JONES v. CLINTON:

RECONSIDERING PRESIDENTIAL IMMUNITY

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INTRODUCTION

In December, 1995, the Eighth Circuit Court of Appeals held that President Clinton must stand trial for the sexual harassment suit filed against him by Paula Corbin Jones. The court of appeals centered its argument for refusing to afford any type of protection to President Clinton on what it believed was the relevant and binding law regarding immunity for executive branch officials. This Note, however, argues that the court of appeals erred in holding that President Clinton must stand trial and defend his case during the term of his presidency.

Part I sets out the basic concepts of immunity, both absolute and qualified, and proceeds to provide the relevant historical precedent regarding legislative, judicial, and executive immunity. The discussion regarding executive immunity covers Supreme Court precedent from 1895 to the watershed case of *Nixon v. Fitzgerald*[493] in 1982. Part I focuses on *Nixon v. Fitzgerald* because both the district court and the court of appeals rely most heavily on this case in their respective opinions in *Jones v. Clinton.*[494]

Part II discusses the district court and the court of appeals opinions in *Jones v. Clinton.* Part III presents the argument that the court of appeals erred in overturning the district court's order to stay the proceedings until the end of President Clinton's term of office. This argument has two elements: (1) that the court of appeals both misinterpreted and dismissed binding precedent; and (2) that the district court has the discretion to delay proceedings. Therefore, the court of appeals abused its discretion by interfering with that decision.

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[493] 457 U.S. 731 (1982).

[494] Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994); Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996).

PART I

Immunity From Suit

United States government officials generally have been protected from suit by either absolute or qualified immunity. The Supreme Court has recognized both absolute and qualified immunity, depending on the official's office and duties.[495] An official enjoys absolute immunity as long as he or she is acting within the ambit of official duty. If the official receives protection from suit through absolute immunity, the motive of the official's conduct is irrelevant, and the immunity operates as a complete bar from suit.[496] However, depending on the factual situation, the immunity may be qualified.[497] Determining qualified immunity often includes consideration of the scope of discretion of the official and the responsibilities of that official's office.[498] If the official passes the "test" for qualified immunity, he will effectively enjoy total immunity from suit.[499]

The Supreme Court has justified immunity for government officials on various grounds. For instance, the Court has found that it would be unfair to subject officials to liability for acts which they are required to perform using their own discretion,[500] in part, reasoning that officials may hesitate to make decisions for fear of civil liability.[501] The Court has also justified the grant of immunity on a separation of powers analysis; i.e., that litigation may cause an unnecessary loss of time and resources which should instead be dedicated to conducting official duties.[502] Finally, the Court has concluded that subjecting officials to civil liability could result in frivolous and vindictive litigation.[503]

Legislative Immunity

The Constitution provides the basis for immunity for federal legislators. Members of Congress enjoy absolute immunity from both

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[495] Scheuer v. Rhodes, 416 U.S. 232, 242 (1974) (noting that "implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err."); *see* Barr v. Matteo, 360 U.S. 564, 569 (1959) (holding that judges are absolutely immune from civil suits for damages).
[496] *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).
[497] *Scheuer*, 416 U.S. at 242-43.
[498] *Id.* at 247.
[499] *See id.* at 247-48; Halperin v. Kissinger, 606 F.2d 1192, 1209 (1979).
[500] *Scheuer*, 416 U.S. at 240; Barr v. Matteo, 360 U.S. 564, 569 (1959).
[501] *See* Imbler v. Pachtman, 424 U.S. 409, 423 (1976); *Scheuer*, 416 U.S. at 240; *Barr*, 360 U.S. at 570.
[502] *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).
[503] *See* Butz v. Economou, 438 U.S. 478, 512 (1978); *Imbler*, 424 U.S. at 423; *Barr*, 360 U.S. at 564-65, 570.

monetary damages and injunctive relief.[504] Article I, Section 6 has been interpreted to give legislators immunity in two ways.[505] First, except for treason, felony, or breach of the peace, the Arrest Clause protects legislators from arrest during attendance at sessions and while they travel to and from those sessions.[506] Second, the Speech and Debate Clause provides immunity to senators and representatives for what is said during legislative debate.[507] The Supreme Court has also interpreted the Speech and Debate Clause to include all activity in either house of Congress which relates to business before that house.[508]

Judicial Immunity

The Constitution is silent regarding immunity for federal judges; judicial immunity evolved out of common law.[509] In England, judges possessed absolute immunity based on the maxim that "the King can do no wrong," since judges were instruments of the king.[510] Further, the English recognized judicial immunity for activities performed by a judge.[511]

The Supreme Court has imitated the English common law in recognizing judicial immunity.[512] So long as a judge has proper jurisdiction, he is immune from suit for all of his judicial acts, regardless of intent or motive; bad faith is irrelevant.[513] For example, in *Pierson v.*

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[504] Ann Woolhandler, *Patters of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 400 (1987).

[505] *See* William F. Allen, Note, *President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air*, 11 J.L. & POL. 555, 560 (1995).

[506] U.S. CONST. art. I, § 6, cl. 1 ("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 . . . .").

[507] "[A]nd for any Speech or Debate in either House [the senators and representatives] shall not be questioned in any other Place." *Id.*

[508] Allen, *supra* note 13, at 561. *See also* Barr v. Matteo, 360 U.S. 564, 569 (1959) (stating that the Constitution gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session."). Note, however that the Speech and Debate Clause does have limits. It does not protect legislators for *all* conduct related to their position. For example, a legislator would not enjoy immunity for the taking bribes or stealing information. Allen, *supra* note 13, at 561.

[509] *See* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976); Scheuer v. Rhodes, 416 U.S. 232, 239 (1974).

[510] Theodore P. Stein, Note, *Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 759 n.2 (1983). *See also* Spalding v. Vilas, 161 U.S. 483, 494-95 (1895).

[511] Allen, *supra* note 13, at 561.

[512] *See Barr*, 360 U.S. at 569; Spalding v. Vilas, 161 U.S. 483, 493 (1895); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

[513] *Bradley*, 80 U.S. (13 Wall.) at 335; Stump v. Sparkman, 435 U.S. 349 (1978) (indicating that a state judge has absolute immunity for all judicial acts).

