CLINTON v. JONES

SUPREME COURT OF THE UNITED STATES
520 US 681
May 27, 1997

OPINION: JUSTICE STEVENS...This case raises a constitutional and a prudential question concerning the Office of the President of the United States. [Paula Jones], a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and re-elected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants. The complaint alleges two federal claims, and two state law claims over which the federal court has jurisdiction because of the diverse citizenship of the parties. As the case comes to us, we are required to assume the truth of the detailed--but as yet untested--factual allegations in the complaint.

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the **Excelsior Hotel in Little Rock, Arkansas**. The Governor delivered a speech at the conference; respondent--working as a state employee--staffed the registration desk. **She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel**, where he made "abhorrent" sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner's alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred.

Respondent seeks actual damages of $75,000, and punitive damages of $100,000. Her complaint contains four counts. The first charges that petitioner, acting under color of state law, deprived her of rights protected by the Constitution, in violation of *42 U.S.C. §1983*. The second charges that petitioner and Ferguson engaged in a conspiracy to violate her federal rights, also actionable under federal law. The third is a state common-law claim for intentional infliction of emotional distress, grounded primarily on the incident at the hotel. The fourth count, also based on state law, is for defamation, embracing both the comments allegedly made to the press by Ferguson and the statements of petitioner's agents. Inasmuch as the legal sufficiency of the claims has not yet been challenged, we assume, without deciding, that each of the four counts states a cause of action as a matter of law. With the exception of the last charge, which arguably may involve conduct within the outer perimeter of the President's official responsibilities, **it is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.**

In response to the complaint, petitioner promptly advised the District Court that he intended to file a motion to dismiss on grounds of **Presidential immunity**, and requested the court to defer all other pleadings and motions until after the immunity issue was resolved. Relying on our cases holding that immunity questions should be decided at the earliest possible stage of the litigation, our recognition of the "singular importance of the President's duties" and the fact that the question did not require any analysis of the allegations of the complaint, the court granted the request. Petitioner thereupon filed a motion "to dismiss...without prejudice and to toll any statutes of limitation [that may be applicable] until he is no longer President, at which time the plaintiff may refile the instant suit."...

The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency. Although she recognized that a "thin majority" in *Nixon v. Fitzgerald (1982)* had held that "the President has absolute immunity from civil damage actions arising out of the execution of official duties of office," she was not convinced that "a President has absolute immunity from civil causes of action arising prior to assuming the office." She was, however, persuaded by some of the reasoning in our opinion in *Fitzgerald* that deferring the trial if one were required would be appropriate. Relying in part on the fact that respondent had failed to bring her complaint until two days before the 3-year period of limitations expired, she concluded that the public interest in avoiding litigation that might hamper the President in conducting the duties of his office outweighed any demonstrated need for an immediate trial.

Both parties appealed. A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss, but because it regarded the order postponing the trial until the President leaves office as the "functional equivalent" of a grant of temporary immunity, it reversed that order. Writing for the majority, Judge Bowman explained that "the President, like all other government officials, is subject to the same laws that apply to all other members of our society," that he could find no "case in which any public official ever has been granted any immunity from suit for his unofficial acts," and that the rationale for official immunity "is inapposite where only personal, private conduct by a President is at issue." The majority specifically rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch through scheduling orders, potential contempt citations, and sanctions would violate separation of powers principles. Judge Bowman suggested that "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," would avoid the perceived danger.

In dissent, Judge Ross submitted that even though the holding in *Fitzgerald* involved official acts, the logic of the opinion, which "placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages," applies with equal force to this case. In his view, "unless exigent circumstances can be shown," all private actions for damages against a sitting President must be stayed until the completion of his term. In this case, Judge Ross saw no reason why the stay would prevent respondent from ultimately obtaining an adjudication of her claims.

In response to the dissent, Judge Beam wrote a separate concurrence. He suggested that a prolonged delay may well create a significant risk of irreparable harm to respondent because of an unforeseeable loss of evidence or the possible death of a party. Moreover, he argued that in civil rights cases brought under §1983 there is a "public interest in an ordinary citizen's timely vindication of...her most fundamental rights against alleged abuse of power by government officials." In his view, the dissent's concern about judicial interference with the functioning of the Presidency was "greatly overstated." Neither the involvement of prior presidents in litigation, either as parties or as witnesses, nor the character of this "relatively uncomplicated civil litigation," indicated that the threat was serious. Finally, he saw "no basis for staying discovery or trial of the claims against Trooper Ferguson."

...Petitioner's principal submission--that "in all but the most exceptional cases," the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office--cannot be sustained on the basis of precedent.

