at 741.
141. *Id.* at 745, 748.
142. *Id.* at 751.
143. *Nixon*, 457 U.S. at 751–52 (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).

> ties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.[144]

"In view of the special nature of the President's constitutional office and functions," the Court held that the President is entitled to absolute immunity against damages liability for acts within the "outer perimeter" of his official responsibilities.[145]

Even though the President was afforded absolute immunity from civil damages suits, the Court reasoned that the "[n]ation [is not] without sufficient protection against misconduct on the part of the Chief Executive."[146] The Court specifically identified impeachment as a constitutional remedy for misconduct by a President, including "formal and informal checks," such as, "constant scrutiny by the press," "[v]igilant oversight by Congress," the President's "desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature."[147] The Court concluded that "[t]he existence of alternative remedies and deterrents establishes that absolute immunity will not place the President 'above the law.' For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends."[148]

However, the plurality opinion was intensely criticized by the dissenters. Writing the dissent, Justice Byron R. White argued:

> 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. Until now, this concept had survived in this country only in the form of sovereign immunity . . . . Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.[149]

Justice White accurately summarized the history of the American common law doctrine of executive immunity during his rebuttal:

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144. *Id.* at 753.
145. *Id.* at 756.
146. *Id.* at 757.
147. *Id.*
148. *Nixon*, 457 U.S. at 758.
149. *Id.* at 766–67 (White, J. dissenting).

> The Court's response, until today, to this [immunity] problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decisionmaking within that function .... The functional approach to the separation-of-powers doctrine and the Court's more recent immunity decisions converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all Presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States v. Nixon.*[150]

Harlow v. Fitzgerald[151] addressed the scope of immunity available to senior aides and advisors of the President of the United States involving lawsuits for damages predicated upon their official acts.[152] White House aides Alexander Butterfield and Bryce Harlow were alleged to have joined former President Richard M. Nixon[153] in a conspiracy to violate constitutional and statutory rights of the respondent A. Earnest Fitzgerald.[154] Consequently, Butterfield and Harlow appealed the denial of their immunity defense independent of former President Nixon.[155]

Writing for the Court, Justice Lewis F. Powell, Jr. determined that, "[o]ur decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.' For executive officials in general, however, our cases make plain that qualified immunity represents the norm."[156] Butterfield and Harlow argued that they were "entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides."[157] Since the President must delegate a large measure of authority, they argued that "recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself."[158] The Court coun-

150. *Id.* at 784–85 (citation omitted).
151. 457 U.S. 800 (1982).
152. *Id.* at 802.
153. *Id.* The alleged conspiracy is the same as involved in *Fitzgerald. Id.*
154. *Id.* at 802.
155. *Harlow*, 457 U.S. at 806.
156. *Id.* at 807 (citations omitted).
157. *Id.* at 808.
158. *Id.* at 810.

tered by stating that "we implicitly rejected such derivative immunity in *Butz* . . . . In general our cases have followed a 'functional' approach to immunity law."[159]

Butterfield and Harlow also asserted their entitlement to immunity based on the "special functions" of White House aides.[160] To this argument the Court responded:

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. But a 'special functions' rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties . . . . In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.[161]

The Court agreed that if Butterfield and Harlow failed to establish absolute immunity, public policy "mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial."[162] "Yet . . . the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the 'good faith' standard established by our decisions."[163]

The Court reasoned that "Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact . . . regarded as inherently requiring resolution by a jury."[164] Justice Powell explained:

> Immunity generally is available only to officials performing discretionary functions . . . . [and] the judgments surrounding discretionary action almost inevitably are influenced by the decision-

159. *Id.*
160. Harlow, 457 U.S. at 811.
161. *Id.* at 812–13.
162. *Id.* at 813.
163. *Id.* at 814–15.
164. *Id.* at 816.

> maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment.... Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquires of this kind can be peculiarly disruptive of effective government.[165]

Accordingly, the Court held that "government officials 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."[166] The Court reasoned that, "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[167]

The Court fashioned a two-step analysis for issues of qualified immunity on summary judgment.[168] First, the judge should determine what is the currently applicable law.[169] Second, the judge should determine "whether that law was clearly established at the time an action occurred."[170] The Court justified this analysis by stating the following:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.[171]

III. THE HISTORY OF EXECUTIVE PRIVILEGES

Scholarly literature has associated and combined the term "immunity" with "privilege," hence an essential prerequisite to any intelligent discussion

165. *Harlow*, 457 U.S. at 816–17.
166. *Id.* at 818.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Harlow*, 457 U.S. at 818.
171. *Id.*

of privilege involves distinguishing privilege from the related doctrines of governmental immunity.[172] Primarily, executive privilege is defined as an executive official's or a President's claim of constitutional authority to withhold information from the legislative and judicial branches, whereas immunity, if granted, permanently prohibits a plaintiff's cause of action.[173] "The very words 'executive privilege' were conjoined only yesterday, in 1958."[174] Just as executive immunity began with arguments that the President was not subject to service of process or jurisdiction, these arguments were also advanced by Presidents to avoid subpoenas in executive privilege cases.[175]

In addition to a communications privilege, some commentators suggest that the President has a witness privilege.[176] It is suggested that due to presidential responsibilities, a President should be excused from actual appearance, and instead, may give his or her testimony by deposition.[177] However, several Presidents and former Presidents have testified in court and before Congress.[178]

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172. 26 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5663 (1992).

173. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1 (1974).

174. *Id.* at 1.

175. *See* NOWAK & ROTUNDA, *supra* note 35, at 235 n.1.

> Subpoenas of the President. Prior to the subpoena of a President upheld in United States v. Nixon, the courts only twice before issued a subpoena to a sitting President. The first was the subpoena issued to President Jefferson in United States v. Burr; Chief Justice Marshall, sitting on circuit during the treason trial of Aaron Burr, was the trial judge. Burr intended to obtain a letter sent to Jefferson as well as various documents. The extent to which Jefferson complied is unclear. Jefferson withheld parts of the letter, and Marshall apparently accepted this withholding. The letter was not introduced in evidence.
>
> On January 3, 1818, President Monroe became the second President to be served with a subpoena while in office.

Id. (citations omitted).

176. WRIGHT & GRAHAM, *supra* note 172, § 5673, at 58.

177. *Id.*

178. *See* NOWAK & ROTUNDA, *supra* note 35, at 238–39 n.28.