Ray,[514] the Supreme Court awarded absolute immunity to a state judge in a suit based on the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983.[515] The justification for this absolute immunity is "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[516] The protection of absolute immunity prevents unnecessary second-guessing and needless interference.[517] Admittedly there exists a potential risk for abuse, but the mechanism of impeachment acts as a check on the judiciary's power.[518]

Executive Immunity

Similar to judicial immunity, the Constitution lacks guidance for providing immunity to members of the executive branch, including the President. Hence, immunity must be grounded in the common law.[519] As one scholar has noted, there are two important considerations. First, there is the concern that an executive official wields the power to deprive a citizen of liberty or property, often "without prior judicial determination of the legality of [the] action."[520] Conversely, there arises the problem of protecting an official's discretion to make decisions inherent in the nature of his office.[521]

Because of these competing considerations, the case law regarding immunity for executive branch officials is, not surprisingly, inconsistent and confusing. While early Supreme Court precedent provided absolute immunity across the board for executive officials,[522] 27 the Court has recently held that some officials are entitled to qualified immunity only.[523] Nevertheless, in *Nixon v. Fitzgerald*, the Supreme Court provided the President with the protection of absolute immunity.[524]

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[514] 386 U.S. 547 (1967).
[515] Note, however, that judges enjoy immunity from damages liability but not from coercive relief. Woolhandler, *supra* note 12, at 400.
[516] *Pierson*, 386 U.S. at 554.
[517] *See Spalding*, 161 U.S. at 494.
[518] Woolhandler, *supra* note 12, at 455.
[519] *See* Scheuer v. Rhodes, 416 U.S. 232, 239 (1974); *Barr*, 360 U.S. at 569.
[520] Woolhandler, *supra* note 12, at 410. *See also* Butz v. Economou, 438 U.S. 478, 505 (1978).
[521] Woolhandler, *supra* note 12, at 410.
[522] *See, e.g.*, Spalding v. Vilas, 161 U.S. 483 (1895) (holding that officers of the executive branch are entitled to absolute immunity); *Barr*, 360 U.S. at 564 (holding that even officials below cabinet rank enjoy absolute immunity).
[523] *See, e.g.*, *Scheuer*, 416 U.S. at 232. *See also* footnotes 2-13, *supra*, regarding the difference between absolute and qualified immunity.
[524] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

The case law on executive immunity dates back to 1895. In *Spalding v. Vilas*, the Supreme Court ruled that federal officers of the executive branch were entitled to absolute immunity.[525] In *Spalding*, the Postmaster General, who was at the time a member of the President's cabinet, was sued for defamation.[526] The Court found that since the alleged misconduct fell within the Postmaster General's authority, he was entitled to absolute immunity from civil suit.[527]

As with its rulings regarding immunity for judges, the *Spalding* Court based its decision on notions of "public policy and convenience."[528] Like a judge, an executive officer should not have to fear liability for civil damages and the risk that plaintiffs will consider an officer's motives when he makes discretionary decisions.[529] Following this decision, the courts generally conferred absolute immunity for executive officers; however, such immunity was given only so long as the officer acted within the scope of his authority.[530]

Over sixty years later in *Barr v. Matteo*, a plurality of the Supreme Court extended absolute immunity to officials below the cabinet rank by awarding absolute immunity to an executive official who had been sued for defamation based on a press release.[531] Once again, finding that motive should not be a factor, the Court considered the same justifications for executive immunity that it had considered for judicial immunity: "The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."[532] Further, the Court asserted that the level in which the executive branch official works is irrelevant; one of the purposes behind immunity is to "aid in the effective functioning of government."[533]

In 1974 the Supreme Court retreated on its policy of providing executive branch officials absolute immunity in *Scheuer v. Rhodes*.[534] For the first time, the Court limited the protection to qualified immunity. In *Scheuer*, the Court considered whether to award immunity to various state

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[525] *Spalding*, 161 U.S. at 498.
[526] *Id.* at 486.
[527] *Id.* at 498. For a discussion on the historical roots of executive officials' immunity beginning with *Spalding*, see example, Allen, *supra* note 13; Aviva A. Orenstein, Note, *Presidential Immunity from Civil Liability*, 68 CORNELL L. REV. 236 (1983); Stein, *supra* note 18; Laura H. Burney, Case Note, 14 ST. MARY'S L.J. 1145 (1983).
[528] *Spalding*, 161 U.S. at 498.
[529] *Id.*
[530] Stein, *supra* note 18, at 764.
[531] Barr v. Matteo, 360 U.S. 564, 565, 572 (1959).
[532] *Id.* at 575 (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)).
[533] *Barr*, 360 U.S. at 572-73.
[534] 416 U.S. 232 (1974).

executive officers.[535] The case arose out of the civil unrest at Kent State University in May, 1970.[536] The plaintiffs were families of those who died in the incident, and they sued the Chief Executive Officer of the state of Ohio, the officers and enlisted personnel of Ohio's National Guard, and the President of Kent State University.[537]

The case differed from prior suits involving officials' immunity in that it involved state rather than federal executive officers. Additionally, the plaintiffs in *Scheuer* based their claims on alleged violations of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983. These two facts played a considerable role in the Court's decision as it looked at the functions and responsibilities of the particular defendants as well as the purpose behind § 1983.[538] The Court found that Congress enacted § 1983 to protect citizens from civil rights abuses by state officials.[539] Although the Court recognized that the higher the executive officer, the more complex and discretionary his or her decisions, the Court still found that the best solution in this case was to confer only qualified immunity.[540] The Court held that a state officer can assert qualified immunity as a defense, and the Court will look at whether the officer possessed a good-faith belief that his or her conduct was lawful. If so, the officer will be granted immunity.[541] The *Scheuer* test was criticized because the defendants objected to opening up their thought processes for review, and the plaintiffs found it difficult to fulfill their burden of proving bad faith.[542]

The Supreme Court added an objective element to the test in *Wood v. Strickland*.[543] In *Wood*, a student sued a school board member under 42 U.S.C. § 1983, and the Court held that the school board member could claim qualified immunity.[544] The Court required, however, that the plaintiff demonstrate that the officer knew or should have known that he was abridging the plaintiff's constitutional rights.[545] Therefore, for § 1983 suits against state executive branch officials, the test consisted of two alternate parts: (1) the subjective element as to whether the official acted with malice; or (2) the objective element as to whether the official knew or should have known that his acts violated the law. If a court determined