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office. Complaints against **Theodore Roosevelt** and **Harry Truman** had been dismissed before they took office; the dismissals were affirmed after their respective inaugurations. Two companion cases arising out of an automobile accident were filed against **John F. Kennedy** in 1960 during the Presidential campaign. After taking office, he unsuccessfully argued that his status as Commander in Chief gave him a right to a stay under the Soldiers' and Sailors' Civil Relief Act of 1940. The motion for a stay was denied by the District Court, and the matter was settled out of court. Thus, none of those cases sheds any light on the constitutional issue before us.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is <u>inapplicable to unofficial conduct</u>. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability. We explained in *Ferri v. Ackerman* (1979):

> "As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion."

That rationale provided the principal basis for our holding that a former President of the United States was "entitled to **absolute immunity** from damages liability predicated on his **official acts**." Our central concern was to avoid rendering the President "unduly cautious in the discharge of his official duties."

This reasoning provides no support for an immunity for *unofficial* conduct. As we explained in *Fitzgerald*, "the sphere of protected action must be related closely to the immunity's justifying purposes." Because of the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity...

Moreover, when defining the scope of an immunity for acts clearly taken *within* an official capacity, we have applied a functional approach. "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." Hence,

for example, a judge's absolute immunity does not extend to actions performed in a purely **administrative capacity**. As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it."

> For example, if he were ever to drive a vehicle in traffic, a President would not be immune for civil damages arising out of his negligence in spite of the fact that he was on "official business" at the time of running the stop sign.

Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.

We are also unpersuaded by the evidence from the historical record to which petitioner has called our attention. He points to a comment by Thomas Jefferson protesting the *subpoena duces tecum* Chief Justice Marshall directed to him in the Burr trial, a statement in the diaries kept by Senator William Maclay of the first Senate debates, in which then Vice-President John Adams and Senator Oliver Ellsworth are recorded as having said that "the President personally [is] not...subject to any process whatever," lest it be "put...in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government" and to a quotation from Justice Story's Commentaries on the Constitution. None of these sources sheds much light on the question at hand.

Respondent, in turn, has called our attention to conflicting historical evidence. Speaking in favor of the Constitution's adoption at the Pennsylvania Convention, James Wilson--who had participated in the Philadelphia Convention at which the document was drafted--explained that, although the President "is placed on high," "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." This description is consistent with both the doctrine of presidential immunity as set forth in *Fitzgerald*, and rejection of the immunity claim in this case. With respect to acts taken in his "public character"-- that is official acts--the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.

In the end, as applied to the particular question before us, we reach the same conclusion about these historical materials that Justice Jackson described when confronted with an issue concerning the dimensions of the President's power. "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side...They largely cancel each other." *Youngstown Sheet & Tube Co. v. Sawyer*.[1]

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[1]Case 2-13 on this website.

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a **postponement** of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation of powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that--given the nature of the office--the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. Former presidents, from George Washington to George Bush, have consistently endorsed petitioner's characterization of the office. After serving his term, Lyndon Johnson observed: "Of all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 A.M., and there were few mornings when I didn't wake up by 6 or 6:30." In 1967, the Twenty-fifth Amendment to the Constitution was adopted to ensure continuity in the performance of the powers and duties of the office; one of the sponsors of that Amendment stressed the importance of providing that "at all times" there be a President "who has complete control and will be able to perform" those duties. As Justice Jackson has pointed out, the Presidency concentrates executive authority "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer* (Jackson, J., concurring). We have, in short, long recognized the "unique position in the constitutional scheme" that this office occupies. Thus, while we suspect that even in our modern era there remains some truth to Chief Justice Marshall's suggestion that the duties of the Presidency are not entirely "unremitting," *United States v. Burr*[2], we accept the initial premise of the Executive's argument.

It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers "built into the tripartite Federal Government...a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Thus, for example, the Congress may not exercise the judicial power to revise final judgments, *Plaut v. Spendthrift Farm, Inc.*, (1995), or the executive power to manage an airport, see *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc. (1991)* (holding that "if the power is executive, the Constitution does not permit an agent of Congress to exercise it"). *J. W. Hampton, Jr., & Co. v. United States (1928)* (Congress may not "invest itself or its members with either executive power or judicial power"). Similarly, the

[2]Case 3-2 on this website.

President may not exercise the legislative power to authorize the seizure of private property for public use. *Youngstown.* And, the judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive, or permit the federal courts to resolve nonjusticiable questions.