> **Ford.** In United States v. Fromme, President Ford was compelled to testify by videotaped deposition at trial of Lynette "Squeaky" Fromme, who had attempted to assassinate Ford. In addition, while President, President Ford voluntarily appeared before a House subcommittee to answer questions that had been raised concerning his pardon of former President Nixon; and on September 15, 1988 Ford voluntarily appeared before a Senate Committee and testified about the War Powers Resolution, which he criticized as "impracticable" and "unconstitutional."

The President has the right to receive confidential communications from his aides and advisors pursuant to Article II of the United States Constitution.[179] "[A]lthough the Constitution does not explicitly reference a privilege of confidentiality, to the extent the President's interest in confidentiality relates to the effective discharge of Executive powers, it is constitutionally based."[180] Although the need to protect confidential communications is derived from the constitutional doctrine of separation of powers, executive privilege is not absolute, but rather a qualified privilege.[181]

Although some commentators thought that executive privilege was first recognized by the courts in the trial of Aaron Burr,[182] most writers assert that the privilege demanded by President Thomas Jefferson during that case was what is today called "executive privilege."[183] The case most frequently cited as being the first American decision allowing for the privilege of state secrets is *Totten v. United States.*[184] "However, a careful reading of *Totten* tends to support those who argue that the basis of the decision was the law of contracts, not the privilege for secrets of state."[185]

"In 1953, in the midst of the worst of the McCarthy hysteria, the Supreme Court decided *United States v. Reynolds*, its first and still the leading case on the state secrets privilege."[186] In *United States v. Rey-*

Carter. During his presidency, President Carter gave videotaped testimony that was presented at the criminal trial of two Georgia state officials charged with gambling conspiracy; two years later, President Carter provided videotaped testimony for a grand jury probing charges that Robert Vesco, a fugitive financier, had enlisted the White House to quash extradition proceedings against him. Also while President, President Carter was interviewed under oath by the Counsel on Professional Responsibility pursuant to a Department of Justice order to investigate "for criminal, civil and administration purposes" any offenses resulting from his brother Billy Carter's relations with the Libyan Government.

Reagan. In United States v. Poindexter, the district court ordered videotaped deposition of former President Reagan, at the insistence of criminal defendant Poindexter; the former President testified on videotape, which was introduced in the trial, which was part of the series of trials prosecuted by the statutorily created Independent Counsel and growing out of the Iran-Contra affair.

Id. (citations omitted).

179. Andrea L. Wolff, *The Federal Advisory Committee Act and the Executive Privilege: Resolving the Separation of Powers Issue*, 5 SETON HALL CONST. L.J. 1023, 1040 (1995).

180. *Id.*

181. *Id.*

182. United States v. Burr, 25 F. Cas. 30 (No. 14,692D) (C.C.Va. 1807).

183. WRIGHT & GRAHAM, *supra* note 172, § 5663, at 505–06.

184. 92 U.S. 105 (1875).

185. WRIGHT & GRAHAM, *supra* note 172, § 5663, at 506.

186. *Id.* at 507–08.

nolds,[187] the Supreme Court granted certiorari "[b]ecause an important question of the Government's privilege to resist discovery is involved . . . ."[188] A military aircraft took flight to test secret electronic equipment.[189] While in flight, fire consumed the bomber's engines and killed six crew members and three civilians in the resulting crash.[190] The widows of the three deceased civilians brought a consolidated suit against the United States.[191] During discovery, the widows sought production of the Air Force's official accident investigation report. The Government moved to quash the request for production on the ground that these matters were privileged against disclosure.[192] After the Government produced the documents to the judge for a determination of whether they contained privileged information, the district court declined the claim of privilege and ordered the documents be produced.[193] In the end, final judgment was awarded to the widows and an appeal followed.[194] The appellate court affirmed, stating both that there was a sufficient showing of good cause for the production of the documents and as to the ultimate disposition of the case.[195]

The government's attorney argued to the United States Supreme Court that executive department heads have the power to withhold any documents in their custody from judicial view if they deem it to be in the public interest.[196] Writing for the Court, Chief Justice Fred M. Vinson reasoned that, "[w]hen the Secretary of the Air Force lodged his formal 'Claim of Privilege,' he attempted therein to invoke the privilege against revealing military secrets. . . ."[197] Ruling on the merits, the Court stated:

> [T]he trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed . . . there was certainly a suffi-

187. 345 U.S. 1 (1953).
188. *Id.* at 3.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Reynolds*, 345 U.S. at 3.
193. *Id.* at 5.
194. *Id.*
195. *Id.*
196. *Id.* at 6.
197. *Reynolds*, 345 U.S. at 6.

> cient showing of privilege to cut off further demand for the document.[198]

Since there was nothing to suggest that the electronic equipment had any causal connection with the accident, the Court reversed the decision of the court of appeals and remanded the case to the district court.[199] Thus, the Court granted a qualified executive privilege to executive department heads in civil suits.

In *United States v. Nixon*,[200] an indictment was issued alleging violations of federal statutes by certain White House staff and political supporters of the President. Before trial, the Special Prosecutor filed a motion for a subpoena duces tecum directing President Nixon to produce certain tapes and documents relating to precisely identified conversations and meetings between the President and others.[201] The President filed a motion to quash the subpoena, claiming executive privilege.[202] Initially, President's counsel argued that the court lacked jurisdiction to issue the subpoena, because the matter was an intra-branch dispute between a subordinate and superior officer of the executive branch and hence not subject to judicial review.[203]

Writing for a unanimous court, Chief Justice Warren E. Burger first addressed the issue of justiciability. The Court reasoned:

> The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense . . . [i]n the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence . . . sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable . . . ." Moreover, since the matter is one arising in the regular

198. *Id.* at 10–11.
199. *Id.* at 11–12.
200. 418 U.S. 683 (1974).
201. *Id.*
202. *Id.*
203. *Id.* at 692.

> course of a federal criminal prosecution, it is within the traditional scope of Art. III power.[204]

Thus, the Court ruled that the Special Prosecutor has standing to enforce a subpoena duces tecum for the production, before trial, of certain tapes and documents relating to precisely identified conversations and meetings between the President and others.

