**JONES v. CLINTON: REQUIRING THE PRESIDENT TO TAKE RESPONSIBILITY FOR HIS UNOFFICIAL ACTIONS**

No man in the country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.¹

**INTRODUCTION**

The United States Constitution expressly provides each of the three branches of Government with certain rights and powers.² Article I gives Congress the power to make the laws.³ Article II vests the executive power in the President to enforce the laws.⁴ Finally, Article III provides the courts with the power to interpret the laws.⁵ Although these branches each have their own respective rights and duties, at times these duties conflict and separation of powers issues arise.⁶

Since the Constitution’s drafting, separation of powers issues have arisen several times between the Executive and the Judicial branches.⁷ These conflicts have led to the evolution of the doctrine of Presidential immunity.⁸ Although this doctrine has roots in the common law, it has evolved considerably in the last 200 years.⁹

Initially, the United States Supreme Court ruled that it had the power to order the President to act because it was the “province and duty of the judicial department to say what the law [was].”¹⁰ Sixty three years later, the Supreme Court refused to enjoin a President from performing his official duties.¹¹ In a subsequent decision ninety years later, the Court did exercise jurisdiction over the President and

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². See infra notes 3-5 and accompanying text.
³. U.S. CONST. art. I.
⁴. U.S. CONST. art. II.
⁵. U.S. CONST. art III.
⁶. See infra notes 138-274 and accompanying text.
⁷. Id.
⁸. Id.
⁹. Id.
¹⁰. Marbury v. Madison, 5 U.S. 137, 177 (1803). For additional discussion concerning Marbury, see infra notes 138-52 and accompanying text.
allowed an injunction to be issued prohibiting him from enforcing an executive order.  

Finally, beginning in the mid-1970's, the Court heard several cases involving the now-late President Richard Nixon. Through these cases, the Supreme Court expanded its prior decisions by holding that even though a President is subject to a subpoena in a criminal investigation, he is "entitled to absolute immunity from damages liability predicated on his official acts." The Court extended the scope of this immunity to all acts within the "outer perimeter" of the President's official responsibility.

In Jones v. Clinton, the United States Court of Appeals for the Eighth Circuit declined the opportunity to expand the doctrine of Presidential immunity to a President's unofficial acts. In Jones, a former State of Arkansas employee, Paula Jones ("Jones"), filed a civil suit against President William Jefferson Clinton ("Clinton"), based on an incident of sexual harassment which allegedly occurred while Clinton was Governor of Arkansas. In response to the suit, Clinton filed a motion to dismiss, asserting Presidential immunity.

The Eighth Circuit stated that the doctrine of Presidential immunity is not mentioned in the Constitution, but rather evolved from the separation of powers doctrine. The Eighth Circuit further noted that it was unaware of any case in which a public official had ever been "granted any immunity from suit for his unofficial acts." The Eighth Circuit refused to expand the doctrine of Presidential immunity to a suit based on a President's unofficial acts, and thus, held that the trial should proceed.

This Note will initially discuss the events surrounding Jones' lawsuit and the Eighth Circuit's decision. Second, this Note will review the history and evolution of the doctrine of Presidential immunity.

15. Id. at 756.
20. Jones, 72 F.3d at 1359.
21. Id. at 1358.
22. Id. at 1363.
23. See infra notes 28-130 and accompanying text.
24. See infra notes 138-274 and accompanying text.
Third, this Note will analyze the Eighth Circuit's decision in light of prior case law. Fourth, this Note will examine two alternative tests which could be employed to determine the appropriateness of Presidential immunity in future cases. Finally, this Note will conclude that although the Eighth Circuit was correct in refusing to extend absolute Presidential immunity to Clinton for unofficial acts, it may be appropriate to grant a temporary stay in the trial until Clinton leaves office.

FACTS AND HOLDING

JONES' ALLEGATIONS

On May 6, 1994, Paula Corbin Jones ("Jones") filed a lawsuit against William Jefferson Clinton ("Clinton") and Arkansas State Trooper Danny Ferguson ("Ferguson"). The lawsuit stems from an incident which allegedly occurred on May 8, 1991, at the Third Annual Governor's Quality Management Conference ("Conference") at the Excelsior Hotel in Little Rock, Arkansas. As Governor of Arkansas, Clinton was scheduled to make a speech at the Conference. Jones, as an employee of Arkansas Industrial Development Commission, was working at the Conference registration desk.

At some time during the day, Clinton's bodyguard, Trooper Ferguson, allegedly approached the registration desk and made small talk with Jones. Ferguson returned to the registration desk later that day, allegedly giving Jones a slip of paper which had a four digit number printed on it. The note purportedly stated, "[t]he Governor [Clinton] would like to meet with you." Jones contends that she agreed to meet with Clinton because she believed the meeting might lead to employment opportunities. Ferguson then escorted Jones to Clinton's hotel room.

25. See infra notes 280-363 and accompanying text.
26. See infra notes 364-82 and accompanying text.
27. See infra notes 378-82 and accompanying text.
30. Complaint at ¶ 7, Jones (LR-C-94-290).
31. Id. at ¶¶ 6, 8.
32. Id. at ¶ 9.
33. Id. at ¶ 10.
34. Id.
35. Id. at ¶ 12.
Jones alleges that upon entering the hotel room, she and Clinton engaged in casual conversation.37 Clinton then allegedly took Jones by the hand and drew her close to him.38 In response to this action, Jones purports to have removed her hand and retreated from Clinton.39 However, Clinton allegedly approached Jones again and stated, "I love the way your hair flows down your back" and "I love your curves."40 At the same time Clinton was allegedly making these comments, he also purportedly attempted to kiss Jones on the neck.41 Clinton's sexual advances allegedly continued until Jones finally exited the room.42

Nearly three years after the alleged incident, and following Clinton's election as President of the United States, Jones filed a lawsuit against Clinton and Ferguson.43 Jones set forth four causes of action in her complaint.44 First, Jones asserted a claim under Title 42 of the United States Code section 1983 alleging that Clinton deprived her of her equal protection and due process constitutional rights.45 Second, Jones asserted a Title 42 of the United States Code section 1985 claim alleging that Clinton had conspired with Ferguson to deprive her of her equal protection rights.46 Third, Jones asserted a claim of intentional infliction of emotional distress.47 Finally, Jones included a claim of defamation of character.48

THE DISTRICT COURT'S STAY

Clinton denied Jones' allegations and requested the trial court's permission to file a Motion to Dismiss on the grounds of Presidential

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37. Complaint of Paula Jones at ¶ 17, Jones (LR-C-94-290).
38. Id. at ¶ 18.
39. Id. at ¶ 19.
40. Id. at ¶ 20.
41. Id.
42. Id. at ¶¶ 21-24. For a more detailed description of the events which allegedly took place, see Complaint of Paula Jones at ¶¶ 21-24, Jones (LR-C-94-290).
44. See infra notes 45-48 and accompanying text.
46. Complaint of Paula Jones at ¶¶ 66-69, Jones (LR-C-94-290). A § 1985 claim, in part, provides a cause of action for an individual who is deprived of Constitutional rights or privileges by the conspiracy of two or more persons acting under the color of state law. 42 U.S.C. § 1985 (1994).
47. Complaint of Paula Jones at ¶¶ 70-74, Jones (LR-C-94-290).
48. Id. at ¶¶ 75-79. The defamation claim was a result of statements made by Clinton's press aides and attorneys denying the allegations contained in Jones' complaint. Jones, 858 F. Supp. at 904.
immunity. Clinton further asked the court to allow him to postpone the filing of other briefs and motions until the issue of Presidential immunity was resolved. The United States District Court for the Eastern District of Arkansas granted Clinton's motion and allowed him to file the Motion to Dismiss on grounds of Presidential immunity. The court also postponed the filing of any other motions or pleadings until the immunity issue could be resolved.

Clinton asserted that he could not be sued in a civil lawsuit while he was President, even if the events giving rise to the suit occurred prior to his assumption of office. The court categorized this assertion as a "claim of absolute immunity." Judge Wright rejected the notion that a President is absolutely immune from suit while in office for claims arising out of actions which occurred prior to the President's assumption of office. As support for its conclusion, the court stated that "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found."

Although refusing to grant Clinton's request for absolute immunity, the court realized that Clinton should not be forced to "devote his time and effort to the defense of this case at trial while in office." The court therefore held that Clinton was entitled to limited, or temporary immunity, and determined that the case would not go to trial until Clinton left office. However, discovery, the court held, would be allowed to proceed.

