

JONES v. CLINTON AND PRESIDENTIAL IMMUNITY

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On May 6, 1994, Paula Corbin Jones set in motion events that could alter the legal status of the office of the President of the United States. Ms. Jones filed a lawsuit against William Jefferson Clinton, the sitting President, because of sexual improprieties he allegedly committed while serving as Governor of Arkansas.³⁷⁰ As of January 1996, the case had already worked its way up the judicial ladder from the trial court to the first appellate level. *Jones v. Clinton* is poised to come before the United States Supreme Court, which could address unexplored areas of presidential jurisprudence--the body of legal theory and doctrine that deals with the Chief Executive.

The suit itself has not yet been tried. No jury has been impanelled, and no attorney has placed the President on the witness stand. Currently, the courts are wrangling over procedural matters rather than substantive ones. Nevertheless, the particular procedural issue in this case is important in its own right: whether a sitting president may be sued for acts committed before he assumed office. The watershed case in this area of "presidential immunity" is *Nixon v. Fitzgerald*, in which the Supreme Court decided that President Richard Nixon was not subject to lawsuits over matters connected with the execution of the duties of his office.³⁷¹ This paper examines the interaction of the *Fitzgerald* decision, the presidential immunity issue as raised in *Jones v. Clinton*, and the judicial philosophy of the current Supreme Court. As the twenty-first century approaches, Ms. Jones' suit will have an impact on the Office of the President that will no doubt reverberate throughout both the legal and political worlds.

Nixon v. Fitzgerald and Presidential Immunity

In November 1968, Ernest Fitzgerald, an Air Force management analyst, testified before a congressional subcommittee that certain aerospace developmental projects would engender cost overruns of nearly

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³⁷⁰ *Jones v. Clinton*, 858 F. Supp. 902, 904 (1994).

³⁷¹ *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

two billion dollars.³⁷² In January 1970, Mr. Fitzgerald's job was eliminated during a putative cost-cutting reorganization.³⁷³ However, Mr. Fitzgerald believed his superiors fired him in retaliation for his testimony before Congress, thereby violating federal civil service regulations, and he filed suit against several executive branch officials, including--eventually--President Nixon.³⁷⁴

By the time Nixon was named as a defendant in 1978, he was no longer a sitting president; nevertheless, he argued that the doctrine of "presidential immunity" operated to bar his inclusion as a defendant.³⁷⁵ In an opinion written by Justice Powell,³⁷⁶ the Supreme Court engaged in a lengthy analysis of the evolution of governmental immunity.³⁷⁷ The Supreme Court had previously held that government officials enjoy absolute immunity from common law actions for damages based upon their official acts.³⁷⁸ Subsequent decisions extended the immunity doctrine to shield state officials acting within their official capacities from actions brought under the Civil Rights Act of 1968.³⁷⁹ Eventually, the Supreme

³⁷² *Id.* at 734. The Supreme Court opinion, in footnote one, directs the reader to *Economics of Military Procurement: Hearings before the Subcommittee on Economy in Government of the Joint Economic Committee*, 90th Cong., 2d Sess., pt. 1, 199-201 (1968-1969).

³⁷³ *Fitzgerald*, 457 U.S. at 734.

³⁷⁴ *Id.* at 739. Fitzgerald's dismissal caught the attention of both Congress and the press. The subcommittee before which Fitzgerald testified conducted a derivative hearing into his dismissal (*The Dismissal of A. Ernest Fitzgerald by the Department of Defense: hearings before the Subcommittee on Economy in Government of the Joint Economic Committee*, 91st Cong., 1st Sess., 24 (1969)), which received extensive press coverage. Following this bad publicity coming in the midst of the unrest surrounding the Vietnam War, an embattled administration proposed a reassignment of Fitzgerald to another government position, tentatively in the Bureau of the Budget. *See Fitzgerald*, 457 U.S. at 735. However, some administration officials resisted this move. In fact, White House aide Alexander Butterfield circulated a memo suggesting that the administration "let [Fitzgerald] bleed" for his remarks. *Id.* When no other federal employment offers were forthcoming, Fitzgerald complained to the Civil Service Commission, which decided in closed hearings that Fitzgerald was improperly discharged for "purely personal" reasons, and that he should be reappointed to his position or a comparable one. *Id.* at 738. Fitzgerald then filed the suit referenced in the text of this article, which eventually named Nixon as a defendant after more than eight years of procedural battles similar to those at issue in *Jones*. *Id.* at 740.