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[535] *Id.* at 234.
[536] *Id.*
[537] *Id.* at 242.
[538] *Id.* at 243.
[539] *Id.*
[540] *Id.* at 247.
[541] *Id.* at 247-48.
[542] Orenstein, *supra* note 35, at 240.
[543] 420 U.S. 308 (1975).
[544] *Id.* at 314.
[545] *Id.* at 321.

that there existed either malice or a knowledge of wrongdoing, then the official would be denied the privilege of immunity.[546]

The Court eventually eliminated the subjective element of the test in *Harlow v. Fitzgerald.*[547] Therefore, motive is now irrelevant. The *Harlow* Court instead expounded a two-step analysis. A court must first determine whether the statutory or constitutional right asserted by the plaintiff was clear at the time of the alleged unlawful conduct.[548] If that threshold question is met, the court must then consider whether the executive official knew or should have known his conduct was illegal.[549]

The Supreme Court did not retreat to a policy of qualified immunity for state prosecutors. In *Imbler v. Pachtman*, a citizen filed suit against a state prosecutor under 42 U.S.C. § 1983, alleging that the prosecutor unfairly and unjustifiably initiated and pursued a criminal prosecution against him.[550] The Court conferred absolute immunity for the prosecutor, relying on the same considerations that underlie the common law immunities for judges acting within the scope of their duties.[551] A prosecutor could not adequately perform his duties if he constantly feared civil suit from disgruntled citizens because "[i]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."[552]

It is important to note that the *Imbler* Court turned the analysis into one of *function* rather than *office*. If an executive official's job involved "quasi-judicial" functions, then he would be protected by absolute immunity; otherwise, he had to satisfy the test for qualified immunity.[553] Note, however, that the Court did suggest that a prosecutor would not enjoy the protection of absolute immunity for duties not considered "quasi-judicial," for example, administrative or investigative duties.[554]

The Supreme Court applied this new "functional approach" to executive officials in *Butz v. Economou.*[555] The case involved a constitutional tort claim against an officer of the Department of

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[546] *Id.*at 322; Stein, *supra* note 18, at 766.
[547] Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[548] *Id.* at 818.
[549] *Id.*
[550] Imbler v. Pachtman, 424 U.S. 409, 410 (1976).
[551] *Id.* at 423.
[552] *Id.* at 425.
[553] Stein, *supra* note 18, at 767.
[554] Stein, *supra* note 18, at 768. "We have no occasion to consider whether like or similar reasons require immunity of those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Imbler*, 424 U.S. at 430-31.
[555] Butz v. Economou, 438 U.S. 478 (1978).

Agriculture.[556] The Court reviewed the case law and asserted that these officials should not enjoy absolute immunity when they abridge a citizen's constitutional rights.[557] The Court refused to allow executive officials to use their office as an excuse to avoid liability, for the Court stated that "[n]o man in this country is so high that he is above the law."[558] Therefore, the executive official could claim qualified, rather than absolute immunity.[559]

In 1982, the Supreme Court squarely addressed the issue of immunity for the President of the United States in *Nixon v. Fitzgerald*.[560] In *Fitzgerald*, the Court for the first time considered the scope of immunity from civil suit for a President.[561] The case involved the plaintiff, A. Ernest Fitzgerald, who lost his job as an employee of the Department of the Air Force.[562] Fitzgerald sued various government officials, including former President Richard M. Nixon, alleging that the government wrongfully discharged him in retaliation for his truthful testimony in front of Congress.[563]

In deciding *Fitzgerald*, the Court considered at length the Constitution, legislative history, case law, the separation of powers doctrine, and public policy. In a 5-4 decision the Court determined that the President should enjoy the protection of absolute immunity from civil damages suits.[564]

Writing for the plurality, Justice Powell began by considering the relevant precedent regarding executive immunity.[565] According to Powell, the law had developed to provide qualified immunity for executive branch officials, with the exception, first clearly articulated in *Imbler*, that under a

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[556] *Id.* at 480.
[557] *Id.* at 494.
[558] *Id.* at 506 (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).
[559] *Id.* at 507.
[560] Nixon v. Fitzgerald, 457 U.S. 731 (1982). In 1979, the Court of Appeals for the D.C. Circuit addressed the question of presidential immunity, but found, under a functional analysis, that the President could enjoy the privilege of only qualified immunity. Halprin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979). The court stated that the Constitution is silent and provides no indication that the framers intended immunity for the President. *Id.* at 1211. Further, the court explained that although the doctrine of separation of powers requires limited interference among the branches, the branches are not "entirely insulated from each other." *Id.* at 1212. Finally, the court found that a justification of immunity based on the risk of frivolous suits was unfounded, and did not provide a strong enough basis for allowing the President an excuse from defending himself in civil suits. *Id.* at 1213.
[561] *Fitzgerald*, 457 U.S. at 741.
[562] *Id.* at 733.
[563] *Id.* at 739.
[564] *Id.* at 749.
[565] *See supra* notes 27-67 and accompanying text for discussion of the historical precedents of executive immunity.

functional analysis, those who performed "quasi-judicial" activities would be given the full protection of absolute immunity.[566]

As Powell explained, in addition to case law concerning immunity for other executive officials, the Constitution, federal statutes, and history provided guidance.[567] Because the Presidency did not exist through most of the development of the common law, the analysis must also come from this country's constitutional heritage and structure.[568] Powell explained that such an inquiry must include a public policy analysis: an analysis that "involves 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."[569]

The Court found unpersuasive the argument that, since the Constitution explicitly provides immunity for members of Congress, the framers must not have intended such immunity for the President, or they would have included it in the Constitution as well.[570] As the Court explained, a specific textual basis has never been required as a prerequisite for immunity. In fact, the Court had found absolute immunity for judges as well as executive officials with quasi-judicial functions, regardless of the Constitution's failure to provide such immunity.[571]

Powell also maintained that there is historical evidence implying that the Framers intended the President to be immune from civil damages suits.[572] For example, there is evidence that at the Constitutional Convention several delegates asserted that the impeachment clause was improper because it would impair the President's capacity to perform his duties.[573] Further, the Court pointed to the views of some Constitutional Convention delegates who stated that "the President, personally, was not the subject to any process whatever . . . [for that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government."[574]

In addition to the historical support for some form of presidential immunity, Powell rested his argument on the recognition that the

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[566] *Fitzgerald*, 457 U.S. at 744-47.
[567] *Id.* at 747-48.
[568] *Id.* at 748.
[569] *Id.*
[570] *Id.* at 750 n.31.
[571] *Id. See supra* notes 17-26 and 58-67 and accompanying text for discussion of the case law on judicial and quasi-judicial immunity.
[572] *Fitzgerald*, 457 U.S. at 750 n.31.
[573] *Id.* (citing 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64 (1911) (remarks of Gouverneur Morris and Charles Pickney)).
[574] *Id.* (citing JOURNAL OF MACLAY 167 (E. Maclay ed., 1890)).