STAY OF THE PROCEEDINGS AGAINST FERGUSON

In response to the district court's decision, both Clinton and Jones filed appeals with the United States Court of Appeals for the Eighth Circuit. Clinton also filed a motion in the district court for a stay pending appeal of the district court's order allowing discovery to continue. The district court recognized that it was divested of its juris-

49. Jones, 858 F. Supp at 903. Ferguson on the other hand, filed an answer to the complaint. Danny Ferguson's Answer to Plaintiff's Complaint, Jones (L-RC-94-290).
51. Id. at 906-07.
52. Id.
54. Id.
55. Id. at 698.
56. Id.
57. Id.
58. Jones, 72 F.3d at 1357.
59. Id. at 1363.
diction over the case because Clinton had filed his appeal with the Eighth Circuit.62 Although the parties agreed that discovery against Clinton would be stayed pending the resolution of his appeal before the Eighth Circuit, the district court addressed the issue of whether discovery against Clinton’s co-defendant, Ferguson, would also be stayed.63

Clinton attempted to persuade the court to stay all proceedings against Ferguson, even though Ferguson himself asserted no such right.64 As support for this argument, Clinton asserted that because one of the issues involved in his appeal was whether the action should proceed against Ferguson, the court should not take further action until that issue was resolved.65 The court noted that Clinton’s argument was unsupported by any authority, and thus retained jurisdiction over Ferguson.66 However, the court recognized that if proceedings were to continue against Ferguson, Clinton’s attorneys would be heavily involved in the action.67 Therefore, because the “claims [were] so inextricably intertwined,” the court granted Clinton’s motion to stay the proceedings against Ferguson while Clinton appealed the district court’s rulings.68

**CLINTON’S APPEAL TO THE EIGHTH CIRCUIT**

On September 14, 1995, Clinton’s appeal was submitted to the United States Court of Appeals for the Eighth Circuit.69 Clinton asserted that the district court’s decision to stay the trial proceedings until he left office, rather than dismissing the suit, was erroneous.70 Clinton also argued that the district court erred in allowing discovery to proceed in the case despite the stay of the trial.71 Jones cross-appealed, petitioning the Eighth Circuit to lift the stays imposed by the district court so that she could proceed to have her case heard.72

**IMPORTANCE OF SUIT**

In support of his position, Clinton argued that the complaint should be dismissed without prejudice solely because he is the Presi-
dent of the United States. Clinton asserted that he was entitled to immunity while he was in office. Clinton argued that Jones' suit was neither important nor urgent, and "certainly not consequential enough to trump [his] claim to temporal immunity from suit." As evidence of the alleged unimportance of Jones' suit, Clinton noted that Jones had waited nearly three years from the time of the alleged incident to file suit.

Judge Pasco M. Bowman, writing for the United States Court of Appeals for the Eighth Circuit, rejected Clinton's argument concerning the unimportance of Jones' suit as a rationale for a grant of immunity. Specifically, Judge Bowman noted that the "unimportance test" asserted by Clinton was not the appropriate standard to resolve the Presidential immunity issue. Judge Bowman further stated that Jones is "constitutionally entitled to access to the courts and to the equal protection of the laws." Judge Bowman referred to United States Supreme Court precedent for the proposition that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [such an individual] receives an injury."

Motivation Behind Suit

Clinton also asserted that Jones' motives for filing her lawsuit, allegedly political, should be considered by the court when determining the issue of immunity. Judge Bowman rejected this argument, stating, "[s]uch an approach would convert a presidential immunity analysis into the taking and weighing of accusations and recriminations, an exercise unnecessary and inappropriate to the proper determination of a claim of immunity based on the Constitution."

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73. Id. at 1357.
74. Id. at 1359-60.
75. Id. at 1360.
77. Jones, 72 F.3d at 1360.
78. Id.
79. Id.
80. Id. (citing Marbury v. Madison, 5 U.S. 137, 163 (1803)).
81. Memorandum in Support of Clinton's Motion to Dismiss on Grounds of Presidential Immunity, Jones (LR-C-94-290). Clinton specifically asserts that the "moral annihilation" approach that is present in modern politics would result in the recruitment of potential plaintiffs by political opponents. Id. at 15 n.20. Clinton argued that the plaintiff could be used to "neutralize, disable, or divert a President" from achieving public policy objectives. Id. at 15.
82. Jones, 72 F.3d at 1360.
SEPARATION OF POWERS

Clinton also presented a separation of powers argument. Specifically, Clinton alleged that by denying his claim of immunity, the Judicial Branch would unconstitutionally intrude upon, and disrupt, his duties and responsibilities as President. According to Clinton, "because a federal court will control the litigation, the Judicial Branch necessarily will interfere with the Executive Branch through the court's scheduling orders and it powers to issue contempt citations and sanctions.%86

Because Clinton merely made a "sweeping claim" that the President's official duties would be impaired, without providing details explaining how specific responsibilities would be affected by the suit, Judge Bowman rejected Clinton's separation of powers argument. Judge Bowman explained that the Constitution does not contemplate the total separation of the three branches of Government. Judge Bowman contended that instead of granting immunity to avoid the separation of powers problem, the district court could use its discretion in scheduling proceedings to meet the unique burdens and demands of Clinton's schedule. According to Judge Bowman, had the district court utilized discretion in scheduling, the case would have been able to continue without creating scheduling problems which would have obstructed Clinton's official duties.%89

JUDGE BEAM'S CONCURRING OPINION

Judge C. Arlen Beam filed a special concurring opinion to address three matters which he contended were not sufficiently addressed by either Judge Bowman's opinion or the dissenting opinion. Judge Beam's "insufficiently addressed" issues included: (1) the impact that a stay of litigation would have on Jones and her claims; (2) the potential impact of the litigation upon the duties of the President; and (3) the stay of the proceedings with respect to Ferguson.%91

83. Id. at 1361.
84. Id.
85. Id.
86. Id.
87. Id. (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam)).
88. Id. at 1361.
89. Id.
90. Id. at 1363 (Beam, J., concurring).
91. Id. at 1363-66 (Beam, J., concurring).
IMPACT OF STAY ON JONES

Judge Beam first addressed the impact that a stay of litigation would have on Jones. Judge Beam stated that in Jones’ case, the “potential for prejudice . . . reaches, or at least approaches, constitutional magnitude.” Judge Beam noted that one example of possible prejudice was the danger of losing relevant evidence. According to Judge Beam, if a stay was granted and discovery was postponed, Jones would have no opportunity to obtain testimony from witnesses who might either die or become incompetent during the delay. Judge Beam recognized that Jones’ claim could be destroyed or substantially impaired if she were denied timely access to the courts.

Judge Beam also expressed concern about the shifting of the burden to Jones to establish that she would be irreparably injured by delay of the suit. Judge Beam stated that no authority or precedent requires non-moving parties to establish that they would be irreparably harmed by delay. Instead, according to Judge Beam, the burden is typically on parties moving for stays to prove that they would suffer a hardship or inequity if a case proceeded. Judge Beam ultimately reached the conclusion that Clinton’s interests in delaying the trial did not outweigh Jones’ interests in proceeding. Therefore, according to Judge Beam, Jones was entitled to proceed with her claims.

IMPACT OF SUIT ON CLINTON

Judge Beam then addressed his second concern: the potential impact of litigation upon Clinton’s duties. Judge Beam admitted that the interference of the Judicial Branch with a functioning President is an issue of great concern. However, Judge Beam asserted that Clinton, and the amici who filed briefs in his support, overstated those concerns. Citing several incidents in which sitting Presidents had

92. Id. at 1363-65 (Beam, J., concurring).
93. Id. at 1363 (Beam, J., concurring).
94. Id. (Beam, J., concurring).
95. Id. at 1363-64. (Beam, J., concurring).
96. Id. at 1364 (Beam, J., concurring).
97. Id. (Beam, J., concurring).
98. Id. (Beam, J., concurring).
99. Id. (Beam, J., concurring).
100. Id. at 1365 (Beam, J., concurring).
101. Id. (Beam, J., concurring).
102. Id. (Beam, J., concurring).
103. Id. at 1365-66 (Beam, J., concurring).
104. Id. at 1365 (Beam, J., concurring). Among the amici filing briefs were: The United States of America; Akhil Reed Amar, Southmayd Professor of Law, Yale Law School; Richard H. Fallon, Jr., Professor of Law, Harvard Law School; Henry J. Fletcher, Associate Dean, University of Minnesota Law School; Gerald Gunther, William Nelson Cromwell Professor, Stanford Law School; Ronald D. Rotunda, Professor of
been held amenable to the legal process, Judge Beam reached the conclusion that a President can be involved in scheduled litigation "without creating a cataclysmic episode in which the constitutional duties of the office [would be] compromised."¹⁰⁵

Judge Beam also asserted that Jones' claims would not involve complicated litigation, and thus, the proceedings could advance with minimal impact on Clinton's schedule.¹⁰⁶ Judge Beam further noted that Clinton would not even be required to attend the trial if the case were to proceed.¹⁰⁷ Additionally, Judge Beam contended, the Federal Rules of Civil Procedure allow the use of several devices, such as written interrogatories, requests for admissions, and stipulations of undisputed facts, which would reduce the amount of time and resources Clinton would be required to expend in the litigation process.¹⁰⁸ Therefore, according to Judge Beam, the actual impact of this litigation on Clinton's duties had been "vastly magnified" by Clinton and the amici who wrote in his support.¹⁰⁹

STAY OF SUIT FOR FERGUSON

Judge Beam then addressed his final area of concern: the stay of the proceedings with respect to Ferguson.¹¹⁰ Judge Beam stated that no basis existed for staying discovery or trial against Ferguson.¹¹¹ Judge Beam explained that even though Clinton's interests might be affected, Clinton did not need to be directly involved in discovery regarding Ferguson's activities.¹¹² Judge Beam further noted that Clinton probably would not attend Ferguson's deposition.¹¹³ Thus, according to Judge Beam, the discovery process and litigation with respect to Ferguson should be allowed to continue.¹¹⁴

Law, University of Illinois College of Law; and Stephen B. Burbank, University of Pennsylvania Law School. Id. at 1354-55.
¹⁰⁵ Jones, 72 F.3d at 1366 (Beam, J., concurring) (citing United States v. Nixon, 418 U.S. 683 (1974); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974); Ronald D. Rotunda & John Nowak, Constitutional Law, § 7.1, at 575 (5th ed. 1995)). Judge Beam also noted that Jimmy Carter provided videotaped grand jury testimony in a criminal investigation. Id. at 1366 (Beam, J., concurring). Further, Gerald Ford testified by videotaped deposition in a criminal trial where the defendant was charged with attempting to assassinate the President. Id. (Beam, J., concurring).
¹⁰⁶ Jones, 72 F.3d at 1366 (Beam, J., concurring).
¹⁰⁷ Id. (Beam, J., concurring).
¹⁰⁹ Jones, 72 F.3d at 1366 (Beam, J., concurring).
¹¹⁰ Id. at 1366-67 (Beam, J., concurring).
¹¹¹ Id. at 1366 (Beam, J., concurring).
¹¹² Id. at 1366-67 (Beam, J., concurring).
¹¹³ Id. at 1366 (Beam, J., concurring).
¹¹⁴ Id. at 1367 (Beam, J., concurring).
Judge Donald R. Ross filed a dissenting opinion in which he stated that he would affirm the district court's decision staying the action during Clinton's term in office, but would reverse the district court's decision allowing discovery to proceed. Judge Ross, relying upon United States Supreme Court precedent, concluded that Jones' action should be stayed until Clinton left office, unless exigent circumstances could be shown.