Of course the lines between the powers of the three branches are not always neatly defined. But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that--as a by-product of an otherwise traditional exercise of judicial power--burdens will be placed on the President that will hamper the performance of his official duties. We have recognized that "even when a branch does not arrogate power to itself...the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States* (1996). As a factual matter, petitioner contends that this particular case--as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn--may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, **only three sitting Presidents** have been subjected to suits for their private actions. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. "Our...system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively." As Madison explained, separation of powers does not mean that the branches "ought to have no *partial agency* in, or no *control* over the acts of each other." The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. *Youngstown Sheet & Tube Co. v. Sawyer*. Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law. Our holding was an application of the principle established in *Marbury v. Madison*[3], that "it is emphatically the province and duty of the judicial department to say what the law is."

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a *subpoena duces tecum* could be directed to the President. *United States v. Burr*. We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. As we explained, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."

Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty. President Monroe responded to written interrogatories; President Nixon... produced tapes in response to a *subpoena duces tecum;* President Ford complied with an order to give a deposition in a criminal trial, *United States v. Fromme*; and President Clinton has twice given videotaped testimony in criminal proceedings...Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case under such circumstances and President Carter similarly gave videotaped testimony for use at a criminal trial.

In sum, "it is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. **The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.** We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

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[3]Case 6-2 on this website.

Ludicrous! The Court is saying that the burden on a President's time and energy of defending a lawsuit SURELY cannot be considered as onerous as that same burden imposed on him in the appellate review of a case to determine whether or not he should be required to defend the case in chief. Pray tell! SURELY the Court does not have a crystal ball on such matters and SURELY the President's lawyers will handle the appeal, while it is the President himself who must participate directly in a lawsuit.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay "in all but the most exceptional cases." Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" subcategory. In all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution. Accordingly, we turn to the question whether the District Court's decision to stay the trial until after petitioner leaves office was an abuse of discretion.

The Court of Appeals described the District Court's discretionary decision to stay the trial as the "functional equivalent" of a grant of temporary immunity. Concluding that petitioner was not constitutionally entitled to such an immunity, the court held that it was error to grant the stay. Although we ultimately conclude that the stay should not have been granted, we think the issue is more difficult than the opinion of the Court of Appeals suggests.

Strictly speaking the stay was not the functional equivalent of the constitutional immunity that petitioner claimed, because the District Court ordered discovery to proceed. Moreover, a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity. The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. As we have explained, "especially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.

Nevertheless, we are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period--albeit near the end of that period--and delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.

The decision to postpone the trial was, furthermore, premature...We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment. History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition--especially in matters involving national security--of giving "the utmost deference to Presidential responsibilities." Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests. If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

CONCURRENCE: JUSTICE BREYER...[O]nce the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle--a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire "executive Power" in a single individual, implemented through the Constitution's structural separation of powers, and revealed both by history and case precedent...

The Constitution states that the "executive Power shall be vested in a President." U.S. Const., Art. II, §1. This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. He (along with his constitutionally subordinate Vice President) is the only official for whom the entire Nation votes, and is the only elected officer to represent the entire Nation both domestically and abroad.

This constitutional delegation means still more. Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. It thereby creates a constitutional equivalence between a single President, on the one hand, and many legislators, or judges, on the other.

The Founders created this equivalence by consciously deciding to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. Compare U.S. Const., Art. II, §1 (vesting power in "a President") with U.S. Const., Art. I, §1 (vesting power in "a Congress" that "consists of a Senate and House of Representatives") and U.S. Const., Art. III, §1 (vesting power in a "supreme Court" and "inferior Courts").

The authority explaining the nature and importance of this decision is legion. For present purposes, this constitutional structure means that the President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent, see U.S. Const., Art. I, §5, cl. 1. It means that the President is not like the Judiciary, for judges often can designate other judges, *e.g.,* from other judicial circuits, to sit even should an entire court be detained by personal litigation. It means that, unlike Congress, which is regularly out of session, U.S. Const., Art. I, §§ 4, 5, 7, **the President never adjourns.**

More importantly, these constitutional objectives explain why a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it. And the related constitutional equivalence between President, Congress, and the Judiciary, means that judicial scheduling orders in a private civil case must not only take reasonable account of, say, a particularly busy schedule, or a job on which others critically depend, or an underlying electoral mandate. They must also reflect the fact that interference with a President's ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out their public obligations.