President holds a unique position under the Constitution.[575] Powell relies on this concept to support two arguments for immunity: (1) the President cannot make important and discretionary decisions if he is in constant fear of civil liability, and (2) diverting the President's time and attention with a private civil suit affects the functioning of the entire federal government, thereby abrogating the separation of powers mandated by the Constitution.[576]

As Powell explained, the President has supervisory duties and special responsibilities entrusted to no other officer of the government; he is the penultimate member of the executive branch under the Constitution.[577] The President faces issues and makes decisions on matters that are far-reaching, very sensitive, and "likely to 'arouse the most intense feelings.'"[578] It is in the public interest for the President to have the opportunity to make these decisions efficiently, skillfully, and without fear of civil liability.[579] Invoking this same reasoning, Powell refuted the argument that the President should be entitled to only qualified immunity like other executive officials who do not perform quasi-judicial functions.[580] Powell explained that, unlike cabinet members or state governors, the President is the only member of the executive branch with such an exalted status, and he is the only one in a singular position that can make critical decisions affecting the entire nation.[581]

This argument that the President holds a unique position under the Constitution is equally relevant to the separation of powers argument. Powell found historical evidence which supported the Court's argument that the separation of powers doctrine mandates presidential immunity from civil liability. While the Constitution does not specifically set forth the separation of powers doctrine, the theory is well established that the executive, judicial, and legislative branches are equal and will not intrude

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[575] *Id.* at 749. Powell specifically pointed to Article II, section 1 of the Constitution which vests the executive power in the President. *Id.* at 750. Professor Laura Krugman Ray notes that the majority used the word "unique" four times in three pages. She states that this can be attributed to the importance that the majority put on the fact that the court must distinguish the office of the President from those other executive officials who are protected only by qualified immunity. Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 738, 779 (1991-1992).

[576] *See Fitzgerald*, 457 U.S. at 750-52.

[577] *Id.* at 750. Powell further listed some of the more important and discretionary duties, such as enforcement of federal law, the conducting of foreign affairs, and the management of the executive branch. *Id.*

[578] *Id.* at 751-52 (Pierson v. Ray, 386 U.S. 547, 554 (1967)).

[579] *Id.* at 752.

[580] *Id.* at 751.

[581] *Id.* at 752.

upon each other.[582] As President Thomas Jefferson argued in opposition to Chief Justice Marshall's holding in *United States v. Burr:*

> The leading principle of our Constitution is the independence of the [l]egislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.[583]

In addition, Justice Joseph Story held it implicit in the separation of powers that the President be able to discharge his duties without the interference of private lawsuits:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The [P]resident cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.[584]

Powell admitted that the separation of powers doctrine does not prohibit every exercise of judicial power over the President.[585] Therefore, Powell looked to the balancing test set forth in *Nixon v. Administrator of General Services.*[586] Under that test, before a court may exercise

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[582] *Id.* at 753.

[583] *Id.* at 750 n.31 (citing 10 THE WORKS OF THOMAS JEFFERSON 404 (P. Ford ed., 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial)). In the United States v. Burr, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692), with Chief Justice Marshall sitting at trial as Circuit Justice, the court considered the question of whether a subpoena *duces tecum* could be issued to the President.

[584] *Id.* at 749, 750 n.31 (citing 3 JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (1st ed., 1833)).

[585] *Id.* at 753-54.

[586] Nixon v. Administrator of Gen. Services, 433 U.S. 425 (1977).

jurisdiction over the President, it "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."[587] Powell deduced that when using this balancing analysis in a criminal prosecution, the balance would weigh in favor of permitting prosecution and allowing the judiciary to interfere with the executive. However, when the case is merely a private civil suit, the dangers of "intrusions on the authority and functions" of the President and the executive branch outweigh those interests.[588]

Subjecting the President to private civil suit would result in a diversion of his energies and would "raise unique risks to the effective functioning of government."[589] No one can say how long the trial process would take or whether the claim was frivolous. Furthermore:

> [I]t is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute . . . .[590]

Finally, Powell argued that because of the visibility of the President, he stands as open target for harassing and possibly politically motivated civil suits.[591]

Chief Justice Burger's concurring opinion rested solely on the separation of powers argument. Burger argued that there is support in the Constitution for absolute immunity, and that it is not a doctrine derived from common law or public policy.[592] Burger asserted that the essential reason for separation of powers among the three branches is to prevent "risk of control, interference, or intimidation by other branches."[593] Therefore, to allow the judiciary to intrude upon the functioning of the executive branch through private civil suits would be contrary to the

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[587] *Fitzgerald*, 457 U.S. at 754 (construing Nixon v. Administrator of Gen. Services, 433 U.S. at 443, and United States v. Nixon, 418 U.S. 683, 703-13 (1974)).
[588] *Id.* at 754.
[589] *Id.* at 751.
[590] *Id.* at 751 n.32 (quoting Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
[591] *Id.* at 753. Powell stated in a footnote that the dangers of suit, whether legitimate or not, are significant, although there is little historical record to support this conclusion, as the right to sue federal officials has only been recognized since the early 1970s when the Supreme Court decided Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). *Id.* at 753 n.33.
[592] *Id.* at 760 (Burger, C.J., concurring).
[593] *Id.* at 760-61.

purpose of separation of powers, and is thus impermissible and unconstitutional.[594]

In sum, the Supreme Court, although divided, held that President Nixon was absolutely immune from liability in civil suits so long as they involved conduct related to presidential executive authority.[595] Powell emphasized that the ruling would not put the President above the law.[596] In addition, the public still has protection from abuse through the power of impeachment, not to mention the constant and unwavering scrutiny by the media.[597]