To support his conclusion, Judge Ross asserted that if Clinton were required to defend himself from suit while in office, both real and obvious dangers would result from the intrusion of the Judicial Branch into the Executive Branch's domain. Further, Judge Ross contended that the energy and attention that Clinton would be required to devote to the litigation would divert him from the demands of his office and result in a disservice to the public's interest. Judge Ross stated that the suit would affect Clinton's "unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution."

Judge Ross also espoused the idea that if the President could be subjected to suit while in office, people might file lawsuits for any number of reasons. According to Judge Ross, these claims could result in the President becoming involved in embarrassing and potentially unfounded litigation which would be difficult to dispose of through pretrial motions.

Judge Ross further stated that the separation of powers doctrine requires civil suits against the President to be stayed until the President leaves office. Judge Ross supported his contention by pointing out that civil lawsuits against the President provide "opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes."

Judge Ross reasoned that in a civil action, in which no urgency to pursue damages exists, the better course of action to avoid separation

115. Id. (Ross, J., dissenting).
116. Id. (Ross, J., dissenting) (citing Nixon v. Fitzgerald, 457 U.S. 731 (1982)).
117. Id. at 1367 (Ross, J., dissenting).
118. Id. (Ross, J., dissenting).
119. Id. at 1367-68 (Ross, J., dissenting).
120. Id. at 1368 (Ross, J., dissenting). Judge Ross stated that people could file suit "for the purpose of gaining partisan political disruption, public notoriety, unwarranted financial gain, or potential extortion." Id. (Ross, J., dissenting).
121. Jones, 72 F.3d at 1368 (Ross, J., dissenting).
122. Id. (Ross, J., dissenting).
123. Id. (Ross, J., dissenting).
of powers conflicts would be to stay the case until the President's term expires.\textsuperscript{124} According to Judge Ross, a civil action should be stayed, unless the plaintiff can demonstrate that he or she would suffer irreparable harm as a result of the imposition of a stay.\textsuperscript{125} Further, Judge Ross stated, the burden should rest on the plaintiff to prove that adjudication would not significantly impair the President's official duties.\textsuperscript{126}

\section*{Further Appeals}

Subsequent to the Eighth Circuit's decision, Clinton requested a rehearing en banc.\textsuperscript{127} The Eighth Circuit denied the request on March 28, 1996.\textsuperscript{128} Clinton then filed a petition for a writ of certiorari with the United States Supreme Court.\textsuperscript{129} The United States Supreme Court granted certiorari on June 24, 1996, and heard oral arguments on January 13, 1997.\textsuperscript{130}

\section*{Background}

Issues of Presidential immunity and separation of powers have been addressed several times during the history of the United States.\textsuperscript{131} Courts and commentators have argued for, and against, positions ranging from absolute Presidential immunity to a limited or temporary immunity.\textsuperscript{132} The foundation for the arguments, whether

\textsuperscript{124} Id. at 1369 (Ross, J., dissenting).
\textsuperscript{125} Id. (Ross, J., dissenting).
\textsuperscript{126} Id. (Ross, J., dissenting).
\textsuperscript{128} Jones, 81 F.3d at 78. Judge McMillian filed a dissenting opinion in which he basically reiterated Judge Ross' prior dissenting opinion and asserted that Clinton should be "above the law and immune from suit." Id. at 78-80 (McMillian, J., dissenting from denial of rehearing).
\textsuperscript{130} Clinton, 116 S. Ct. at 2545.
\textsuperscript{131} See infra notes 138-274 and accompanying text.
\textsuperscript{132} Compare Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701 (1995) (stating that if immunity was granted for Nixon, it should be granted to Clinton) with Bradford E. Biegno, Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's, 82 Va. L. Rev. 677 (1996) (disagreeing with Amar and Katyal and arguing that Clinton should not be granted immunity) and Michael T. Matria, Running For Cover Behind Presidential Immunity: The Oval Office As Safe Haven From Civil Suits, 29 Suffolk U. L. Rev. 195 (1995) (stating that automatic temporary immunity for the President is unneeded and inconsistent with traditional immunity) and Jennifer L. Long, How To Sue The President: A Proposal For Legislation Establishing The Extent of Presidential Immunity, 30 Val. U. L. Rev. 283 (1995)(proposing legislation to determine the applicability of immunity) and Laurier W. Beaupre, Birth of a Third Immunity? President Clinton Secures Temporary Immunity From Trial, 36 B.C.L. Rev. 725 (1995) (arguing that a President should be presumptively amenable to suit) and William F. Allen, Note, President Clinton's Claim of Temporary Immunity: Constitutional-
for or against immunity, is often based on the provisions of the United States Constitution. The Constitution does not, however, clearly articulate the President's amenability to service of process. Instead, the doctrine of Presidential immunity has evolved through the development of precedent and through judicial consideration of the separation of powers doctrine. This evolution has created several conflicts between the Judicial and Executive Branches.

PRE-NIXON CIVIL CASES

Interpreting the Duty of the Judicial Branch

In Marbury v. Madison, the United States Supreme Court addressed the separation of powers doctrine with regard to the Executive Branch. In Marbury, President John Adams had nominated William Marbury ("Marbury") for an appointment as a Justice of the Peace. The Senate approved the nomination, the commission was signed by President Adams and the official seal was affixed by the Secretary of State. However, prior to delivery of the commission, President Adams left office. Marbury requested that then Secretary of State James Madison deliver the commission, but Madison refused. Marbury then filed an action directly with the United States Supreme Court, seeking a writ of mandamus which would direct Madison to deliver the commission.

Chief Justice John Marshall delivered the opinion of the Court. First, Chief Justice Marshall determined that Marbury had a right to

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133. See generally Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701 (1995) (arguing that if Nixon was entitled to immunity, Clinton also should be granted immunity); Bradford E. Biegon, Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's, 82 Va. L. Rev. 677 (1996) (disagreeing with Amar and Katyal and arguing that Clinton is not entitled to immunity for unofficial acts).
134. U.S. Const. art. II.
136. Id. at 235-43.
137. See infra notes 138-274 and accompanying text.
138. 5 U.S. 137 (1803).
139. Nowak & Rotunda, supra note 135, § 7.1(a), at 235.
141. Marbury, 5 U.S. at 138.
142. Id.
143. Id. at 138.
144. Id. at 153-54.
receive his judicial commission. Chief Justice Marshall then addressed the issue of whether the laws of the United States provided Marbury with a remedy for the denial of his commission. Chief Justice Marshall stated that the essence of civil liberty is that injured individuals have a right to the protection of the laws. Chief Justice Marshall further noted that the Government itself must provide such protection to injured individuals.

Chief Justice Marshall then examined the power of the Court to direct a writ of mandamus to a member of the Executive Branch. After a discussion of the Court's jurisdiction, Chief Justice Marshall ultimately reached the decision that the Court could order a member of the Executive Branch to deliver the commission. Chief Justice Marshall concluded that "it is emphatically the province and duty of the judicial department to say what the law is."

Refusing to Enjoin the President from Performing Official Duties

Several years later, in Mississippi v. Johnson, the United States Supreme Court had the opportunity to address the question of whether President Andrew Johnson could be made a party defendant to a petition in which the State of Mississippi sought to enjoin execution of two Congressional acts. The State of Mississippi argued that the President was "but [a] creature of the Constitution," who was not above the law, and thus, was subject to the law's restraints.