³⁷⁵ *Fitzgerald*, 457 U.S. at 741.

³⁷⁶ *Id.* (Burger, C.J., concurring and White, J., Brennan, J., Marshall, J., and Blackmun, J., dissenting).

³⁷⁷ *Id.* at 744-49.

³⁷⁸ *Id.* at 744 (explaining *Spalding v. Vilas*, 161 U.S. 483 (1896), in which the Court held the Postmaster General enjoyed absolute immunity from civil damages actions in the interest of preserving "proper and effective administration of public affairs.").

³⁷⁹ *See Fitzgerald*, 457 U.S. at 745. Justice Powell discusses *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (holding that, absent evidence of express Congressional legislative intent, a federal state would not operate to "impinge on a tradition [of immunity] so well grounded in history and reason," and therefore state legislators would enjoy absolute immunity under the statute for legislative acts) and *Pierson v. Ray*, 386 U.S. 547 (1967)

Court addressed immunity of federal officials from damages for constitutional violations in *Butz v. Economou*,³⁸⁰ holding that like state officials, federal officials generally have a qualified "good faith" immunity, but that some officials--like prosecutors and judges--enjoy absolute immunity due to the "special nature of their responsibilities."³⁸¹ This approach, granting immunity based on particular functions of an office, has been termed the "functional approach."³⁸²

In light of this body of case law, the *Fitzgerald* Court held that the Chief Executive of the United States enjoys absolute immunity from damages liability for official acts, even those only within the "outer perimeter" of official responsibility.³⁸³ In reaching this position, Powell reasoned that the unique characteristics of the presidential office, as delineated by the Constitution,³⁸⁴ prevent application of a "functional approach" and require recognition of absolute immunity, as opposed to the qualified immunity extended to state governors and cabinet officers under *Butz*.³⁸⁵ Powell drew authority for the President's absolute immunity from the Constitution's separation of powers doctrine. Whenever the judiciary is called upon to exercise jurisdiction over another branch of government, the separation of powers doctrine mandates that courts balance the need to serve the public interest against the dangers of intrusion on the authority and functions of the other branch.³⁸⁶ For instance, the Supreme Court found that the public interest requires the President to submit to the jurisdiction of the judiciary in an ongoing criminal investigation.³⁸⁷ Conversely, in *Fitzgerald*, the Supreme Court concluded that Mr. Fitzgerald's right to damages under a "merely private" suit, based on the President's official acts, does not outweigh the danger of intrusion into the

(holding that state judges enjoy absolute immunity from sec. 1983 suits for judicial acts while police officers enjoy qualified immunity when their official acts are performed in good faith). See also *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (extending qualified immunity to state executive officials charged with constitutional rights violations based 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.").

³⁸⁰ 438 U.S. 478 (1978).

³⁸¹ See *Fitzgerald*, 475 U.S. at 747.

³⁸² Laura H. Burney, Note, *Nixon v. Fitzgerald*, 14 ST. MARY'S L.J. 1145, 1155 (1983).

³⁸³ See *Fitzgerald*, 475 U.S. at 747.

³⁸⁴ Justice Powell quotes Article II, sec. 1, which states that "[t]he executive Power shall be vested in a President of the United States" See *Fitzgerald*, 475 U.S. at 749 (quoting U.S. CONST. art. II, sec. 1).

³⁸⁵ See *Fitzgerald*, 475 U.S. at 750 (distinguishing application of qualified immunity to state executive officials under *Butz* and *Scheuer* from extension of absolute immunity to the federal chief executive in *Fitzgerald*).

³⁸⁶ See *Fitzgerald*, 475 U.S. at 754.