Writing for the dissent in *Fitzgerald*, Justice White forcefully proclaimed that the plurality erred in its analysis supporting absolute immunity for the President. White found importance in presidential accountability as well as the power of the Court to provide a remedy to those who have been injured.[598] White asserted that based on precedent and the functional analysis previously pronounced by the Court, the President neither deserves nor needs the protection of absolute immunity.[599] He is neither legislator nor judge, and the performance of his duties does not involve "quasi-judicial" functions.[600] White claimed that the plurality's decision could not be grounded in the Constitution, history, or precedent, but that it was grounded almost completely in public policy. Such judicial activism was improper.[601] White argued that if the President was to enjoy any immunity at all, it must be qualified immunity.[602]

PART II

Jones v. Clinton--District Court Opinion

On May 6, 1994, Paula Corbin Jones brought a civil action against the sitting President of the United States, William Jefferson Clinton, in federal

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[594] *Id.* Burger also emphasized that this impermissibility of intrusion by the judiciary into the affairs of the executive branch is especially true in the case of the President, as his office is a unique one, and he wields far more discretionary authority than any other official.
[595] *Id.* at 755.
[596] *Id.* at 758 n.41. Powell conceded that absolute immunity may infringe upon the rights of the opposing parties. However, the same infringement occurs when the Court confers absolute immunity upon judges and executive officials with quasi-judicial functions. *Id.* at 754 n.37. Further, as Powell explained, the Court has recognized a lesser public interest in civil suits than in criminal prosecutions. *Id.*
[597] *Id.* at 757.
[598] Ray, *supra* note 83, at 782.
[599] Nixon v. Fitzgerald, 457 U.S. 731, 764 (1982) (White, J., dissenting).
[600] *See id.* at 766.
[601] *Id.* at 769.
[602] *Id.* at 764.

district court in Arkansas.[603] Because Jones' case involved the President of the United States, the district court anticipated a claim of immunity. President Clinton filed a motion to dismiss and the court agreed to hold off on any further proceedings until the court made its decision regarding immunity.[604] Hence, the issue before the district court was whether Jones could sue the President of the United States while he held that office but where the factual basis for the complaint arose before his assumption of that office and was unrelated to that office.[605]

President Clinton petitioned the district court for a dismissal without prejudice with the agreement that the statute of limitations would be tolled.[606] After considering the common law, the United States Constitution, legislative history, and recent precedent, the district court was unwilling to grant President Clinton immunity from suit. The court decided, however, to stay the proceedings with the caveat that discovery, including depositions, must proceed in order to preserve the evidence.[607] In arriving at its decision, the district court performed an analysis similar to that performed by the Supreme Court in *Fitzgerald*.[608] However, the analysis had to be modified since the conduct, as alleged, did not fall within the scope of President Clinton's official duties as President; the alleged conduct occurred before he even took office.[609] As the Court in *Fitzgerald* found, while the Constitution provides immunity for official conduct by a member of Congress,[610] it does not explicitly provide immunity for the President.[611] Therefore, an examination of the legislative history contributes little to the analysis. There is evidence to support the notion that the Framers never intended to give the President protection, while there is similar support for the opposite contention.[612]

Consequently, the district court referred to and heavily relied on, the watershed case on presidential immunity, *Nixon v. Fitzgerald*.[613] First, the

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[603] Jones v. Clinton, 869 F. Supp. 690, 691 (E.D. Ark. 1994). The plaintiff, Paula Jones, also filed suit against Danny Ferguson, an Arkansas state trooper. *Id.* This case note does not discuss that portion of her suit.

[604] *Id.* at 692.

[605] *Id.*

[606] *Id.* Clinton wanted the entire case dismissed until he finished his term(s) as President; he was not asking for absolute immunity from suit. *Id.*

[607] *Id.* at 699.

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

[609] *Jones*, 869 F. Supp. at 697.

[610] *See* U.S. CONST. art. I, § 6 (Speech and Debate Clause). *See also supra* notes 12-16 and accompanying text.

[611] *Jones*, 869 F. Supp. at 694.

[612] *See Fitzgerald*, 457 U.S. at 764 (White, J., dissenting). *See also id.* at 750-51 n.31 (discussing historical legislative support for immunity of the President).

[613] *Jones*, 869 F. Supp. at 697. For a complete examination of the Supreme Court's holding in Nixon v. Fitzgerald, see discussion supra notes 68-110 and accompanying text.

district court referred to the Supreme Court's finding that the President holds a unique position and that diverting the President's time and energy affects the entire executive branch.[614] Second, the court used *Fitzgerald* to support a separation of powers analysis to arrive at the conclusion that President Clinton should not stand trial during his term of office.[615]

The district court remained within the bounds of *Fitzgerald* in holding that the President cannot use absolute immunity to protect himself from civil suit when the charges are unrelated to his official duties as President.[616] In fact, the court stated that "nowhere in the Constitution, congressional acts, or the writings of any judges or scholar" can one find credible support for granting immunity from liability for the type of allegations with which President Clinton has been charged.[617] Granting absolute or qualified immunity to President Clinton would not only run against precedent, but it also would result in a form of judicial activism in which the district court refused to participate.[618]

The district court relied on the *Fitzgerald* Court's emphasis that the President holds a position unlike any other government officer.[619] Although the President enjoys the help of the administrative bureaucracy, a civil suit like this could easily cripple the office.[620] The singular importance of the position of President means that a diversion of presidential energies to such a lawsuit would impair the functioning of the entire federal government.[621]

From this the court moved to the separation of powers analysis, using that reasoning to support its holding to stay the proceedings until President Clinton finishes his term of office.[622] Under the balancing test set out in *Nixon v. Administrator of General Services* and affirmed in *Fitzgerald*, defending a civil suit is an intrusion on the duties of the President and the functioning of the executive branch that is not outweighed by the public interest.[623] As the court admitted, the *Fitzgerald* opinion involved a suit for conduct while Nixon was in office; *Jones* does not. However, the court pointed out that a separation of powers analysis, the notion that the judiciary must refrain from intruding on the functioning of the executive branch, applies regardless of the basis of the suit.[624]

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[614] *Jones*, 869 F. Supp. at 697.
[615] *Id.* at 698.
[616] *Id.*
[617] *Id.*
[618] *Id.*
[619] *Id.*
[620] *Id.* at 697.
[621] *Id.* at 698.
[622] *See id.*
[623] *Id.*
[624] *Id.* at 699.