As support for its position, the State of Mississippi argued, by analogy, that if a President could be subject to a subpoena in a criminal trial, as President Jefferson had been in United States v. Burr,

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146. Marbury, U.S. at 162.
147. Id.
148. Id. at 163.
149. Id.
150. Id. at 169.
151. Id. at 173-80. The Court, however, refused to order the Secretary of State to deliver the commission because the Court ruled that it lacked original jurisdiction over the case. Nowak & Rotunda, supra note 135, at § 7.1.
152. Marbury, 5 U.S. at 177.
153. 71 U.S. 475 (1866).
154. Mississippi v. Johnson, 71 U.S. 475, 476 (1866). The State of Mississippi's action sought to enjoin the President from carrying out the acts of March 2nd and 23rd, 1867, more commonly referred to as the Reconstruction Acts. Johnson, 71 U.S. at 475. According to the State of Mississippi, the Reconstruction Acts would destroy the State and its government by allowing Congress to exercise sovereign power over the state. Id. at 476.
155. Mississippi, 71 U.S. at 476-79.
a President could also be subject to an injunction in a civil action.\textsuperscript{157} The State further argued that just as a chief executive officer of a particular state is susceptible to the control of the courts of that state, the President of the United States should be amenable to the control of the courts under the United States Constitution.\textsuperscript{158}

President Johnson first countered Mississippi's argument by distinguishing the pending case from \textit{Burr}.\textsuperscript{159} The key distinguishing factor, according to Johnson, was that \textit{Burr} involved a criminal case, while their case was a civil action.\textsuperscript{160} Johnson also asserted that the Court erred in \textit{Burr} by holding that a President could be subpoenaed.\textsuperscript{161} Johnson supported this assertion by articulating that the best interests of the Government would not be served if a President would be forced to "remit his duties over the whole and attend to his duties to the individual."\textsuperscript{162} President Johnson concluded by demonstrating the potential conflicts that could arise between the Executive and Judicial Branches if Mississippi were allowed to make the President a party to the action.\textsuperscript{163}

In delivering the opinion of the Court, Chief Justice S.P. Chase first noted that the President has the duty to see that the laws of the United States are faithfully executed.\textsuperscript{164} According to the Court, any attempt on the part of the Judicial Branch to enforce the performance of Presidential duties would be an "absurd and excessive extravagance."\textsuperscript{165} The Court held that it did not have jurisdiction to enjoin the President from performing his official duties, specifically, the execution of a Congressional act.\textsuperscript{166}

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John Marshall ultimately ruled that the President was subject to the subpoena. United States v. \textit{Burr}, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14, 694).

\begin{itemize}
\item \textsuperscript{157} \textit{Mississippi}, 71 U.S. at 478-79.
\item \textsuperscript{158} Id. at 480.
\item \textsuperscript{159} Id. at 481-82.
\item \textsuperscript{160} Id. at 483-84.
\item \textsuperscript{161} Id. at 483.
\item \textsuperscript{162} Id. at 483-84.
\item \textsuperscript{163} Id. at 486. According to President Johnson, the future effects of subjecting a President to service of a subpoena could be detrimental to the sanctity of the Presidential office. \textit{Mississippi}, 71 U.S. at 486-87. For example, by being subjected to a subpoena, the President would then be subject to any court's orders, such as a contempt order. \textit{Id.} According to Johnson, this would intrude upon the President's dignity and hinder his ability to effectively perform the duties of his position. \textit{Id.} at 488.
\item \textsuperscript{164} \textit{Mississippi}, 71 U.S. at 499.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 501.
\end{itemize}
ISSUING INJUNCTION PROHIBITING ENFORCEMENT OF EXECUTIVE ORDER

Nearly ninety years after the Court rendered its decision in Johnson, the Judicial Branch once again clashed with the Executive Branch in Youngstown Sheet & Tube Co. v. Sawyer. In Youngstown, the United Steelworkers of America, C.I.O., announced that it was commencing a nation-wide strike. President Harry S. Truman, realizing that the strike could result in a shortage of steel which could lead to a national catastrophe, issued an Executive Order ("Order") directing the Secretary of Commerce Sawyer ("Sawyer") to take control of the nation's steel mills.

The steel companies protested the Order, and eventually filed suit in the United States District Court for the District of Columbia against Sawyer. The companies sought a preliminary and permanent injunction against the enforcement of the Order, alleging that the seizure had not been authorized by Congress or by any provisions of the Constitution. The United States countered the steel companies' arguments by asserting that President Truman had "inherent power" to issue the Order.

The district court ruled in favor of the steel companies and issued an injunction prohibiting Sawyer from enforcing the Order. On the same day, Sawyer appealed, and the United States Court of Appeals for the District of Columbia Circuit stayed the district court's injunction. Determining that the issue in Youngstown should be addressed promptly, the United States Supreme Court granted certiorari three days later.

Justice Hugo Black, writing for the majority, first stated that any power the President has to issue an Executive Order, such as the one in dispute, must come either from the Constitution or an act of Congress. Justice Black then noted that because no act of Congress authorized the President to issue such an Order, the President's power must be found in a constitutional provision. After examining the various constitutional provisions concerning the powers of the Executive and Legislative Branches, Justice Black ultimately reached

169. Youngstown Sheet & Tube, 343 U.S. at 583.
170. Id.
171. Id.
172. Id. at 583-84.
173. Id. at 584.
174. Id.
175. Id.
176. Id. at 585.
177. Id. at 587.
the conclusion that the duty of the Legislative Branch was to make the laws, while the duty of the President to was ensure that the laws are faithfully executed.\(^\text{178}\) Thus, Justice Black held that the district court was correct in issuing an injunction prohibiting the enforcement of the order which had directed Sawyer to seize control of the Nation's steel mills.\(^\text{179}\)

**THE NIXON TRILOGY**

Between 1974 and 1982, the United States Supreme Court examined three cases involving the late President Richard Nixon (“Nixon”).\(^\text{180}\) These cases, one relating to a criminal matter and the other two involving civil matters, directly addressed the issues of Presidential immunity and preservation of separation of powers.\(^\text{181}\)

**SUBJECTING THE PRESIDENT TO A SUBPEONA IN A CRIMINAL TRIAL**

In the first case of the Nixon trilogy, *United States v. Nixon*,\(^\text{182}\) the United States Supreme Court heard arguments concerning the amenability of a President to a third-party *subpeona duces tecum*.\(^\text{183}\) The controversy in *Nixon* arose when Nixon refused to comply with a subpoena issued by the Watergate Special Prosecutor in the criminal trial of John Mitchell.\(^\text{184}\) The subpoena required Nixon to produce “certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others.”\(^\text{185}\) Prior to the return date of the subpoena, Nixon entered a special appearance and filed a motion to quash the subpoena.\(^\text{186}\) In addition to the motion, Nixon also included a formal claim of privilege.\(^\text{187}\)

The United States District Court for the District of Columbia denied the motion and ordered Nixon to produce the requested documents, stating that the Special Prosecutor had rebutted the presumption that the material was privileged.\(^\text{188}\) The district court additionally rejected Nixon's allegation that the Judicial Branch did not have authority to review the President's assertion of executive

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\(^{178}\) *Id.* at 587-88.

\(^{179}\) *Id.* at 589.

\(^{180}\) See *infra* notes 182-274 and accompanying text.

\(^{181}\) *Id.*


\(^{184}\) *Nixon*, 418 U.S. at 686.

\(^{185}\) *Id.* at 688.


\(^{187}\) *Nixon*, 418 U.S. at 688.

\(^{188}\) *Mitchell*, 377 F. Supp. at 1331.
In rejecting the allegation, the court held that the judiciary was the "final arbiter of a claim of executive privilege."189

Nixon subsequently appealed the district court's decision to the United States Court of Appeals for the District of Columbia Circuit.190 However, before the court could render a judgment, the United States Supreme Court, in order to reach a prompt resolution of the issues, granted both the United States' petition, and Nixon's cross-petition, for certiorari.191

Chief Justice Warren Burger, writing for a unanimous Court, addressed Nixon's claim of immunity based on the separation of powers doctrine.192 Chief Justice Burger recognized that although the Court had never "defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution," it had ruled that other uses of power by the Executive Branch and the Legislative Branch had been found invalid due to conflict with the Constitution.193 However, according to Chief Justice Burger, the Court had authority to interpret claims regarding powers which allegedly were derived from enumerated powers.194

Chief Justice Burger proceeded to recognize that a certain amount of deference must be afforded to each branch by the others.195 Drawing upon this principle, Chief Justice Burger reiterated the Court's earlier holding in Marbury, and stated "it is the province and duty of [the] Court 'to say what the law is' with respect to the claim of privilege ...."196

Chief Justice Burger then stated that the separation of powers doctrine could not sustain absolute Presidential immunity from judicial proceedings in all circumstances.197 Such an unqualified and absolute immunity, according to Chief Justice Burger, would conflict with Article III of the Constitution by "gravely impair[ing]" the court's

190. Id.
191. Id. at 689-90.
192. Id. at 690.
193. Id. at 703. Then-Justice William H. Rehnquist did not take part in the consideration of this case because he was a friend and had worked for former Attorney General John Mitchell, one of the indicted defendants. Nowak & Rotunda, supra note 135, at 236 n.12.
195. Id. at 704.
196. Id.
197. Id. at 705 (citing Marbury, 5 U.S. at 177).
198. Id. at 706.
ability to perform its constitutionally assigned duties.\textsuperscript{199} Chief Justice Burger concluded by affirming the lower court’s decision, and ordered President Nixon to transmit the subpoenaed material to the district court.\textsuperscript{200}

Refusing to Grant Absolute Immunity

In the second case of the Nixon trilogy, \textit{Halperin v. Kissinger},\textsuperscript{201} the Judicial Branch once again had the opportunity to examine a claim of immunity by President Nixon.\textsuperscript{202} In \textit{Halperin}, a former member of the National Security Council, Morton Halperin (“Halperin”), and his family, sued ten federal officials, including Nixon and National Security Adviser Henry Kissinger.\textsuperscript{203} The events giving rise to Halperin’s suit took place between February and April of 1969 of the Nixon Administration.\textsuperscript{204} Specifically, a number of leaks to the press regarding classified information and foreign policy documents caused the Nixon Administration to become concerned.\textsuperscript{205} This concern was based on the belief that the leaks would limit the administration’s flexibility in establishing foreign policy.\textsuperscript{206}