³⁸⁷ Ironically, see *United States v. Nixon*, 418 U.S. 683, 703-13 (1974).

authority of the presidential office.³⁸⁸ Thus, Fitzgerald's suit against the President was dismissed.³⁸⁹

Jones v. Clinton and Presidential Immunity

Paula Jones filed a complaint on May 6, 1994, in the United States District Court for the Eastern District of Arkansas against President William Clinton and State Trooper Danny Ferguson. The complaint alleged, inter alia, violations of the federal Civil Rights Act concerning sexual harassment and conspiracy, as well as state law defamation claims.³⁹⁰ Ms. Jones' complaint was based upon an alleged encounter on May 8, 1991 between herself and then- Governor Clinton in a Little Rock, Arkansas hotel room during a conference they both attended.³⁹¹ By the time Ms. Jones filed the complaint, Mr. Clinton had been elected President of the United States.³⁹²

President Clinton filed a motion in the trial court to dismiss the case on the grounds of the presidential immunity doctrine concerning private suits for damages set forth in *Fitzgerald*.³⁹³ However, since the acts giving rise to Ms. Jones' claims occurred prior to Mr. Clinton's assumption of office, he tempered his demand for immunity from the absolute grant in *Fitzgerald* to immunity from litigation while in office, with potential reinstatement of the claims after he leaves office.³⁹⁴ Accordingly, the district court scheduled a second proceeding to resolve the threshold issue of President Clinton's immunity.³⁹⁵

After reviewing the arguments of both parties, the district court produced a lengthy analysis of the immunity doctrine, canvassing the Magna Carta as well as American constitutional theory. The court concluded that the case should be put "on hold" until President Clinton leaves office, though discovery could proceed to ensure the preservation of evidence.³⁹⁶ To support its decision, the district court noted that,

³⁸⁸ *Fitzgerald*, 457 U.S. at 754.

³⁸⁹ *Id.* at 758.

³⁹⁰ *Jones v. Clinton*, 858 F. Supp. 902, 904 (E.D. Ark. 1994).

³⁹¹ *Id.*

³⁹² *Id.* at 903-04.

³⁹³ *Id.* at 904.

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 905.

³⁹⁶ *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994). Judge Wright begins her discussion of presidential immunity with an examination of the limitations placed on the English throne by the Magna Carta and enlarged by the Petition of Right. *Id.* at 693. Judge Wright then chronicles the tension among the framers of the Constitution concerning the proper role of the executive juxtaposing Roger Sherman's statement that the "President should be nothing more than an instrument for carrying the will of the Legislative into effect" with Gouverneur Morris' contention that the President should be

although *Fitzgerald* was inapposite, the problem facing the President "[was] essentially the same--the necessity to avoid litigation, which also might blossom through other unrelated civil actions and which could conceivably hamper the President in conducting the duties of his office."³⁹⁷

On January 9, 1996, the United States Court of Appeals for the Eighth Circuit rejected the district court's reasoning and reversed the order granting the motion to stay the trial and affirming the order permitting discovery.³⁹⁸ Writing for the panel, Judge Bowman determined that, since no presidential immunity of any kind is expressed in the Constitution, "whatever immunity the President enjoys flows by implication from the separation of powers doctrine, which itself is not mentioned in the Constitution, but is reflected in the division of powers among the three branches."³⁹⁹ Furthermore, the court of appeals determined that Justice Powell's discussion of presidential immunity in *Nixon v. Fitzgerald* represents the "fundamental authority" on the subject.⁴⁰⁰ Analyzing that case, the court of appeals reasoned that, by definition, unofficial acts such as the ones underlying this case are not within the perimeter--not even the outer perimeter--of the President's official responsibility. Therefore, immunity is unavailable.⁴⁰¹ Circuit Judge Bowman fleshed out this reasoning by stating that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [she] receives an injury."⁴⁰² Ms. Jones retains that right in her suit against Mr. Clinton, provided she is not challenging actions that fall within the ambit of official presidential responsibility.⁴⁰³

The court went on to discount the district court's concern for the potential intrusion of increased civil litigation in the efficient functioning of the presidential office. First, the court of appeals stated that the *Fitzgerald* Court was troubled by the potential impact of private suits

"the guardian of the people, even of the lower classes, against Legislative tyranny." *Id.* at 694 (quoting Arthur Schlesinger, Jr., *The Constitution: Article II*, in AN AMERICAN PRIMER 121-22 (Daniel J. Boorstin ed., 1968)). Judge Wright surmises that this tension partially underlies the Constitution's silence on the issue of immunity from civil suits. *Id.* As a result, Judge Wright concludes that "there is nothing in the [Constitution] relating to civil actions . . . [t]hus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judiciary, particularly the Supreme Court." *Id.* at 697. With this in mind, Judge Wright distinguishes *Fitzgerald* from the instant case since the events here occurred prior to President Clinton's assumption of office. *Id.* at 698.