After determining that the requirements of rule 17(c) were satisfied,[205] the Court turned to the claim of executive privilege.[206] The President's first argument was that the separation of powers doctrine precluded judicial review of the President's claim of privilege.[207] Additionally, the President argued that if he does not prevail on the claim of absolute privilege, the Court should, as a matter of constitutional law, hold that the privilege prevails over the subpoena duces tecum.[208] The Court first reiterated a proposition in *Marbury v. Madison*, that "it is emphatically the province and duty of the judicial department to say what the law is."[209] Accordingly, the Court concluded that it had the authority in this case to state what the law was regarding the President's claim of privilege.[210] Turning to the second argument, Chief Justice Burger reasoned:

> To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III.[211]

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204. *Id.* at 696–97 (citation omitted).

205. *See* United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). In order to require production prior to trial, the moving party must show: 1) that the documents are evidentiary and relevant; 2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; 3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and 4) that the application is made in good faith and is not intended as a general 'fishing expedition.' *Id.* at 338.

206. *Nixon*, 418 U.S. at 703.

207. *Id.*

208. *Id.*

209. *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

210. *Id.* at 705.

211. *Nixon*, 418 U.S. at 707.

The Court held that a general claim for the privilege of confidentiality of presidential communications must be weighed against the effects which this particular exercise of privilege would bear against the effective functioning of the judicial process.[212] However, the Court proceeded to justify the invocation of a qualified, presumptive privilege.

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution . . . .
>
> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer. . . ." To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. . . . Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.[213]

After weighing the competing interests at stake, the Court concluded that President Nixon's generalized interest in confidentiality of communications does not prevail over fundamental demands of due process of law in the fair administration of criminal justice.[214]

In *Nixon v. Administrator of General Services*,[215] President Nixon, after his resignation, entered into an agreement with the Administrator of General Services that provided for the storage of an estimated 42 million pages of documents and 880 tape recordings. Under the agreement, neither President Nixon nor the General Services Administration ("GSA") could gain access to the materials without the other's consent.[216] Just after a public announcement of this agreement, a bill was introduced in Congress designed to

212. *Id.* at 707–08.
213. *Id.* at 708–11 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
214. *Id.* at 711–13.
215. 433 U.S. 425 (1977) [hereinafter *General Services*].
216. *Id.*

invalidate it.[217] Approximately three months later, this bill was enacted as the Presidential Recordings and Materials Preservation Act ("Act") and was signed into law by President Gerald Ford.[218] The Act directs the Administrator of GSA to take custody of President Nixon's materials and have them screened by Government archivists.[219] The purpose was to return to President Nixon those materials, personal and private in nature, and to preserve those having historical value.[220] This Act would make important materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke."[221]

The day after the Act was signed into law, President Nixon filed an action seeking declaratory and injunctive relief against enforcement of the Act by challenging the Act's constitutionality on the grounds that it violates: 1) the principle of separation of powers; 2) the Presidential privilege; 3) President Nixon's privacy interests; 4) his First Amendment associational rights; and 5) the Bill of Attainder Clause.[222] Because this section is only concerned with presidential privileges, this discussion is limited to those issues related to the presidential privilege doctrine.

Writing for the Court, Justice William J. Brennan, Jr. stated that President Nixon may only assert a privilege as to those materials which fall within the scope of the privilege as recognized in *United States v. Nixon*.[223] The Court stated that *Nixon* held that the privilege is limited to communications "'in performance of [a President's] responsibilities, of his office,'" and made "'in the process of shaping policies and making decisions.'"[224] The Court denied President Nixon's claim of privilege, reasoning that section 104 of the Act directed the Administrator to take into account "'the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege'" and the need to return purely private materials to the President.[225] The Court concluded that, "[i]n view of these specific directions, there is no reason to believe that the restriction on public access ultimately

217. *Id.*
218. *Id.*
219. *Id.*
220. *General Services*, 433 U.S. at 425.
221. *Id.*
222. *Id.* at 425–26.
223. *Id.* at 449.
224. *Id.* (citations omitted).
225. *General Services*, 433 U.S. at 450 (citation omitted).

established by regulation will not be adequate to preserve executive confidentiality."[226] Ultimately, the Court reasoned:

> [that] given the safeguards built into the Act to prevent disclosure of such materials and the minimal nature of the intrusion into the confidentiality of the Presidency, we believe that the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes.[227]

Although Supreme Court opinions involving executive privilege cases are sparse, the procedure involved in claiming and establishing the privilege parallels those arguments advanced in *Jones v. Clinton*[228] in support of a "temporary immunity." This presumptive privilege would entail halting all civil legal process against a sitting President for the duration of his or her tenure. A President may still be sued, but a presumption could be attached where the plaintiff or President will have the burden to show why they would be injured if the proceeding were continued or stayed.

IV. JONES V. CLINTON

A. *Facts*

On May 6, 1994, Paula Corbin Jones filed suit against President William Jefferson Clinton and Arkansas State Trooper Danny Ferguson, who was assigned to President Clinton's security detail during his tenure as Arkansas' Governor.[229] On May 8, 1991, the underlying incident was alleged to have occurred in a Little Rock, Arkansas, hotel suite where President Clinton, then Governor of Arkansas, delivered a speech at a conference that day.[230] According to the complaint, Trooper Danny Ferguson, President Clinton's bodyguard, delivered a piece of paper to Paula Jones with a four digit number written down and said, "[t]he Governor

226. *Id.*

227. *Id.* at 454.

228. *See* 72 F.3d 1354 (8th Cir. 1996) The dissent argues that the plaintiff should have the burden of proving why this litigation will not interfere with the President's duties, whereas the concurrence argues that the President should bear the burden of establishing why this litigation would interfere with real and established responsibilities. *Id.* (Ross J., dissenting).

229. *Id.* at 1357.