As a result of Nixon’s concerns, he authorized electronic surveillance of individuals who were suspected of leaking classified information.\textsuperscript{207} Attorney General John Mitchell subsequently authorized the installation of a wiretap on the Halperin’s home telephone.\textsuperscript{208} During the twenty-one month period in which the wiretap was in effect, the Federal Bureau of Investigation monitored the Halperin’s telephone calls.\textsuperscript{209} When the Halperins subsequently learned of the wiretaps, they filed suit in the United States District Court for the District of Columbia, alleging that the Nixon administration’s actions consti-

\begin{itemize}
\item \textsuperscript{199} \textit{Id.} at 707. Article III of the United States Constitution vests the judicial power of the United States in the courts. U.S. Const. art III.
\item \textsuperscript{200} \textit{Nixon}, 418 U.S. at 714.
\item \textsuperscript{201} 606 F.2d 1192 (D.C. Cir. 1979), \textit{aff’d in part}, 452 U.S. 713 (1981).
\item \textsuperscript{204} \textit{Halperin}, 424 F. Supp. at 840.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Halperin}, 606 F.2d at 1196.
\item \textsuperscript{207} \textit{Id.} The determination of which individuals were to be wiretapped was based on the suspected person’s access to the information which was leaked, incriminating material about the suspect found in security files, and on incriminating materials found in FBI files. \textit{Id.}
\item \textsuperscript{208} \textit{Halperin}, 424 F. Supp. at 841.
\item \textsuperscript{209} \textit{Id.} at 841.
\end{itemize}
tuted a violation of their constitutional rights, as well as a violation of United States statutes. 210

Judge John Lewis Smith, Jr., writing for the district court, rejected the defendant's claim of absolute immunity and concluded that Nixon, Mitchell and Haldeman violated Halperin's constitutional rights. 211 The defendants appealed the district court's decision to the United States Court of Appeals for the District of Columbia Circuit. 212 On appeal, Nixon argued that the district court erred in failing to grant him absolute immunity for actions which were undertaken in the course of his official responsibility.213

The District of Columbia Circuit initially noted that the United States Supreme Court, in Butz v. Economou, 214 had adopted standards governing immunity for executive officials. 215 The court, quoting the Economou opinion, stated that an executive official is "not immune . . . [A] if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [person] affected, or [B] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." 216 The court noted that only one of the two standards need be fulfilled in order for the official to forfeit his immunity from suit.217

The court proceeded to state that in order to accept Nixon's absolute immunity argument, the court "would have to hold that his status as President sets him apart from the other high Executive officials named as defendants to [the] action." 218 The court noted that in order to grant the President absolute immunity, while requiring the other defendants to stand trial, " . . . the Constitution [would have to] exempt

210. Id. at 840. The Constitutional rights which were allegedly violated include the First, Fourth, Fifth and Ninth Amendments. Id. The United States Statute which the Nixon Administration's actions allegedly violated was 18 U.S.C. § 2510 et seq., the Omnibus Crime Control and Safety Streets Act of 1968. Id.
211. Halperin, 606 F.2d at 1195. Specifically, the defendants were found to have violated the plaintiff's Fourth Amendment rights. Id. The court dismissed the Omnibus Crime Control and Safe Streets Act claims. Id.
212. Halperin, 606 F.2d at 1195.
213. Id. at 1208.
214. 438 U.S. 478 (1978). Butz involved an action for damages filed against several United States Officials, including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner and a Department of Agriculture attorney. Butz 438 U.S. at 482. The suit was based on allegations that the defendants violated the plaintiff's constitutional rights by instituting unauthorized proceedings against him. Id. at 482-83. The United States Supreme Court ruled that executive officials exercising discretion are typically only entitled to qualified immunity, unless extraordinary circumstances demonstrate that absolute immunity is necessary in order to conduct public business. Id. at 507.
215. Halperin, 606 F.2d at 1208-09.
216. Id. at 1209.
217. Id.
218. Id. at 1210.
the President from all liability . . . because the repercussions of finding liability would be drastically adverse."\textsuperscript{219}

According to the court, the constitutional scheme does not bear any indication that the President or the other officials of the Executive Branch are entitled to any kind of immunity.\textsuperscript{220} The court also asserted that the Judicial Branch can not avoid its constitutional duty to define the powers and obligations of the various branches of Government.\textsuperscript{221} In fact, the separation of powers doctrine, according to the court, "does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other."\textsuperscript{222}

The court concluded that Nixon was not entitled to absolute immunity from a damage action by a citizen who was subjected to an illegal or unconstitutional wiretap.\textsuperscript{223} Nixon appealed the court's decision and an equally divided United States Supreme Court affirmed the decision without issuing an opinion.\textsuperscript{224}

\textbf{GRANTING ABSOLUTE IMMUNITY FOR OFFICIAL ACTS WITHIN THE OUTER PERIMETER OF A PRESIDENT'S OFFICIAL DUTIES}

In 1982, a sharply divided Supreme Court reached a decision in \textit{Nixon v. Fitzgerald},\textsuperscript{225} which extended absolute immunity to President Nixon for any civil damages arising from acts which were within the "outer perimeter" of his official duties as President.\textsuperscript{226} In \textit{Nixon}, A. Ernest Fitzgerald ("Fitzgerald") was dismissed from his job as a management analyst with the United States Air Force.\textsuperscript{227} Fitzgerald initially complained to the Civil Service Commission, asserting that his termination was an unlawful retaliation for his congressional testimony concerning cost-overruns and technical difficulties associated with a certain transport plane.\textsuperscript{228} The Civil Service Commission determined that Fitzgerald's termination "offended applicable civil service regulations," and recommended that he be reappointed to either his former position or one of comparable authority.\textsuperscript{229} Despite this

\begin{itemize}
  \item \textsuperscript{219} \textit{Id.} at 1210-11.
  \item \textsuperscript{220} \textit{Id.} at 1211.
  \item \textsuperscript{221} \textit{Id.}
  \item \textsuperscript{222} \textit{Id.} at 1211-12.
  \item \textsuperscript{223} \textit{Id.} at 1211.
  \item \textsuperscript{224} Kissinger v. Halperin, 452 U.S. 713, 713 (1981). Then-Justice William H. Rehnquist took no part in the consideration of this matter. \textit{Id.}
  \item \textsuperscript{225} 457 U.S. 731 (1982).
  \item \textsuperscript{226} Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).
  \item \textsuperscript{227} \textit{Fitzgerald}, 457 U.S. at 733.
  \item \textsuperscript{228} \textit{Id.} Fitzgerald testified before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress on November 13, 1968. \textit{Id.} at 734.
  \item \textsuperscript{229} \textit{Fitzgerald}, 457 U.S. at 738.
\end{itemize}
recommendation, the Chief Examiner for the Civil Service Commission expressly limited his conclusion, refusing to imply that Fitzgerald had been retaliated against because of his congressional testimony.\textsuperscript{230}

After Civil Service Commission Examiner's decision, Fitzgerald decided to present his claims in public and filed suit in the United States District Court for the District of Columbia.\textsuperscript{231} In his complaint, Fitzgerald alleged essentially the same allegations that he had presented to the Civil Service Commission.\textsuperscript{232} The district court dismissed the action in accordance with the District of Columbia's three year statute of limitations.\textsuperscript{233} The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision as to all but one defendant, and remanded that action to the district court for further proceedings.\textsuperscript{234}

After the remand, and following considerable discovery, Fitzgerald filed an amended complaint in the United States District Court for the District of Columbia.\textsuperscript{235} This amended complaint, filed more than eight years after Fitzgerald had initially complained to the Civil Service Commission, named President Richard Nixon as a defendant.\textsuperscript{236} Nixon filed a motion for summary judgement, alleging that he was entitled to absolute Presidential immunity.\textsuperscript{237} When the district court denied Nixon's motion, he appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.\textsuperscript{238}

The District of Columbia Circuit summarily dismissed Nixon's appeal based on its previous decision in \textit{Halperin}, which had rejected Nixon's immunity claim.\textsuperscript{239} Nixon subsequently appealed the court's decision to the United States Supreme Court.\textsuperscript{240} The Supreme Court granted certiorari, noting that it had not previously addressed the important issue of the "scope of immunity available to a President of the United States."\textsuperscript{241}

\textsuperscript{230} \textit{Id.} at 739.
\textsuperscript{231} \textit{Id.} at 736.
\textsuperscript{232} \textit{Id} at 739.
\textsuperscript{233} \textit{Id}.
\textsuperscript{234} \textit{Fitzgerald}, 457 U.S. at 739-40. The plaintiff's cause of action against Alexander Butterfield was remanded to the district court because the court of appeals held that the concealment of illegal activities tolled the statute of limitations, and thus, Fitzgerald's cause of action was not time barred. \textit{Id}.
\textsuperscript{235} \textit{Fitzgerald}, 457 U.S. at 740.
\textsuperscript{236} \textit{Id}. In addition to Nixon, Fitzgerald named White House aide Bryce Harlow and other Nixon Administration officials as defendants to the suit. \textit{Id}.
\textsuperscript{237} \textit{Fitzgerald}, 457 U.S. at 740-41.
\textsuperscript{238} \textit{Id}.
\textsuperscript{239} \textit{Id}. at 741.
\textsuperscript{240} \textit{Id}.
\textsuperscript{241} \textit{Id}.
Scope of Immunity

The Supreme Court held that Nixon was entitled to absolute immunity from civil suits based on his official acts. The Court initially noted that the Court's decisions regarding governmental immunity from civil damages had been directed by principles of the Constitution, by federal law, and by history. The Court further stated that it had considered public policy concerns borne out by history, and the structure of the United States Government, when addressing Presidential immunity cases. The Court specifically recognized that Presidential immunity was "rooted in the separation of powers under the Constitution."