Finally, the district court noted that delaying the trial would not harm Jones' right to recover or cause undue inconvenience.[625] The parties were still required to move forward with discovery, including depositions, so as to preserve the evidence. Hence, while the trial would be delayed, the parties would have their day in court once President Clinton finishes his term in office.[626]

Jones v. Clinton--8th Circuit Court of Appeals Opinion

Although the district court's holding allowed President Clinton to avoid standing trial while President, it did require discovery. President Clinton therefore sought either a reversal on his motion to dismiss, i.e., a dismissal without prejudice and a tolling of the statute of limitations, or, in the alternative, a reversal on the holding refusing to stay discovery.[627] Jones filed a cross-appeal, requesting the appeals court to reverse the district court's decision to stay the trial.[628] The court of appeals not only refused to stay the discovery but reversed the district court's holding and ordered that the trial move forward.[629] The court of appeals held that neither federal legislation nor the Constitution supported presidential immunity when a lawsuit involves unofficial conduct.[630] The court pointed out that the Supreme Court has never granted any type of immunity to public officials for unofficial acts.[631] Like the district court, the court of appeals relied heavily upon *Nixon v. Fitzgerald.*[632] Particularly, the appellate court based its opinion in part on Chief Justice Burger's concurrence in *Fitzgerald* which asserted that the "absolute immunity" afforded to the President does not apply to acts outside the President's official duties.[633]

The court of appeals maintained that a careful reading of *Fitzgerald* reveals that the real concern of the Court was that if the President were amenable to suit for conduct within his official duties, it would have an adverse influence on his decision-making because he would fear personal liability for unpopular choices.[634] The court spoke of the special status of the President and referred to the discussion in *Fitzgerald* about the

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[625] *Id.* The court intimated that there really is no urgency as Jones filed her claim just two days before the statute of limitations was about to run. *Id.*
[626] *Id.*
[627] Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996).
[628] *Id.* at 1356.
[629] *Id.* at 1363.
[630] *Id.* at 1358-59.
[631] *Id.* at 1358.
[632] Nixon v. Fitzgerald, 457 U.S. 731 (1982).
[633] Jones v. Clinton, 72 F.3d 1354, 1359 (8th Cir. 1996); *see also Fitzgerald*, 457 U.S. at 759 (Burger, C.J., concurring).
[634] *Jones*, 72 F.3d at 1360.

discretionary and sensitive decisions the President must make.[635] As the court pointed out, this rationale is inapplicable to cases such as President Clinton's where his alleged misconduct does not implicate presidential decision-making.[636]

The court of appeals also addressed the argument set forth in *Fitzgerald* that the unique status of the President means that the diversion of the President's time and energy would affect the entire executive branch.[637] However, the court practically dismissed this separation of powers argument, asserting that the Supreme Court limited this analysis to suits surrounding official acts only.[638] Consequently, the balancing analysis set forth in Fitzgerald was discounted by the court.[639] The court asserted that if such a balancing analysis were to take place, it was President Clinton's burden to prove the degree of the intrusion.[640] The court intimated that, if given the opportunity, President Clinton could not carry such a burden.[641]

The appellate court also found unpersuasive the notion that the President is an open target for frivolous, vexatious, and harassing litigation, a risk discussed in *Fitzgerald*.[642] The court asserted that history did not reveal such problematic litigation against past Presidents.[643] Further, the court argued that, compared to the number of people who could sue the President for official conduct, the number of people who could sue the President for unofficial acts is small since the number of people who would involve themselves with him in a personal capacity would be limited.[644]

Finally, the court of appeals emphasized Jones' right to sue: she has constitutionally protected access to the courts.[645] The court stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[646] According to the appellate court, to uphold the district court's decision to stay the proceedings would impermissibly abridge this right.[647]

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[635] *See id.* at 1359.
[636] *Id.* at 1360.
[637] *Id.* at 1359.
[638] *Id.*
[639] *Id.* at 1360.
[640] *See id.* at 1361.
[641] *See id.*
[642] *Id.*
[643] *Id.* at 1361-62.
[644] *Id.* at 1362.
[645] *Id.* at 1360.
[646] *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).
[647] *Id.* at 1360.

The court of appeals refused to affirm the district court's decision to stay the proceedings. The court held that staying the proceeding was like giving "temporary immunity"[648] when there was no such thing: "[a] sitting President is either entitled to immunity from suit for his unofficial acts, or he is not."[649] In the court's opinion, it is the Constitution which would ordain such immunity, but it does not.[650] Therefore, granting or denying immunity to Clinton for his unofficial acts would to be an abuse of discretion.[651]

The heart of the concurring opinion was that Jones has a fundamental right to use the judicial process.[652] Since there is a risk that evidence may be lost or witnesses may die or become incompetent, Jones faces a risk of irreparable injury.[653] According to the concurring opinion, Jones has a fundamental right to trial, and President Clinton's official duties do not "override his permanent and fundamental duty as a citizen and as a debtor to justice."[654]

The dissent agreed with the district court's decision to stay the proceedings.[655] The dissent asserted that the Supreme Court's reasoning in *Fitzgerald* was instructional even though *Jones* involved unofficial rather than official acts.[656] The dissenting opinion found persuasive the fact that the "President occupies a unique position . . . [that] distinguishes him from other executive officials."[657] Considering this special status, the dissent found that standing trial would affect the presidential office and the entire executive branch.[658] The dissent thus argued that the separation of powers rationale articulated in *Fitzgerald* justified staying the proceedings.[659]

The dissent referred to the Supreme Court's concern that the President stands as an open target for frivolous and vexatious litigation.[660] The dissent found that litigation may be pursued because of the very public and political nature of the presidential office.[661] A plaintiff might file suit merely to cause partisan disruption, to obtain unwarranted financial

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[648] *See id.* at 1361 n.9.
[649] *Id.* at 1362.
[650] *Id.* at 1363.
[651] *Id.* at 1362.
[652] *Id.* at 1363.
[653] *Id.* at 1363-64.
[654] *Id.* at 1366.
[655] *Id.* at 1367.
[656] *Id.*
[657] *Id.* (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)).
[658] *Id.*
[659] *Id.* at 1368.
[660] *Id.*
[661] *Id.*

benefits, or even simply to obtain the notoriety that comes with suing the President of the United States.[662]

PART III

The Court of Appeals Erred In Its Decision

The court of appeals erred when it reversed the district court's decision and refused to stay the proceedings until the end of President Clinton's term.[663] First, the court of appeals improperly dismissed important and relevant parts of *Nixon v. Fitzgerald* regarding immunity based on the doctrine of separation of powers.[664] Second, the court of appeals interfered with the trial court's discretionary power to control its own docket.