230. *Id.*

would like to meet with you" in this suite number.[231] Jones, a rank-and-file Arkansas state employee being paid approximately $6.35 per hour, thought it was an honor to be asked to meet with the Governor.[232] It was during this encounter which Paula Jones alleges that President Clinton violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her.[233] She further alleges that Trooper Ferguson and Mr. Clinton conspired to violate her constitutional rights.[234] The Jones complaint also asserts two supplemental state law claims, one against President Clinton for intentional infliction of emotional distress and the other against both Trooper Ferguson and President Clinton for defamation.[235] On June 10, 1994, Mr. Ferguson answered the complaint, admitting that he traveled in an elevator with Paula Jones and pointed out a particular room of the hotel, but that he had no knowledge of what took place in that room.[236]

B. *Prior History of* Jones v. Clinton

In the United States District Court for the Eastern District of Arkansas, Western Division, President Clinton asserted a claim of immunity from civil suit and filed a motion to dismiss the complaint without prejudice to its refiling when he is no longer President.[237] In the alternative, he requested a stay of the proceedings for as long as he remains President.[238] On December 28, 1994, United States District Court Judge Susan Webber Wright denied the sitting President of the United States absolute immunity during presidential service from civil suit for his unofficial acts.[239] Nevertheless, Judge Wright did reason that the separation of powers doctrine entitled President Clinton a "temporary or limited immunity from trial," thereby granting President Clinton a stay of trial during his tenure as President.[240] Judge Wright also justified the stay on the basis of her authority under Rule 40 of

231. Complaint at 3, Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994) [hereinafter Jones I].

232. *Id.*

233. *Jones II*, 72 F.3d at 1357.

234. *Id.*

235. *Id.*

236. Answer of Danny Ferguson at 3–4, Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994).

237. *Jones I*, 869 F. Supp. at 692.

238. *Id.*

239. *Id.* at 698.

240. *Id.* at 699.

the *Federal Rules of Civil Procedure*[241] and "the equity powers of the Court."[242] The court concluded that the claims against Trooper Ferguson were so factually and legally intertwined with the claims of President Clinton that the stay from trial also applied to Mr. Ferguson. However, the court allowed discovery to go forward on Mrs. Jones' claims against both defendants.[243]

President Clinton appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, arguing that the court should have dismissed the suit without prejudice to the refiling of Mrs. Jones' suit when he is no longer President.[244] President Clinton also challenged the decision to permit discovery to proceed during the stay of trial.[245] Contemporaneously, Paula Jones cross-appealed, arguing that the stay entered by the district court was in error, and the case should be allowed to proceed through trial.[246]

Writing for a divided panel, circuit Judge Bowman began with the proposition that the President, like all other government officials, is subject to the same laws that apply to all other members of American society.[247] The appellate court rationally grounded its holding by stating that "[b]y definition, unofficial acts are not within the perimeter of the President's official responsibility at all, even the outer perimeter."[248] Therefore, President Clinton's claim of immunity was not within the holding of *Nixon v. Fitzgerald*.[249] The appellate court continued, "[w]e thus are unable to read *Fitzgerald* as support for the proposition that the separation of powers doctrine provides immunity for the individual who serves as President from lawsuits seeking to hold him accountable for his unofficial actions."[250]

Turning to the issue of temporary immunity, the appellate court cited *Marbury v. Madison*[251] for the proposition that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protec-

241. *See* FED. R. CIV. P. 40 (allowing district courts to place actions upon its trial calendar).
242. *Jones I*, 869 F. Supp. at 699.
243. *Id.*
244. *Jones II*, 72 F.3d at 1356.
245. *Id.*
246. *Id.*
247. *Id.* at 1358.
248. *Id.* at 1359.
249. *Jones II*, 72 F.3d at 1359.
250. *Id.*
251. 5 U.S. (1 Cranch) 137, 163 (1803).

tion of the laws, whenever he receives an injury,'" and the court stated that "Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws."[252] Judge Bowman reasoned:

> Mrs. Jones's [sic] claims, except for her defamation claim, concern actions by Mr. Clinton that, beyond cavil, are unrelated to his duties as President. This lawsuit thus does not implicate presidential decision-making. If this suit goes forward, the President still will be able to carry out his duties without any concern that he might be sued for damages by a constituent aggrieved by some official presidential act. Though amenable to suit for his private acts, the President retains the absolute immunity found in *Fitzgerald* for official acts, and presidential decision-making will not be impaired.[253]

Thus, the court of appeals held that the Constitution does not provide a sitting President with any immunity from civil actions based on unofficial, pre-presidential actions.[254] The case was remanded to the district court to lift the stays and to allow Mrs. Jones' suit to proceed against President Clinton and Trooper Ferguson.[255]

In a special concurrence, circuit Judge Beam wrote separately to express his conviction on three points "insufficiently discussed" by the dissent and Judge Bowman.[256] First, Judge Beam discussed how the stay of proceedings would affect Paula Jones' claim by justifiably realizing,

> Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time . . . . If a blanket stay is granted and discovery is precluded as suggested by Mr. Clinton and his amicus, Ms. Jones will have no way . . . to perpetuate the testimony of any party or witness should they die or become incompetent during the period the matter is held in abeyance . . . . Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal.[257]

252. *Jones II*, 72 F.3d at 1360 (citation omitted).
253. *Id.* (footnote omitted).
254. *Id.* at 1363.
255. *Id.*
256. *Id.* (Beam J., concurring specially).
257. *Jones II*, 72 F.3d at 1363–64.

Judge Beam continued his analysis by addressing the dissent's contention that the burden of proof establishing "'irreparable injury'" along with a showing "'that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office'" should lie with Ms. Jones.[258] Judge Beam reasoned that "a litigant could [n]ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited."[259] Rather, the burden should be upon "the party seeking to delay the usual course of discovery and trial" as in any other civil litigation.[260]

Next, Judge Beam discussed the impact this litigation could have on the President. After citing to numerous instances where an incumbent President has been subject to judicial actions, Judge Beam reasoned that since these previous Presidents had managed to schedule "these encounters without creating a cataclysmic episode in which the constitutional duties of the office have been compromised," accordingly, President Clinton could similarly manage his duties of office while following discovery requests based on an uncomplicated civil litigation.[261] Moreover, the trial judge's careful supervision of the litigation can make certain that discovery requests are "carried out with a minimum of impact on the President's schedule."[262]

Judge Beam then turned his concern to Trooper Danny Ferguson. Judge Beam discussed how he could find "no separation of powers or other constitutional basis for a stay" for the claims against Trooper Ferguson.[263] Judge Beam concluded that:

> Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the rights of any party. As I have attempted to stress, nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled.[264]

Despite these rational and legally based opinions, circuit Judge Ross dissented from the majority opinion. Judge Ross would have held that,

258. *Id.* at 1364 (citation omitted).
259. *Id.*
260. *Id.*
261. *Id.* at 1366.
262. *Jones II*, 72 F.3d at 1366.
263. *Id.* at 1367.
264. *Id.*

"unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term."[265] After reiterating the holding and public policy arguments advanced in *Nixon v. Fitzgerald*,[266] Judge Ross argued, "[w]hile the majority would encourage other courts to exercise 'judicial case management sensitive to the burdens of the presidency,' ... only a stay of civil litigation during a President's term in office will ensure the performance of Executive duties unencumbered by the judiciary and thereby avoid separation of powers conflicts."[267] Judge Ross reasoned:

> Where there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office. The cause of action should be stayed unless the plaintiff can show that he or she will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office.
>
> It is important to keep in mind that the issue here is not *whether* the President may be required to answer claims based on unofficial conduct, but *when*. This conclusion merely delays, rather than defeats, the vindication of the plaintiff's private legal interests, and thus is far less burdensome for a plaintiff than the absolute immunity recognized in *Fitzgerald*. A stay for the duration of the President's service in office would not prevent Jones from ultimately obtaining an adjudication of her claims. Rather, staying the litigation will protect the important public and constitutional interests in the President's unimpaired performance of his duties, while preserving a plaintiff's ability to obtain resolution of his or her claims on the merits.[268]

Additionally, Judge Ross reasoned that a stay of the proceedings against Trooper Ferguson is "essential if the President is to be fully protected."[269] Judge Ross insisted:

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265. *Id.* at 1367 (Ross J., dissenting).
266. 457 U.S. 731 (1982).
267. *Jones II*, 72 F.3d at 1369 (quoting Bowman J., majority opinion).
268. *Id.*
269. *Id.* at 1370.

> [that he] would hold that to rebut the presumption that private suits against a sitting President should not go forward during the President's service in office, the plaintiff should have to demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Absent such a showing, the litigation should be deferred.[270]

In Judge Ross's opinion, "the stay should include pretrial discovery, as well as the trial proceedings, because discovery is likely to pose even more intrusive and burdensome demands on the President's time and attention than the eventual trial itself."[271]

C. *Current Status of* Jones v. Clinton

On May 15, 1996, President Clinton petitioned the United States Supreme Court for a writ of certiorari.[272] The first of two questions presented was whether the incumbent President is entitled to immunity, for the duration of his Presidency, from a civil suit for damages for his unofficial actions. The second question is whether the district court properly exercised its discretion by granting a stay of trial until the President leaves office.

President Clinton's counsel, Robert S. Bennett, stated four reasons for granting the petition. Counsel claimed that the decision of the United States Court of Appeals is inconsistent with previous Supreme Court decisions and jeopardizes the separation of powers doctrine.[273] Counsel contended that "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint."[274] Counsel presumed that the court of appeals "concluded that because the *Fitzgerald* holding was limited to civil damages claims challenging official acts, the President should receive no form of protection from any other civil suits," which is completely "inconsistent with the reasoning of *Fitzgerald*."[275] Counsel persisted:

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270. *Id.*

271. *Id.* at 1369–70.

272. Petition for Writ of Certiorari at 21, Clinton v. Jones, 72 F.3d 1354 (8th Cir. 1996), *cert. granted*, 116 S. Ct. 2545 (1996) (No. 95-1050) [hereinafter Petition].

273. *Id.* at 9.

274. *Id.* (citing *Nixon*, 457 U.S. at 749).

275. *Id.*

> [t]he Court in *Fitzgerald* determined that the President was entitled to absolute immunity not only because the threat of liability for official acts might inhibit him in the exercise of his authority, but also because, in the Court's words, 'the singular importance of the President's duties' means that 'diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.'[276]

Thus, the President's counsel places unwieldy emphasis upon this second policy argument, and concluded that the Court of Appeals "ignored this second basis for the holding of *Fitzgerald*."[277]

Next, Mr. Bennett argued that the Court of Appeals erred by viewing the relief sought by the President as extraordinary.[278] As support for this proposition, counsel maintained that, "[t]here are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected."[279] Three examples are advanced in support of this proposition. First, the Soldiers' and Sailors' Civil Relief Act of 1940[280] grants military personnel the right to toll or stay civil claims while they are on active duty. Therefore, "President Clinton here thus seeks relief similar to that to which he may be entitled as Commander-In-Chief of the Armed Forces."[281] Next,

> [t]he so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. Thus, if [Paula Jones] had sued a party who entered bankruptcy, [she] would automatically find herself in the same position she will be in if the President prevails before this Court--except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.[282]

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276. *Id.* (citing *Nixon* 457 U.S. at 751–52).
277. Petition at 10, *Clinton* (No. 95-1050).
278. *Id.* at 14.
279. *Id.*
280. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 521 (1988 & Supp. V 1993).
281. Petition at 14–15, *Clinton* (No. 95-1050).
282. *Id.* at 15.

Lastly, courts may "put off civil litigation until the conclusion of a related criminal prosecution against the same defendant."[283] As a result, counsel argued that "these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself 'above the law,' or that holding this litigation in abeyance would impermissibly violate a plaintiff's entitlement to access to the courts."[284]

Next, it is argued that the court of appeals erred in asserting jurisdiction over, and reversing, the district court's discretionary decision to stay the trial until after the President leaves office.[285] Mr. Bennett reasoned:

> The question of whether the President is entitled, as a matter of law, to defer this litigation is analytically distinct from the question of whether a district court may exercise its discretion to stay all or part of the litigation . . . the latter is a discretionary determination to be made on the basis of the particular facts of the case. Moreover, . . . a court's exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion. The panel majority's expansion of the court of appeals' jurisdiction over [Paula Jones'] interlocutory appeal was in error.[286]

Counsel concluded that the appellate court never conducted "the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion."[287]

Finally, the President's attorney made an argument that the Supreme Court should grant review now in order to protect the interests of the Presidency.[288] Counsel reasoned, "Now, a court for the first time in history has held that a sitting President is required to defend a private civil damages action."[289] Ending his arguments, counsel reasoned:

> There is no question that the issues raised by this case will have profound consequences for both the Presidency and the Judiciary. The last word on issues of this importance should not be a decision by a splintered panel of a court of appeals--a decision that is incon-

283. *Id.*
284. *Id.* at 16.
285. *Id.*
286. Petition at 17–19, *Clinton* (No. 95-1050).
287. *Id.* at 19.
288. *Id.* at 20.
289. *Id.*

> sistent with the precedents of this Court and with the constitutional tradition of separation of powers.[290]

Therefore, counsel pleaded for the Supreme Court to grant the President's petition for writ of certiorari.