According to the Court, the separation of powers doctrine clearly does not prevent the Judicial Branch from asserting jurisdiction over the President in all cases. However, the Court stated that before exercising jurisdiction, a court must balance the significance of the constitutional interest to be served against the effects of the intrusion on the Executive Branch.

The Court noted that the exercise of jurisdiction over a President had previously been warranted when judicial action had been required to exonerate the general public's interest in a criminal prosecution, or to maintain proper balance between the three branches of Government. The Court then held that the exercise of jurisdiction in a private suit for damages predicated upon a President's official acts is not warranted.

As support for its conclusion, the Court relied on an analysis written by Justice Joseph Story several years earlier:

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 president 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.
As further support for this determination, the Court noted that the visibility of the Presidential Office, and the effect that the President's actions have on numerous people, could result in the President becoming a target for civil suits. The Court asserted that the President's energies could become diverted by these suits, and this diversion would be detrimental to the Presidential Office, as well as to the nation as a whole.

The Court then defined the scope of absolute Presidential immunity as extending to all acts "within the 'outer perimeter' of [a President's] official responsibility." The Court noted that granting the President absolute immunity would not deprive the United States citizens of protection against misconduct by their President. According to the Court, sufficient methods would still ensure that a President did not abuse his position. These methods include impeachment, formal and informal checks, scrutiny by the press, vigilant congressional oversight, a President's desire to be re-elected and a President's natural concern for his reputation and place in history.

Chief Justice Warren Burger wrote a concurring opinion to underscore his belief that Presidential immunity derives from, and is required by, the separation of powers doctrine. Chief Justice Burger stated that at times the need for a fully functioning system of government must outweigh an individual's right to collect damages. However, according to Chief Justice Burger, such deference does not place the President above the law. Instead, it merely places the President on the same level as judges and other officials who are entitled to absolute immunity from civil suits predicated on their official acts.

Chief Justice Burger also noted that intervention by the Judicial Branch would inhibit the Executive Branch's process of decision-making and impede the proper exercise of President's office. As support for this statement, Chief Justice Burger articulated the serious effect defending damage suits would have in distracting the President from

251. Id. at 753.
252. Id.
253. Id. at 756.
254. Id. at 757.
255. Id.
256. Id.
257. Id. at 758 (Burger, C.J., concurring).
258. Id. at 759 (Burger, C.J., concurring).
259. Id. at 763-64 (Burger, C.J., concurring).
260. Id. (Burger, C.J., concurring). Chief Justice Burger stated that over 75,000 public officials, including prosecutors, members of Congress, and Congressional Aides are entitled to absolute immunity from civil suit for acts within the parameters of their official duties. Id. at 759 n.2 (Burger, C.J., dissenting).
his duties.\textsuperscript{262} Chief Justice Burger thus concluded that the President should be immune from civil suits springing from acts which are within the scope of his authority.\textsuperscript{263} However, Chief Justice Burger explicitly pointed out that the Court's ruling did not grant the President immunity for all acts, stating, "a President ... [is] not immune for acts outside official duties."\textsuperscript{264}

Justice Byron White wrote a dissenting opinion in which Justices William Brennan, Thurgood Marshall, and Harry Blackmun joined.\textsuperscript{265} The dissent categorized the majority's decision as placing the President above the law.\textsuperscript{266} According to the dissent, the majority's opinion allows "[a] President, acting within the outer boundaries of what Presidents normally do, [to] without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured."\textsuperscript{267}

The dissent also accused the majority of ignoring the functional approach to Presidential immunity that had characterized all of the Court's prior decisions.\textsuperscript{268} According to the dissent, the majority's disregard for precedent was a "very poor policy" decision which was not warranted by the prior case law.\textsuperscript{269} The dissent concluded by stating that he found it tragic "that the Court would so casually discard its own role of assuring 'the right of every individual to claim the protection of the laws' in the name of protecting the principle of separation of powers."\textsuperscript{267}

Justice Blackmun also filed a dissenting opinion in which he was joined by Justices Brennan and Marshall.\textsuperscript{271} Justice Blackmun asserted that the Court failed to answer the "unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law."\textsuperscript{272} Justice Blackmun noted that although the majority ruled that the separation of powers doctrine compelled absolute immunity for the President, the majority also left open the

\textsuperscript{262} Id. (Burger, C.J., concurring). Chief Justice Burger articulated that the litigation process could be used as a mechanism for extortion if the process was not tightly controlled. Id. (Burger, C.J., concurring). Furthermore, according to Chief Justice Burger, even an "ultimate vindication on the merits [would] not repair the damage." Id. (Burger, C.J., concurring).

\textsuperscript{263} Fitzgerald, 457 U.S. at 763 (Burger, C.J., concurring).

\textsuperscript{264} Id. at 759 (Burger, J., concurring).

\textsuperscript{265} Id. at 764 (White, J., dissenting).

\textsuperscript{266} Id. at 766 (White, J., dissenting).

\textsuperscript{267} Id. at 764 (White, J., dissenting).

\textsuperscript{268} Id. at 770 (White, J., dissenting).

\textsuperscript{269} Id. (White, J., dissenting).

\textsuperscript{270} Id. at 797 (White, J., dissenting) (quoting Marbury, 5 U.S. at 163).

\textsuperscript{271} Id. (Blackmun, J., dissenting).

\textsuperscript{272} Id. (Blackmun, J., dissenting).
possibility that the President could be subjected to a congressionally created cause of action. These two concepts, according to Justice Blackmun, cannot coexist.

ANALYSIS

In *Jones v. Clinton*, the United States Court of Appeals for the Eighth Circuit addressed for the first time the issue of whether the President of the United States is entitled to immunity from civil suits for acts committed prior to their election to the Presidency. The Eighth Circuit held that the Constitution did not confer upon President William Jefferson Clinton ("Clinton") an immunity from civil actions that arose from such unofficial acts. Therefore, the Eighth Circuit affirmed the district court's decision which denied Clinton's motion to dismiss Paula Jones' ("Jones") suit. The Eighth Circuit also allowed discovery to proceed, reversing the district court's decision to stay the trial for the duration of Clinton's presidency.

*FITZGERALD'S BALANCING TEST*

In *Nixon v. Fitzgerald*, the United States Supreme Court, relying on established precedent, stated that a court must necessarily "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch" before a court may exercise jurisdiction over the President. In *Fitzgerald*, the Court ruled that a civil lawsuit for damages based on a President's official acts constituted too great a danger of intrusion on the Executive Branch. However, the ruling did not provide for a "sweeping immunity for a President for all acts." Moreover, the Court indicated that a President would not be absolutely immune for acts arising outside of his official duties. Ap-

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273. *Id.* at 798 (Blackmun, J., dissenting).
274. *Id.* (Blackmun, J., dissenting).
277. *Jones*, 72 F.3d at 1363.
278. *Id.*
279. *Id.*
283. *Id.* at 759 (Burger, C.J., concurring).
284. *Id.* at 755-58. In Chief Justice Burger's concurring opinion, he expressly stated that "a President . . . [is] not immune for acts outside official duties." *Id.* at 759 (Burger, C.J., concurring).
plying this test to the case at hand requires an examination of the interests of both parties.285

JONES' INTERESTS

In *Marbury v. Madison*, Chief Justice John Marshall articulated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [an individual] receives an injury." Chief Justice Marshall extended this protection to William Marbury ("Marbury"), ruling that he had a legal right to receive his justice of the peace appointment.288

Like Marbury, Jones, an individual who has suffered an injury, has a right to the protection of the law. Further, Jones is constitutionally entitled to utilize the courts and to receive equal protection of the law. Delaying Jones' suit, as Clinton requests, could effectively deny Jones her constitutional right to utilize the protection of the courts in several respects.291

First, evidence could be lost or destroyed. If Clinton's request to delay the trial until he leaves office is granted, the trial could potentially be postponed until after January 20, 2001, the last date on which Clinton could constitutionally hold office. During this delay, an important witness could die or become incompetent. Further, memories of the parties or witnesses could fade. If this were to happen, Jones would be unable to supply the testimony needed to support her claims.296

Second, Jones' cause of action was expressly created by Congress. Title 42 of the United States Code section 1983 was intended to provide an avenue of recovery for individuals who are deprived of constitutional rights by a person acting under the color of state law. Thus, this federal statute was aimed at providing Jones with exactly

285. *See infra* notes 286-343 and accompanying text.
286. 5 U.S. 137 (1803).
289. *Id.* at 163.
290. Jones, 72 F.3d at 1360.
291. *See infra* notes 292-302 and accompanying text.
292. Jones, 72 F.3d at 1363 (Beam, J., concurring).
294. Jones, 72 F.3d at 1363-64 (Beam, J., concurring).
296. Jones, 72 F.3d at 1364 (Beam, J., concurring).
the kind of protection which she now seeks.\textsuperscript{299} A delay in the suit could effectively deny Jones access to the courts, her primary avenue for recovery in a section 1983 claim.\textsuperscript{300}