³⁹⁷ *Id.* at 698.

³⁹⁸ *Jones v. Clinton*, 72 F.3d 1354, 1356 (8th Cir. 1996).

³⁹⁹ *Id.* at 1359.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 1360 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

⁴⁰³ *Id.*

arising out of President Nixon's performance of his official duties on the future performance of those duties, not by whether the President as an individual citizen would have time to be a defendant in a lawsuit.⁴⁰⁴ Second, the court asserted that prudent judicial case management should prevent conflicts between litigation and the President's performance of official duties. Third, the court found that, historically, few civil suits against presidents have ever been filed, despite the fact that no court has held that an incumbent president has any immunity from suit for unofficial actions.⁴⁰⁵ Finally, the court repudiated the notion that immunity may be granted on an ad hoc basis where the plaintiff demonstrates no urgent need for relief; instead, the court held that immunity exists, if at all, because the Constitution--and *Fitzgerald* by extension--commands it.⁴⁰⁶

Circuit Judge Ross' dissent affirmed the district court's stay of trial and would reverse its order allowing discovery to proceed. According to the dissent, the separation of powers reasoning of *Fitzgerald* applies with equal force to the factual situation of *Jones*, requiring that, absent exigent circumstances, 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.⁴⁰⁷ Any other result, the dissent argued, would create a separation of powers conflict since it would require the judiciary to weigh the President's performance of official presidential acts against the efficient resolution of litigation when setting trial and hearing dates, thereby intruding upon the performance of those duties.⁴⁰⁸ Using the same deference to the separation of powers doctrine, the dissent would extend the stay to discovery matters as well, reasoning that "discovery is likely to pose even more intrusive and burdensome demands on the President's time and attention than the eventual trial itself."⁴⁰⁹

Thus, the court of appeals relied on a rather literal, restrictive reading of *Fitzgerald* to deny Mr. Clinton's motion for a stay.⁴¹⁰ On the other hand, the dissent undertook a more flexible approach to *Fitzgerald*, arguing that the demands of an efficient government require a grant of immunity, particularly when only temporary, and that *Fitzgerald* may apply to President Clinton's situation by analogy.⁴¹¹

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 1362. Circuit Judge Bowman indicates that the parties have only identified three instances in which sitting presidents have been involved with litigation concerning their acts outside official duties, none of which involved the type of presidential immunity at issue here. *See id.* n.10.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 1367 (Ross, J., dissenting).

⁴⁰⁸ *Id.* at 1369.

⁴⁰⁹ *Id.* at 1369-70.

⁴¹⁰ *Id.* at 1359 (majority opinion).

⁴¹¹ *Id.* at 1367 (Ross, J., dissenting).

The Supreme Court and Separation of Powers

The final arbiter of this presidential immunity question will be the United States Supreme Court. While retrospective analysis is of somewhat limited value, a look at the Court's previous positions concerning the separation of powers doctrine should provide an idea of how the issue may eventually be resolved in the instant case.

Unfortunately, the Supreme Court's approach to the separation of powers doctrine has been characterized as "muddled."⁴¹² In the last few decades, the Court has vacillated between formalist and functionalist approaches to the doctrine.⁴¹³ Under the formalist approach, the Court emphasizes strict adherence to the textual separation of powers found in the Constitution and rejects any argument that a blending of powers would serve a practical need that the original structure was unable to serve.⁴¹⁴ Under this "rule of law" approach, any attempt by one branch to perform duties traditionally reserved for another is per se unconstitutional.⁴¹⁵ On the other hand, a functionalist approach tends to be more pragmatic and evolutionary,⁴¹⁶ assuming that some commingling of functions may occur as long as no excessive--as determined by the Court-- encroachment or aggrandizement results.⁴¹⁷

In *Fitzgerald*, both Justice Powell's plurality and Chief Justice Burger's concurrence focus on a separation of powers analysis to determine availability of immunity.⁴¹⁸ In the case at bar, the Supreme Court will likely be asked to determine if extension of presidential immunity to non-official acts is appropriate. If so, the Court will look again to the separation of powers analysis used in *Fitzgerald*.