On May 17 of 1996, Attorney Gilbert K. Davis, Paula Corbin Jones' counsel, responded in opposition to President Clinton's petition for writ of certiorari.[291] Mr. Davis reinforced three reasons why the Supreme Court should deny the petition. His first declaration bolsters the argument that this case in no way possesses any consequential threat to the functioning of the executive branch. Mr. Davis reiterates that this case is "a very simple dispute about what happened in a very short encounter between two people," and quite possibly the least burdensome case a President may ever face.[292] Gilbert Davis argues that President Clinton has "sought to advance his argument that this litigation might 'interfere with [his] constitutionally assigned duties . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit.'"[293] As counsel made clear:

> In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." The historical record reveals no claims of any presidential hardship in these cases, let alone any claims of presidential immunities.[294]

Concluding that President Clinton failed to raise any concrete issue as to any institutional interference with the Presidency, Mr. Davis reasoned that the President shows neither the extent to which this litigation would violate the separation of powers nor how the executive branch would be prevented from accomplishing its constitutionally assigned functions.[295]

Mr. Gilbert's second argument attacks the President's contention that this litigation comes within the immunity doctrine espoused in *Nixon v.*

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290. *Id.* at 21.

291. Brief for Respondent at 24, Clinton v. Jones, 72 F. 3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996) (No. 95-1050).

292. *Id.* at 10.

293. *Id.*

294. *Id.* at 11 (citation omitted).

295. *Id.* at 14.

Fitzgerald.[296] Counsel argued that the President is not entitled, as a matter of law, to defer this litigation, because the acts complained of are not within the outer perimeter of his official duties.[297] Mr. Davis stated that "Mr. Clinton consistently styled his claim as one of immunity. He has now dropped that word, but the relief he seeks is effectively the same."[298] Following counsel's logic, he stated:

> [N]otwithstanding [the President's] advocacy of discretionary stays, he still contends that under *Nixon v. Fitzgerald* he is "entitled, as a matter of law, to defer this litigation" for the remainder of his presidency. That is essentially the argument for presidential immunity . . . [but] [i]n more than a century of immunity decisions, from *Bradley v. Fisher*, to *Fitzgerald*, this Court has not once suggested that a public official could avoid litigation of a case involving only unofficial acts. To the contrary, as Chief Justice Burger's concurrence in *Fitzgerald* repeatedly stressed, the Court's cases have always presumed that protection of public officials from suit covers only official actions and "does not extend beyond such actions"—that "a President, like Members of Congress, judges, prosecutors, or congressional aides . . . [is] not immune for acts outside official duties." It was precisely that limitation that allowed Chief Justice Burger to declare that *Fitzgerald* did not place [the] President "above the law."[299]

Counsel concluded that nothing within the *Fitzgerald* opinion grants or even suggests that a President, when acting personally, has any immunity, neither qualified nor absolute. Counsel reasoned that to extend immunity here "would contravene the Nation's egalitarian civic creed and the Constitution's guarantee of equal protection of the laws."[300] As the appeals court reasoned, Article II of the United States Constitution certainly did not create a monarchy.[301]

Counsel argued that the appeals court, in a proper exercise of jurisdiction, correctly reversed the district court's grant of temporary immunity from trial and its stay of proceedings.[302] Counsel reasoned that the appeals court

296. 457 U.S. 731 (1982).
297. Brief for Respondent at 14, *Clinton* (No. 95-1050).
298. *Id.*
299. *Id.* at 15–16 (citations omitted).
300. *Id.* at 18.
301. *Id.*
302. Brief for Respondent at 20, *Clinton* (No. 95-1050).

correctly determined that what the district court ordered, a postponement of trial, was "the functional equivalent of a grant of temporary immunity."[303] Even though the trial court had the power to stay proceedings, "the District Court's decision was a manifest abuse of discretion."[304] Mr. Gilbert stressed that when the district court granted trial immunity to President Clinton, the court made no finding that the President even attempted to make a showing of an actual and "clear case of hardship," as required to stay a proceeding.[305] The appellate court's ruling was proper, despite the district court's recitation of Rule 40 of the *Federal Rules of Civil Procedure*[306] and the court's equity powers, because the district court's order was based upon its erroneous holding that Mr. Clinton was entitled to "immunity from trial as *Fitzgerald* seems to require."[307]

Despite Mr. Gilbert's arguments espousing the correct scope of the cases mentioned herein, on June 24 of 1996, the Supreme Court of the United States granted President Clinton's petition for writ of certiorari.[308]

V. PRESIDENTIAL PRIVILEGE

If the Supreme Court extends any protection to President Clinton according to the circumstances underlying *Jones*, then, initially, there must be a determination made to precisely label the form of relief sought by the President. President Clinton hopes to persuade the Supreme Court to recognize some form of immunity, applicable only to the office of the President. However, all rational analyses seem to weight heavily in Paula Jones' favor when distinguishing the circumstances involved in *Jones* to the holding and policy arguments advanced in *Nixon*.[309] According to *Nixon*, presidential immunity attaches to broad official actions within the scope of a President's responsibility.[310] The more narrow functional approach to the immunity doctrine extends to grant officials immunity only for acts within the functions provided to that particular official's discretion and responsibilities. Regardless, President Clinton petitions the Supreme Court to provide the office of the President monumental protection from practically

303. *Id.*
304. *Id.*
305. *Id.* at 21.
306. FED. R. CIV. P. 40.
307. Brief for Respondent at 21, *Clinton* (No. 95-1050).
308. 116 S. Ct. 2545 (1996).
309. 457 U.S. 731 (1982).
310. *Id.* at 756.

all phases of a civil litigation, from discovery through trial, until the President leaves office.

Contrary to the holdings of every executive immunity case, President Clinton's claim arises from actions prior to his Presidency and completely outside of any functional or discretionary executive action taken by then Governor Clinton. If any other citizen, executive official, judge, or legislator were to argue immunity from trial, then summary judgment would have surely put an end to such a claim, because President Clinton's actions were outside of any broad zone of an official's duties or responsibilities. Nevertheless, the Chief Executive of the United States is not just one person in one office representing one department, but rather one person representing an entire branch of government. For this reason alone, the office of the President is definitely unique and merits some form of protection from disruptive lawsuits.