If the delay in suit rendered Jones unable to secure evidence which she needed to prove the elements of her causes of action, she would effectively be denied her day in court.\textsuperscript{301} This potential for prejudice "reaches, or at least approaches, constitutional magnitude," and thus, Jones should not be forced to encounter a delay of her lawsuit.\textsuperscript{302}

\textbf{Clinton's Interests}

In \textit{Fitzgerald}, the Supreme Court realized that "the President occupies a unique position in the constitutional scheme."\textsuperscript{303} The President must be prepared at all times to do whatever is necessary to "preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed."\textsuperscript{304}

The visibility of the Presidential Office, in correlation with the countless number of people who are affected by the President's actions, could subject Clinton to an exponential number of lawsuits.\textsuperscript{305} In addition to legitimate motives behind lawsuits against a President, plaintiffs could also file suit based on frivolous motives.\textsuperscript{306} For example, suits could be filed for political reasons, or as an attempt by the plaintiff to achieve instant celebrity status.\textsuperscript{307} This barrage of lawsuits, be they frivolous or not, could be extremely disruptive to Clinton and distract him from his official duties.\textsuperscript{308} Not only does defending a lawsuit require a significant amount of money, but it also consumes a great deal of time.\textsuperscript{309} In addition to the time spent in court, Clinton would be required to expend a significant amount of time and energy in meetings and strategy sessions with his attorneys.\textsuperscript{310} This expen-

\textsuperscript{299} Allen, 11 J.L. & Pol. at 601.
\textsuperscript{300} See supra notes 291-99 and accompanying text.
\textsuperscript{301} Jones, 72 F.3d at 1364 (Beam, J., concurring).
\textsuperscript{302} Id. at 1363 (Beam, J., concurring).
\textsuperscript{303} Fitzgerald, 457 U.S. at 749.
\textsuperscript{305} Fitzgerald, 457 U.S. at 753.
\textsuperscript{306} See infra notes 307-11 and accompanying text.
\textsuperscript{308} Fitzgerald, 457 U.S. at 763.
\textsuperscript{309} Id.
\textsuperscript{310} Memorandum in Support of Clinton's Motion to Dismiss on Grounds of Presidential Immunity, Jones (LR-C-94-290).
diture of time could rise to such a burden so as to be detrimental to Clinton's position as President.311

As President, Clinton is vested with the entire executive power.312 This requires Clinton to be free to devote his entire time and energies to his official duties.313 Diversion of these energies with concerns of civil lawsuits, whether frivolous or not, could reduce the effective functioning of the Executive Branch and be detrimental to the nation as a whole.314

BALANCING JONES' AND CLINTON'S INTERESTS

On one hand, Jones is entitled to the protection of the law.315 In this case, Jones' cause of action has been expressly provided for by Congress in Title 42 of the United States Code sections 1983 and 1985.316 Jones has the Constitutional right to seek protection under section 1983 through the courts.317 This right is, in fact, the "very essence of our civil liberty."318 Delay of trial could destroy this right, a result which "reaches, or at least approaches, constitutional magnitude."319

On the other hand, Clinton, as President, occupies a unique position in our scheme of Government.320 The Constitution vests the entire executive authority in the President of the United States.321 Diversion of his energies could be detrimental to the effective functioning of government and to the general well-being of the nation.322

A careful examination of these competing interests must result in the conclusion that the Eighth Circuit was correct in allowing Jones to proceed with her claims.323 First, delay of suit could impair Jones' ability to prove her causes of action.324 This would effectively deny Jones her day in court.325 Clearly, Jones, as a citizen of the United States who is entitled to protection of the law and to access to the

311. See supra notes 303-10 and accompanying text.
312. Jones, 72 F.3d at 1367 (Ross, J., dissenting).
313. See id. (Ross, J., dissenting) (stating that "no other branch of government is entrusted to a single person.").
314. Id. (Ross, J., dissenting).
315. See supra notes 148-49 and accompanying text.
316. See supra notes 45-46 and accompanying text.
317. See supra notes 148-49 and accompanying text.
318. Marbury, 5 U.S. at 163.
319. Jones, 72 F.3d at 1363 (Beam, J., concurring).
320. See infra note 321 and accompanying text.
321. U.S. Const. art. II.
322. See supra note 252 and accompanying text.
323. See infra notes 324-43 and accompanying text.
324. See supra notes 291-96 and accompanying text.
325. Jones, 72 F.3d at 1364 (Beam, J., concurring).
courts to redress injuries sustained by violations of the law, should not be deprived of these important rights.\textsuperscript{326}

While Jones' interests could be destroyed with the passage of time, several factors exist which would allow the potentially negative effects on Clinton's interests to be minimized.\textsuperscript{327} First, Clinton would not be required to attend court every day.\textsuperscript{328} Nor is it likely that Clinton would choose to attend the witness' depositions.\textsuperscript{329} Moreover, Clinton's appearance at trial could be entered by counsel; in fact, he need only attend court when his schedule permitted or when his presence was deemed necessary by the court.\textsuperscript{330}

Even during times when his attendance would be required in court, Clinton would still likely be able to attend to his duties.\textsuperscript{331} In fact, Presidents have been subjected to judicial process several times during history.\textsuperscript{332} These Presidents have all found a way to arrange their schedules so as to avoid "a cataclysmic episode in which the constitutional duties of the office [were not] compromised.\textsuperscript{333}

Second, the capabilities of transportation and communications technology present in modern society, such as fax machines, cellular telephones, video conferencing, and E-mail, provide lines of communication at almost all times.\textsuperscript{334} Further, the White House Communications Agency possesses superior technology and can place the President in contact with almost anyone, at almost any time.\textsuperscript{335}

Third, even if unfounded actions are brought against the President, procedural devices are already in place to dispose of such frivolous suits.\textsuperscript{336} For example, Federal Rule of Civil Procedure 12(b)(6) allows dismissal of cases which fail "to state a claim upon which relief can be granted."\textsuperscript{337} Further, as the Eighth Circuit recognized in Jones, the trial court has broad discretion in scheduling trial proceedings.\textsuperscript{338} This power would allow the court to work with the parties in

\begin{itemize}
  \item \textsuperscript{326} Marbury, 5 U.S. at 163.
  \item \textsuperscript{327} See infra notes 328-41 and accompanying text.
  \item \textsuperscript{328} Bradford E. Biegon, Note, Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's Commentaries, 82 VA. L. Rev. 677, 714 (1996).
  \item \textsuperscript{329} Jones, 72 F.3d at 1366 (Beam, J., concurring).
  \item \textsuperscript{330} Biegon, 82 VA. L. Rev. at 714.
  \item \textsuperscript{331} See infra notes 334-35 and accompanying text.
  \item \textsuperscript{332} Jones, 72 F.3d at 1366.
  \item \textsuperscript{333} Id.
  \item \textsuperscript{334} Biegon, 82 VA. L. Rev. at 714 (stating that even when the President is required to be in court, modern technology and communications allow him to be in control of the Nation's nuclear weapons).
  \item \textsuperscript{335} Id.
  \item \textsuperscript{336} Jones, 72 F.3d at 1361-62.
  \item \textsuperscript{337} Biegon, 82 VA. L. Rev. at 713.
  \item \textsuperscript{338} Jones, 72 F.3d at 1361.
\end{itemize}
order to create a schedule which is appropriate for the situation.\textsuperscript{339} Finally, in order to minimize the effects of litigation on the President's official duties, the court could grant a change of venue.\textsuperscript{340} If the President faces a cause of action in a state court, he could remove it to federal court and petition the federal court for a change of venue pursuant to the \textit{forum non conveniens} doctrine.\textsuperscript{341}

The unavailability of options to minimize the potential for prejudice which Jones would experience through a delay of discovery proceeding and trial, in comparison with the options which are present to minimize the effect on Clinton's interests, reveal that Jones' interest in proceeding with trial outweigh Clinton's interests in delaying the proceedings.\textsuperscript{342} Thus, the Eighth Circuit correctly ruled that Jones was entitled to proceed with her suit.\textsuperscript{343}

\textbf{Refusing to Extend Fitzgerald}

Even if Clinton could demonstrate that his interests outweighed Jones', the Eighth Circuit properly refused to extend Fitzgerald to grant Clinton immunity for several reasons.\textsuperscript{344} First, Clinton’s request for immunity is significantly different than Nixon’s.\textsuperscript{345} Clinton seeks immunity from suit for an incident which occurred prior to his assumption of office.\textsuperscript{346} Nixon sought, and received, immunity from suit for actions arising from official duties conducted during his time in office.\textsuperscript{347} In Fitzgerald, the Court expressly stated that the immunity extended to Nixon applied only to those acts arising within the “outer perimeter” of his official duties - not to unofficial acts.\textsuperscript{348} Clearly, Clinton's alleged acts did not occur within the “outer perimeter” of his official duty as President.\textsuperscript{349} Instead, they allegedly occurred in his personal capacity when he was Governor of Arkansas.\textsuperscript{350}