As the court of appeals correctly noted, there is no precedent on point addressing the situation presented by the *Jones* case, specifically whether President Clinton should stand trial for a suit regarding unofficial conduct.[665] The district court and court of appeals were both correct in asserting that the law clearly would not provide absolute immunity for Clinton's alleged misconduct.[666] There is no doubt that, in *Fitzgerald*, Justice Powell did not intend for the Court's holding to be so broad. The *Fitzgerald* Court limited absolute immunity to be conduct within the "outer perimeter" of the President's duties.[667] To hold otherwise would place the President above the law. The district court's holding, however, did not grant absolute or qualified immunity; it only stayed the proceedings until the end of President Clinton's term of office.[668] Clinton will still have to stand trial at the end of his term. While *Fitzgerald* is not squarely on point, it is instructive. The district court properly relied on it in making its decision to stay the proceeding. However, the court of appeal's opinion is flawed in that the court did not adequately recognize the precedential value of the entire opinion.

In *Fitzgerald* the Supreme Court relied on various grounds for its holding that the President would be absolutely immune from civil suit for his official conduct. First, the Court found that although the President was not a legislator, judge, or executive official with quasi-judicial duties, he should enjoy immunity because of his unique status.[669] The President

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[662] *Id.*
[663] *See* Jones v. Clinton, 72 F.3d 1354, 1367 (8th Cir. 1996) (Ross, J., dissenting).
[664] *See Jones*, 72 F.3d at 1368 (Ross, J., dissenting).
[665] *Id.* at 1358.
[666] *See* Jones v. Clinton, 869 F. Supp. 690, 698 (E.D. Ark. 1994) and Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996).
[667] Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982).
[668] *Jones*, 869 F. Supp. at 698.
[669] *Fitzgerald*, 457 U.S. at 750.

makes special, sensitive, and discretionary decisions which require immunity. Absent immunity, it would be difficult to make these important decisions without constantly fearing civil suits.[670] As the court of appeals noted, this reasoning would not apply to President Clinton's case. But the court of appeals' analysis should not have ended there because it did not address all the issues considered by the *Fitzgerald* Court.

The Supreme Court in *Fitzgerald* also relied on the unique status of the President to support a separation of powers argument.[671] As the Court pointed out in *Fitzgerald*, allowing a civil suit to proceed against the President would divert the President's time and energy, effectively disrupting the functioning of the entire executive branch. This would improperly invade the powers of the executive branch.[672]

The court of appeals gave very little credit to this second rationale. In fact, the court essentially found that the real, and possibly only, concern of the Supreme Court in *Fitzgerald* was protecting the President's discretion to make the decisions inherent in his position without fear of liability.[673] Further, the court of appeals found that the separation of powers line of reasoning would not be applicable to President Clinton's case, for the *Fitzgerald* opinion was limited to absolute immunity for official presidential acts.[674] The court of appeals was wrong in denying the instructional value of this analysis. A more reasonable interpretation of *Fitzgerald* is that the holding of absolute immunity for the President is limited to official activities; but the separation of powers reasoning can still apply to other cases such as *Jones v. Clinton.*

This is best illustrated by performing the balancing analysis the *Fitzgerald* Court adopted from *Nixon v. Administrator of General Services.*[675] In determining whether requiring Clinton to stand trial while serving as President would be an improper intrusion by the judiciary, the court must consider the "constitutional weight of the interest to be to served against the dangers of intrusion on the authority and functions of the executive branch."[676] Undeniably, Jones has an interest in having a trial, and the public has an interest in holding the President accountable for his actions outside of his official duties. However, the balance tips in President Clinton's favor when one considers the magnitude of the intrusion the suit would have on Clinton's duties as President and manager of the entire executive branch.

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[670] *Id.* at 753.
[671] *Id.* at 750.
[672] *See Fitzgerald*, 457 U.S. at 750.
[673] Jones v. Clinton, 72 F.3d 1354, 1360 (8th Cir. 1996).
[674] *Id.* at 1359.
[675] *Fitzgerald*, 457 U.S. at 754 (construing Nixon v. Administrator of Gen. Services, 433 U.S. 425 (1977)).
[676] *Id.*

The court of appeals stated that Clinton would not need to be present for a number of the pretrial and trial activities,[677] but this reasoning is flawed. Why wouldn't President Clinton want to participate in the discovery and trial of a sexual harassment suit against him? Activities such as preparing for hearings, traveling to and from Arkansas for hearings, responding to interrogatories, preparing for and taking depositions, meeting with attorneys, and advising on trial strategy will consume a large portion of the President's time at the expense of the entire executive branch. The magnitude of intrusion such activities would impose on President Clinton's duties outweighs both Jones' interest in having a trial and the public's interest in holding the President accountable for his unofficial acts. To allow a court to interfere with President Clinton's duties and the workings of the entire executive branch would violate the separation of powers between the three branches of the federal government.

The court appeals thought it had solved the problem by directing the district court to be flexible in its case management.[678] But this does not solve the problem; the separation of powers dilemma still exists. Every time the court has to schedule a matter, it will have to inquire into the President's schedule. The trial judge will have to pass judgment on the President's priorities, including pressing domestic and foreign demands. Should a trial court second-guess such decisions, decisions which will affect not only the executive branch but the entire country? Furthermore, the trial judge could end up ordering the President of the United States to rearrange his priorities.[679] What about the admonition against a court "bandy[ing] [the President] from pillar to post, keep[ing] him constantly intruding from north to south & east to west, withdraw[ing] him from his constitutional duties?"[680] The flexible case management envisioned by the court of appeals threatens the independence of the executive from the judicial branch; it throws the notion of separation of powers on its head.