However, any claim of immunity by President Clinton is erroneous. Both qualified and absolute immunity, if granted, permanently bars a plaintiff's civil damages action. In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,[311] the Second Circuit's test to determine whether an official's actions were within the established immunity doctrine, required that it must first be determined whether the official was acting "'within the outer perimeter of his line of duty.'"[312] The holding in *Nixon* established this identical limit upon claims of presidential immunity.[313] Clearly, President Clinton's claim of a temporary immunity for pre-presidential, unofficial actions immediately fails under any established immunity doctrine, definition, or test.

In reality, what President Clinton seeks to avoid is the rigorous judicial process only during his tenure as President. President Clinton claims that he and all future Presidents should be entitled to some form of protection for the purpose of being unencumbered while in the execution of Article II responsibilities. This claim has policy merit due to the possibility that the overwhelming exposure of the President makes him "an easily identifiable target for suits for civil damages[,]" and consequently, could frequently "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."[314]

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311. 456 F.2d 1339 (2d Cir. 1972).
312. *Id.* at 1343 (quoting Barr v. Matteo, 360 U.S. 564, 575 (1959)).
313. *Nixon*, 457 U.S. at 756.
314. *Id.* at 753.

President Clinton's ultimate relief is more akin to the term "*presidential privilege*" rather than "temporary immunity." Logically, Mr. Clinton's relief should be termed a privilege, because supporters argue that this temporary immunity should be presumptive with a burden of proof for either the plaintiff or President to establish.[315] This presumptiveness parallels the procedure established for claims based on executive privilege.[316] Moreover, the President's ultimate relief is definitely not any form of an immunity, because, by definition, it is temporary and of a fixed duration.[317] On the other hand, every single grant of immunity has permanently barred the underlying claim. Therefore, how can the President's requested relief be termed "temporary immunity?" The term "temporary immunity" is an oxymoron and absolutely unsuited for any intelligent constitutional analysis. Additionally, President Clinton's relief is exclusively presidential, because all policy arguments supporting President Clinton's claim focus upon the Article II responsibilities and unique office of the Presidency. Therefore, any temporary relief granted to the office of the Presidency should be entitled *presidential privilege*, because Clinton's position parallels executive privilege cases while his basic argument focuses on the uniqueness of the oval office.

Rationalizing the arguments advanced, both pro and con, for President Clinton's claim of a *presidential privilege*, one must recall that these arguments were advanced in both executive immunity and executive privilege cases. According to Judge Ross' dissent in *Jones*, "unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term."[318] Thus, Judge Ross would allow the President a presumptive privilege, which can only be countered with a showing of exigent circumstances. Judge Ross' test parallels that espoused in the *Reynolds* and *Nixon* cases. In *Reynolds*, the Court championed the procedure involved in assessing an executive privi-

315. *See* Jones v. Clinton, 72 F.3d 1354 (1996) (presenting conflicting opinions as both the concurrence and the dissent argue whether the plaintiff or the president should bear the burden of proof).

316. *See* United States v. Reynolds, 345 U.S. 1, 10–11 (1953) (concluding that the person alleging the privilege must make a formal claim of privilege, and then, the opposing party must rebut any presumption of privilege).

317. *See* Petition at 15, *Clinton* (No. 95-1050) (arguing that a stay in this case has a definite term based on the constitutional limit on a president's tenure in office).

318. *Jones II*, 72 F.3d at 1367 (Ross J., dissenting).

lege issue. First, there must be a formal claim of privilege.[319] Thus, it is entirely proper to initially rule that a plaintiff has shown probable cause for the discovery of privileged information.[320] Thereafter, when the formal claim of privilege is asserted, it must be determined if there is a sufficient showing of privilege to cut off further demand for the privileged information.[321] President Clinton is not asserting an absolute immunity from civil process, but a qualified privilege against compelled participation in the process while in office. As a result, a President can be served process and be subjected to judicial process. However, once a President asserts a formal *presidential privilege* claim, then it must be determined if there is a sufficient showing of privilege to cut off further demand for the privileged information.

In *United States v. Nixon*,[322] the Court weighed the competing interests at stake and concluded that a President's generalized interest in confidentiality of communications does not prevail over fundamental demands of due process of law in the fair administration of criminal justice.[323] Hence, Judge Ross' test parallels the procedures and balancing of interests used by the Supreme Court to evaluate a claim of executive privilege because a President bears the burden of establishing the privilege while the court balances the competing interests. President Clinton does not assert that he is always immune from this type of suit, rather that the office itself holds the privilege. Thus, *presidential privilege* is a President's claim of constitutional authority to withhold information, not from the legislative and judicial branches, but from a civil plaintiff while the President remains in office, provided that the President's interest for the privilege relates to the effective discharge of executive powers.

VI. STAY OF PROCEEDINGS

The trial court in *Jones v. Clinton* granted the President "temporary or limited immunity from trial" on the basis of the court's discretion and equity powers.[324] Yet, the appellate court debated whether the plaintiff or the President should bear the "burden of showing specific hardship or inequity if

319. *Reynolds*, 345 U.S. at 10.
320. *Id.*
321. *Id.* at 10–11.
322. 418 U.S. 683 (1974).
323. *Id.* at 711–13.
324. Jones I, 869 F. Supp. at 699.

he or she is required to go forward."[325] If the Supreme Court grants President Clinton a *presidential privilege* to stay any proceedings of this matter during the President's tenure in office, then the Supreme Court must address whether the trial court has the power and discretion to grant a stay of trial, and whether the plaintiff or President must shoulder any burden of proof.

A. *The Trial Court*

President Clinton's counsel cites *Landis v. North American Co.*,[326] in support of the trial court's discretion to stay the trial. Writing for the Court in *Landis*, Justice Benjamin N. Cardozo reasoned:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants . . . . True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.[327]

The *Landis* Court went on to state:

> Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted . . . . Even so, the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners, suppliants for relief, and discretion was abused if the stay was not kept within the bounds of moderation.[328]

Nonetheless, this case concerned the power of a court to stay proceedings in one suit until the decision of an identical suit in another court is rendered.[329] Therefore, the *Landis* decision is distinguishable here, because Paula Jones has filed only one suit in federal court.