Second, the rationale behind the Court’s decision in Fitzgerald, that immunity from civil suits would allow the President to perform his official duties without fear of civil liability, is inapplicable in this

\begin{itemize}
\item \textsuperscript{339} \textit{Id.}
\item \textsuperscript{340} Biegon, 82 VA. L. REV. at 714.
\item \textsuperscript{341} \textit{Id.}
\item \textsuperscript{342} \textit{See supra} notes 315-41 and accompanying text.
\item \textsuperscript{343} \textit{See supra} notes 77-89 and accompanying text.
\item \textsuperscript{344} \textit{See infra} notes 345-63 and accompanying text.
\item \textsuperscript{345} \textit{See infra} notes 346-47 and accompanying text.
\item \textsuperscript{346} \textit{Jones}, 72 F.3d at 1357.
\item \textsuperscript{347} \textit{Fitzgerald}, 457 U.S. at 749.
\item \textsuperscript{348} \textit{Id.} at 759 (Burger, C.J., concurring).
\item \textsuperscript{349} \textit{Jones}, 72 F.3d at 1359. The only exception would possibly be Jones' defamation of character claim. \textit{Id.} at 1359 n.7. The events giving rise to this claim took place after Clinton's election through statements made by his representatives. \textit{Id.}
\item \textsuperscript{350} \textit{See supra} notes 29-42 and accompanying text.
\end{itemize}
Clinton's alleged acts took place before he assumed the Presidency and did not implicate the making of any executive decisions.\textsuperscript{352} Third, as the Eighth Circuit correctly recognized, the Constitution does not support extension of Presidential immunity beyond the boundaries delineated by Fitzgerald.\textsuperscript{353} No court has ever held that a President is immune from suit predicated upon their unofficial actions.\textsuperscript{354} Nor is such a concept supported by the Constitution.\textsuperscript{355} In fact, the President is merely a "creature of the Constitution" and subject to the same laws as everyone else.\textsuperscript{356}

Finally, as the Supreme Court has recognized, an executive official is not immune from civil suit if he knew or should have known that his actions would violate the constitutional rights of another, or if his actions were taken with the malicious intention to deprive another of her constitutional rights.\textsuperscript{357} Thus, if Jones' allegations concerning Clinton's actions are true, Clinton is not entitled to immunity because he presumably would have known that his actions constituted a violation of Jones' constitutional rights.\textsuperscript{358}

Because of the aforementioned reasons, the Eighth Circuit's decision allowing Jones to proceed with her claims was correct.\textsuperscript{359} Jones and Clinton both have significant, competing interests regarding delay of the suit.\textsuperscript{360} However, due to the potential for prejudice that Jones could experience during a delay, her interests clearly outweigh Clinton's.\textsuperscript{361} Jones must not be denied her right to access the courts.\textsuperscript{362} Finally, recognizing that in Fitzgerald, Chief Justice Burger expressly stated that the President is not absolutely immune for non-official actions, the Eighth Circuit correctly refused to extend immunity to Clinton.\textsuperscript{363}

\textsuperscript{351} See infra note 352 and accompanying text.
\textsuperscript{352} See supra notes 29-42 and accompanying text.
\textsuperscript{353} Jones, 72 F.3d at 1359.
\textsuperscript{354} Id. at 1361-62.
\textsuperscript{355} Id. at 1363.
\textsuperscript{356} Mississippi v. Johnson, 71 U.S. 475, 478-79 (1866).
\textsuperscript{358} See Halperin, 606 F.2d at 1212 (stating "[t]he President, like all other citizens, is held to know the relevant law.").
\textsuperscript{359} See supra notes 344-58 and accompanying text.
\textsuperscript{360} See supra notes 286-343 and accompanying text.
\textsuperscript{361} See supra notes 315-43 and accompanying text.
\textsuperscript{362} See supra notes 148-49 and accompanying text.
\textsuperscript{363} See supra note 264 and accompanying text.
PRESIDENTIAL IMMUNITY

TWO OPTIONS FOR TEMPORARY PRESIDENTIAL IMMUNITY IN CIVIL CASES

Presumptive Amenability

Although a President is not entitled to absolute immunity from civil suits for acts arising outside the perimeter of his official duties, in certain instances a limited or temporary immunity should be applied.364 This proposed immunity would allow discovery to continue in all cases, but would allow trial to be delayed if the circumstances required such.365

A doctrine in which the President is presumptively amenable to civil lawsuits would serve both the interests of potential plaintiffs and the President.366 The presumption of amenability would be rebuttable if the President could demonstrate that circumstances implicating national interests required his immediate and complete attention.367 Additionally, the stay would only need to be granted for as long as the crisis requiring the President's attention existed.368

Application of the presumption of amenability test to Jones' pending case against Clinton should result in the presumption that trial would be allowed to proceed.369 However, in the event that Clinton could prove that circumstances implicating national interests and requiring his immediate and complete attention existed, he would be entitled to a delay in trial, at least until the crisis passed.370

AN ALTERNATIVE TO THE PRESUMPTION OF AMENABILITY

An alternative to the presumption of amenability is an examination of each case individually to determine whether the facts merit the distraction of the President which would undoubtedly occur.371 The factors which should be considered in this approach include: (1) the level of intrusion on the President's time; (2) the practicability of delaying the case; and (3) the amount of out-of-pocket losses by the plaintiff which require immediate recoupment.372

364. See infra notes 365-70 and accompanying text.
365. See infra note 370 and accompanying text.
367. Beaupre, 36 B.C. L. Rev. at 764. For example, during the Cuban Missile Crisis President Kennedy would have been entitled to a grant of temporary immunity had an individual pursued a suit against him based on civil damages. Id.
368. Beaupre, 36 B.C. L. Rev. at 766.
369. See supra notes 315-43 and accompanying text.
370. See supra note 365 and accompanying text.
371. See infra note 372 and accompanying text.
Clearly, not all lawsuits would necessarily be equally distracting to the President.\textsuperscript{373} For example, a lawsuit filed to quiet title to a remote piece of land would be less distracting to a President than larger and more complex lawsuits and would weigh in favor of delaying trial.\textsuperscript{374}

Further, some cases would be more difficult than others to try after a long delay.\textsuperscript{375} Additionally, some cases require a more prompt resolution than others.\textsuperscript{376} The lawsuits in which the plaintiff has an immediate personal interest at stake, such as divorce, child custody or child support actions, should be allowed to proceed.\textsuperscript{377}

Application of these factors to the case at hand results in the conclusion that the litigation should be stayed until Clinton leaves office.\textsuperscript{378} First, this case could result in great demands on the President's time.\textsuperscript{379} Second, by allowing discovery to continue, Jones would not be subjected to the problems which could occur if witnesses died, disappeared, were rendered incapacitated, or became forgetful because of the passage of time.\textsuperscript{380} Finally, this is not a case in which the plaintiff requires quick recovery for the damages that she allegedly suffered like a true personal injury suit where the plaintiff would have outstanding medical bills.\textsuperscript{381} This conclusion is evidenced by the fact that Jones waited almost three years to bring suit, and delaying her right to recover will not cause her unnecessary inconvenience.\textsuperscript{382}

**CONCLUSION**

The United States Court of Appeals for the Eighth Circuit in *Jones v. Clinton*\textsuperscript{383} was correct in holding that President Clinton was not entitled to absolute immunity for nonofficial acts occurring prior to his assumption of office. A holding to the contrary would place the President above the law in disregard of Paula Jones' constitutional rights.

Despite the allegations that Jones' motives in filing suit are political or financial, Jones, like all other United States citizens, is entitled to her day in court. Sufficient procedures are available to pierce sham pleadings. However, if the court had granted Clinton's request delay-

\textsuperscript{373} Biegon, 82 Va. L. Rev. at 715.
\textsuperscript{374} Id.
\textsuperscript{375} Amar & Katyal, 108 Harv. L. Rev. at 721.
\textsuperscript{376} Jones, 869 F. Supp. 698-99.
\textsuperscript{377} See id. at 698-99.
\textsuperscript{378} See infra notes 379-82 and accompanying text.
\textsuperscript{379} Jones, 869 F. Supp. at 699.
\textsuperscript{380} Id.
\textsuperscript{381} Id.
\textsuperscript{382} Id.
\textsuperscript{383} 72 F.3d 1354 (8th Cir.), cert. granted, 116 S. Ct. 2545 (1996).
ing all of the proceedings until he left office, Jones could have been severely prejudiced and deprived of her right to a fair opportunity to prove the legitimacy of her claims. In the worst case scenario for Jones, Clinton would not leave the Presidential office until the year 2001. This is approximately ten years after the alleged incident occurred.

The problems which could arise during a delay in the proceedings are numerous. Not only could evidence be lost or destroyed, but memories could fade and people could disappear or die. This loss of evidence could prevent Jones from effectively presenting her case. Thus, she would literally be denied her day in court.

Additionally, it is possible that Clinton's request for immunity is a political ploy to preserve his reputation. Clinton's appeal to the Eighth Circuit delayed this lawsuit for a period of nearly one and one-half years. Clinton's appeal to the United States Supreme Court effectively delayed the trial even longer, and coincidentally, until after the 1996 election. However, if a presumption of amenability test were employed, Jones would only be deprived of her day in court if Clinton could demonstrate that there was a crisis requiring his complete Presidential attention.

On the other hand, it is obvious that a certain amount of respect and deference must be afforded to the President. After all, the President is arguably the most powerful and visible person in the world. Further, Clinton, as President, is certainly in an important and unique position which enables him to provide leadership to the entire free world. Thus, a presumption of amenability in a case, such as Jones’ where there is no immediate need for relief, would place the President in a precarious position. Accordingly, by allowing discovery to proceed while delaying trial, both Jones’ and Clinton’s interests could be effectively achieved. This solution would reinforce the Supreme Court’s prior holdings that a person is entitled to utilize the courts to redress a wrong as well as the fact that “no man in the country is above the law.”