Although the Court has followed a functionalist approach in the last decade, recent cases have shown a formalist shift.⁴¹⁹ On the current Court,

⁴¹² *The Supreme Court, 1994 Term-Leading Cases*, 109 HARV. L. REV. 111, 229 (1995) [hereinafter *Leading Cases*] (quoting Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991)).

⁴¹³ *Leading Cases*, *supra* note 43, at 229-30 (citing Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489-91 (1987)).

⁴¹⁴ Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 92 (1995).

⁴¹⁵ *Leading Cases*, *supra* note 43, at 229 n.2.

⁴¹⁶ Sullivan, *supra* note 45, at 93.

⁴¹⁷ *Leading Cases*, *supra* note 43, at 229 n.3.

⁴¹⁸ Aviva A. Orenstein, Recent Development, *Presidential Immunity from Civil Liability*, 68 CORNELL L. REV. 236, 243 (1983).

⁴¹⁹ Sullivan, *supra* note 45, at 94.

Justice Scalia is a staunch supporter of the formalist approach.⁴²⁰ He has written that the Court should "not treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much--how much is too much to be determined, case-by-case, by this Court" and that there should be no "improvisation of a constitutional structure on the basis of a currently perceived utility."⁴²¹ In *Plaut v. Spendthrift Farm, Inc.*,⁴²² Scalia wrote a formalist decision for a seven to two majority holding that Congress violated the separation of powers doctrine by commanding courts to reopen final judgments in securities fraud cases.⁴²³ Since in *Plaut* there was only a rule-based inquiry into whether the branches of government remain distinct,⁴²⁴ Scalia and the formalist majority now on the Bench would likely support the rule set forth in *Fitzgerald*, which sets the Chief Executive outside the ambit of the judicial branch while engaged in official duties.

Nevertheless, simply because Powell's decision in *Fitzgerald* meshes with Scalia's perspective on separation of powers--and based on the 1995 voting alignments, probably that of most of the sitting Justices⁴²⁵--there is no guarantee that the currently non-activist Court will extend the presidential immunity of *Fitzgerald* to the facts of *Jones*. A formalist approach to *Jones* would probably follow the Eighth Circuit opinion by Judge Bowman, particularly the language stating that "whatever immunity the President enjoys flows by implication from the separation of powers doctrine . . . [and the Supreme] Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered."⁴²⁶ Thus, judicial scrutiny of acts of the President outside the outer perimeter of official duties would not offend the separation of powers theory and, consequently, would not trigger the protections of presidential immunity. Adoption of the Eighth Circuit's reasoning by the Supreme Court would preserve the protection afforded the Chief Executive in *Fitzgerald* while also safeguarding the liberties of those whom a president is alleged to have wronged while acting outside the protected sphere of official duties. As this country

⁴²⁰ *Id.* at 93.

⁴²¹ *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 426-27 (1989) (Scalia, J., dissenting)).

⁴²² ___ U.S. ___, 115 S.Ct. 1147 (1995).

⁴²³ Sullivan, *supra* note 45, at 94 n.126.

⁴²⁴ *Leading Cases*, *supra* note 43, at 235.

⁴²⁵ Harvard Law Review's annual analysis of Supreme Court voting patterns gives the following figures for frequency with which each Justice voted with Scalia in 1995: Thomas 88.2%; Rehnquist 80.0%; Kennedy 75.3%; O'Connor 68.2%; Souter 60.0%; Ginsburg 59.5%; Breyer 59.3%; Stevens 45.2%. *Table I(B) Voting Alignments*, 109 HARV. L. REV. 341 (1995).

⁴²⁶ *Jones*, 72 F.3d at 1359.

moves into the next century, difficult decisions will need to be made concerning allocation of resources and determination of social priorities. This tension is evident in *Jones v. Clinton*, which forces the courts to balance the public interest in the efficient execution of governmental functions against an individual's right to seek timely redress through the legal system. The ultimate resolution of this case, and the public reaction it engenders, should provide an indication of the direction our judiciary will take us in the years to come.