President Clinton argued, in his petition for writ of certiorari, that the trial court's discretionary "decision to postpone trial — unlike review of its

325. *Jones II*, 72 F.3d at 1364.
326. 299 U.S. 248 (1936).
327. *Id.* at 254–55.
328. *Id.* at 256.
329. *Id.* at 249.

decision to reject the President's position that the entire case should be deferred as a matter of law — must address these particular facts of this case."[330] Additionally, "[t]he panel majority justified its reversal of the district court with a single sentence in a footnote . . . [and] it is unclear what the panel meant by labeling the district court's order the 'functional equivalent' of 'temporary immunity.'"[331] Thus, "in its sweeping and conclusory ruling, [the appellate court] did not begin to conduct the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion."[332]

Countering this argument, Paula Jones' counsel contested the President's claim by asserting that "Mr. Clinton misconstrues" the *Landis* case.[333] After reciting the holding in *Landis*, counsel argued that "a stay of litigation may be granted '[o]nly in rare circumstances.'"[334] Counsel contended that the appellate court was faithful to the holding in *Landis* when they properly reversed the trial court's postponement of trial.[335] Counsel reasoned:

> In granting trial "immunity" to Mr. Clinton, the District Court made no finding that Mr. Clinton had made a showing of an actual and "clear case of hardship," a showing not even attempted. As Judge Beam explained, moreover, the danger of harm to Ms. Jones was manifest: she "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time."[336] And the passage of time contemplated by the District Court's order—possibly into the next century—was surely immoderate. Indeed, in *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year."[337] And since the "stay," despite the District Court's citation of FED. R. CIV. P. 40 and the court's equity powers, was dependent upon its erroneous holding that Mr. Clinton was entitled to an "immunity

330. Petition at 18, *Clinton* (No. 95-1050).
331. *Id.* at 19 (quoting *Jones II*, 72 F.3d at 1361).
332. *Id.*
333. Brief for Respondent at 20, *Clinton* (No. 95-1050).
334. *Id.* at 21 (quoting *Landis*, 299 U.S. at 255).
335. *Id.*
336. *Id.* (citing *Jones II*, 72 F.3d at 1364).
337. *Id.* (citing *Landis*, 299 U.S. at 256).

> from trial as *Fitzgerald* seems to require," it was properly reversed for that error as well.[338]

Accordingly, Paula Jones argued that the decision rendered in the appellate court was correct, and her case should proceed against Mr. Clinton and Trooper Ferguson.

Due to the fact that a trial court has the power to control its docket, the Supreme Court will have to determine whether the district court properly exercised its discretion to stay the trial until President Clinton leaves office. On this same issue, the appellate court stated:

> The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.[339]

Thus, the court's justification is to allow the trial court to use its discretionary functions to protect the President when there is a clear and actual conflict between Presidential duties and the judicial process, not a wholesale grant of immunity from trial while sitting as President.

B. *Burden of Proof*

Writing his dissent for the appellate court, Judge Ross reasoned that "[t]he burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability."[340] Thus, circuit Judge Ross asserted that "[t]he cause of action should be stayed unless the plaintiff can show that he or she will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair

338. Brief for Respondent at 21, *Clinton* (No. 95-1050) (citing *Jones I*, 869 F. Supp. at 699).

339. *Jones II*, 72 F.3d at 1362–63.

340. *Id.* at 1367 (Ross, J., dissenting).

the President's ability to attend to the duties of his office."[341] However, Judge Ross cites no authority nor any public policy arguments to support his proposition for shifting the burden onto the plaintiff.

Subsequently, circuit Judge Beam, writing a special concurrence for the court, specifically stated that:

> The dissent cites no established authority or case precedent for this burden-shifting strategy, even by analogy to some reasonably comparable situation. I have discovered none. In this regard, there is no way, in my view, that a litigant could ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited. [T]he burden . . . should be shouldered, as in any other civil litigation, by the party seeking to delay the usual course of discovery and trial. Otherwise, we will have established requirements of insurmountable proportions for any litigant who may have a viable and urgent civil claim against a sitting President or perhaps, against other important governmental figures with constitutionally established duties.
>
> This approach to staying litigation is a well-established legal concept.[342]

Judge Beam reiterated that the traditional approach espoused in *Landis* established that the person applying for the stay has the burden of showing any specific hardship or inequity before the court will grant any stay of the proceedings.[343] If the Supreme Court follows the traditional approach, then President Clinton will have the burden of establishing a stay from proceedings.

VII. CONCLUSION

Since the Supreme Court granted President Clinton's petition for certiorari, the Justices must determine whether President Clinton is entitled to a *presidential privilege* against civil process during his tenure for allegedly unofficial, pre-presidential actions. Paula Jones' allegations have lost the attention of Americans, but the issues now involved are quite real and will impact the Presidency for the immediate and foreseeable future. In this

341. *Id.* at 1369.
342. *Id.* at 1364 (Beam, J., concurring specially).
343. *Id.*

regard, one should not take lightly the allegations advanced; rather, one should focus upon the issues raised by Paula Jones and President Clinton.

If the Supreme Court grants President Clinton a *presidential privilege* against compelled civil process, then the King cannot be wrong while occupying the oval office. Consequently, the doctrine of presidential immunity may encounter a ripple-effect, whereby the historic functional approach may be altered in favor of public policy concerns for an unimpeded Presidency. As a result, the last quasi-judicial process available will be the process of impeachment. But due to the conflicting views in the appellate court's decision on who should bear the burden of proof, the Supreme Court may have to address this issue. If *Landis* is controlling, then President Clinton will bear any burden of *proving* that this litigation will harm his ability to function as President.

If the Supreme Court follows *stare decisis* and applies the holding in *Nixon v. Fitzgerald*, then the appellate court's decision may stand. Since President Clinton's alleged actions are pre-presidential, any application of the holding in *Nixon v. Fitzgerald* will result in a denial of the President's claim for relief. Thus, Paula Jones will be able to claim the protection of the laws against a sitting President, whenever injury results. In the end, every person interested should hope that justice will prevail, and Paula Jones will soon get her day in court.

The Supreme Court may extend to the Presidency a new *presidential privilege*, effectively carving out a constitutional exception applicable only to the presidential office. Contemporary pressures upon the Presidency may favor a policy of allowing the President unimpeded civil protection to perform his or her Article II duties. However, the Court is more likely to take Chief Justice Burger's view in *United States v. Nixon*, that this new *presidential privilege* will gravely impair the role of the courts under Article III and upset the constitutional balance of powers.[344]

Glenn T. Williams

344. 418 U.S. at 707.