The District Court Has The Discretion To Grant a Stay

The Eighth Circuit Court of Appeals abused its discretion in invading the province of the trial court to control its own docket. The district court stayed the proceedings until Clinton finished his term, and it was beyond the appellate court's power to interfere with this ruling.

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[677] *Jones*, 72 F.3d at 1362.
[678] *Id.*
[679] Brief for the Petitioner on Writ of Certiorari to the United States Supreme Court at *8, Clinton v. Jones, 81 F.3d 78 (8th Cir. 1996) (No. 95-1853) 1996 WL 448096.
[680] *Fitzgerald*, 457 U.S. at 750, n.31 (citing 10 THE WORKS OF THOMAS JEFFERSON 404 (P. Ford ed., 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial)).

The Supreme Court has established that a district court has "broad discretion in granting or denying stays so as to 'coordinate the business of the court efficiently and sensibly.'"[681] Furthermore, every court has the power to "control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants."[682] Such power comes with limits. Decisions whether to grant a stay must be done in the exercise of good judgment, "weigh[ing] competing interests and maintain[ing] an even balance."[683]

The Supreme Court provided that the stay must not be of an indefinite duration unless there is a pressing need.[684] But so long as the stay is reasonable, an individual may have to submit to the delay in the interest of the public welfare or convenience.[685] With these principles in mind, the district court's decision was within its discretion, and the stay was proper.

The district court did not stay the proceedings indefinitely; Jones will have her day in court as soon as President Clinton completes his term of office. The district court found that in light of Supreme Court precedent and the doctrine of separation of powers, it is in the public interest to delay the trial and avoid interference with the President, his constitutional duties, and the functioning of the entire executive branch.

A stay of the proceedings is analogous to a continuance. The Supreme Court held in *Isaacs v. United States* that the action of the trial court regarding the granting of a continuance is "purely a matter of discretion, not subject to review . . . unless it clearly appears that the discretion has been abused."[686] In *Isaacs*, a criminal defendant asked for a continuance because he did not have one of his witnesses for trial. The record revealed that the defendant had not attempted to procure the attendance of this witness and therefore, the trial court denied the motion for a continuance.[687] The Supreme Court refused to rule whether the denial of the continuance was proper. It found no abuse of discretion by the trial court and asserted that interfering with the trial court's ruling on the issue would be overstepping the role of the appellate court.[688]

The Supreme Court affirmed this holding in *Ehrlichman v. Sirica*.[689] The case concerned an application by a criminal defendant for a stay of

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[681] McSurely v. McClellan, 426 F.2d 664, 671 (D.C. Cir. 1970) (quoting Landis v. North Am. Co., 299 U.S. 248, 255 (1936)).
[682] Landis v. North Am. Co., 299 U.S. 248, 255 (1936).
[683] *Id.* at 255; *see also* McKnight v. Blanchard, 667 F.2d 477, 479 (5th Cir. 1982).
[684] *Landis*, 299 U.S. at 255.
[685] *Id.* at 256.
[686] Isaacs v. United States, 159 U.S. 487, 487 (1895).
[687] *Id.* at 489.
[688] *Id.*
[689] Ehrlichman v. Sirica, 419 U.S. 1310 (1974).

the proceedings.[690] The reason behind the defendant's petition for a delay was a risk of prejudicial publicity surrounding the trial.[691] The Supreme Court refused to interfere with the trial court's decision. It held that ordinarily pretrial orders are matters within the judicial discretion of the trial judge; he is the one presumed to be aware of the case and the factors which bear upon the relief sought.[692] The Court further stated that "passing on a claim for . . . delay in a trial because of prejudicial pretrial publicity calls for the exercise of the highest order of sound judicial discretion by the district court."[693] Doubts about the correctness of a decision to delay are not sufficient to form a basis for reversal by the appellate court.[694]

Jones involves a civil suit rather than a criminal prosecution. However, *Sirica* is relevant because when making a decision whether to delay a trial, it is within the trial court's discretion to weigh the possible factors that may impact the parties to the suit. In *Sirica*, the trial court found that a delay was appropriate considering the risk of prejudicial publicity. Similarly, in *Jones*, the district court found that, based on Supreme Court precedent, it must take into consideration the possible impact a trial would have on the President's ability to fulfill his constitutional duties.[695] This type of determination is within the trial court's discretion. Therefore, the court of appeals erred in encroaching on the district court's decision.

CONCLUSION

The Supreme Court has not been consistent in its rulings regarding immunity for members of the executive branch. However, in *Nixon v. Fitzgerald*, that the Court singled out the President and afforded him additional protection over and above that which had been given to the other officers of the executive branch.[696] With that in mind, the Eighth Circuit Court of Appeals erred in holding that President Clinton must defend the civil suit filed against him by Paula Jones.

The court of appeals erred in basing its decision solely on the fact that unofficial acts of executive officials are not protected. The separation of powers argument is relevant and properly applies to *Jones*. There is sufficient support for the notion that in order to maintain the proper separation of powers required by the Constitution, the judiciary must refrain from interfering with the effective functioning of the executive

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[690] *Id.* at 1310.
[691] *Id.*
[692] *Id.* at 1312.
[693] *Id.*
[694] *See id.* at 1312.
[695] Jones v. Clinton, 72 F.3d 1354, 1362 (8th Cir. 1996).
[696] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

branch. Forcing a President to defend a civil suit while in office is an intrusion that exceeds the permissible limits of this doctrine. Finally, the district court historically has had the power to control and manage its docket. So long as it acts in moderation and with sound judgment, the court has the discretion to stay a case, and this decision is normally not an appropriate decision for appellate review. Therefore, it was an abuse of discretion for the court of appeals to reverse the district court's decision to stay the proceedings.

EPILOGUE

Since the original writing of this article, President Clinton petitioned the Eighth Circuit Court of Appeals for a rehearing. The petition was denied.[697] However, the Supreme Court has granted Clinton's petition for writ of certiorari, and the case was heard this term.[698] A decision will be handed down this summer.

[697] Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996), *reh'g en banc and by panel denied*, 81 F.3d 78 (8th Cir. 1996).

[698] Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994), *rev'd in part*, 72 F.3d 1354, *reh'g en banc and by panel denied*, 81 F.3d 78 (8th Cir.), *cert. granted*, 116 S. Ct. 1545 (No. 95-1853) (June 24, 1996).