The leading case regarding Presidential immunity from suit is *Nixon* v. *Fitzgerald*. Before discussing *Fitzgerald*, it is helpful to understand the historical precedent on which it relies. While later events have called into question some of the more extreme views on Presidential immunity, the essence of

the Constitutional principle remains true today. The historical sources, while not in themselves fully determinative, in conjunction with this Court's precedent inform my judgment that the Constitution protects the President from judicial orders in private civil cases to the extent that those orders could significantly interfere with his efforts to carry out his ongoing public responsibilities.

Three of the historical sources this Court cited in *Fitzgerald* --a commentary by Joseph Story, an argument attributed to John Adams and Oliver Ellsworth, and a letter written by Thomas Jefferson--each make clear that this is so.

First, Joseph Story wrote in his Commentaries:

> "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 those, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. 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 interpreted by this Court in *Nixon* v. *Fitzgerald,* the words "for this purpose" would seem to refer to the President's need for "official inviolability" in order to "perform" the duties of his office without "obstruction or impediment." As so read, Story's commentary does not explicitly define the contours of "official inviolability." But it does suggest that the "inviolability" is timebound ("while... in the discharge of the duties of his office"); that it applies in private lawsuits (for it attaches to the President's "person" in "civil cases"); and that it is functional ("necessarily implied from the nature of the [President's] functions").

Since *Nixon* did not involve a physical constraint, the Court's reliance upon Justice Story's commentary makes clear, in the Court's view, that the commentary does not limit the scope of "inviolability" to an immunity from a physical imprisonment, physical detention, or physical "arrest"--a now abandoned procedure that permitted the arrest of certain civil case defendants (*e.g.,* those threatened by bankruptcy) during a civil proceeding.

I would therefore read Story's commentary to mean what it says, namely that Article II implicitly grants an "official inviolability" to the President "while he is in the discharge of the duties of his office," and that this inviolability must be broad enough to permit him "to perform" his official duties without "obstruction or impediment." As this Court has previously held, the Constitution may grant this kind of protection implicitly; it need not do so explicitly.

Second, during the first Congress, then-Vice President John Adams and then-Senator Oliver Ellsworth expressed a view of an applicable immunity far broader than any currently asserted. Speaking of a sitting President, they said 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." They included in their claim a kind of immunity from criminal, as well as civil, process. They responded to a counter argument--that the President "was not above the laws," and would have to be arrested if guilty of crimes--by stating that the President would first have to be impeached, and could then be prosecuted. This court's rejection of Adams' and Ellsworth's views in the context of criminal proceedings does not deprive those views of authority here. Nor does the fact that Senator William Maclay, who reported the views of Adams and Ellsworth, "went on to point out in his diary that he virulently disagreed with them." Maclay, unlike Adams and Ellsworth, was not an important political figure at the time of the constitutional debates.

Third, in 1807, a sitting President, Thomas Jefferson, during a dispute about whether the federal courts could subpoena his presence in a criminal case, wrote the following to United States Attorney George Hay:

> "The leading principle of our Constitution is the independence of the Legislature, 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?"

Three days earlier Jefferson had written to the same correspondent:

> "To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not then mean that it should be withdrawn from its station by any co-ordinate authority."

Jefferson, like Adams and Ellsworth, argued strongly for an immunity from both criminal and civil judicial process--an immunity greater in scope than any immunity, or any special scheduling factor, now at issue in the civil case before us. The significance of his views for present purposes lies in his conviction that the Constitution protected a sitting President from litigation that would "withdraw" a President from his current "constitutional duties." That concern may not have applied to Mr. Fitzgerald's 1982 case against a *former* President, but it is at issue in the current litigation.

Precedent that suggests to the contrary--that the Constitution does *not* offer a sitting President significant protections from potentially distracting civil litigation--consists of the following: (1) In several instances sitting Presidents have given depositions or testified at criminal trials, and (2) this Court has twice authorized the enforcement of subpoenas seeking documents from a sitting President for use in a criminal case.

I agree with the majority that these precedents reject any absolute Presidential immunity from all

court process. But they do not cast doubt upon Justice Story's basic conclusion that "in civil cases," a sitting President "possesses an official inviolability" as necessary to permit him to "perform" the duties of his office without "obstruction or impediment."

The first set of precedents tells us little about what the Constitution commands, for they amount to voluntary actions on the part of a sitting President. The second set of precedents amounts to a search for documents, rather than a direct call upon Presidential time. More important, both sets of precedents involve *criminal* proceedings in which the President participated as a witness. Criminal proceedings, unlike private civil proceedings, are public acts initiated and controlled by the Executive Branch; they are not normally subject to postponement, see U.S. Const., Amdt. 6; and ordinarily they put at risk, not a private citizen's hope for monetary compensation, but a private citizen's freedom from enforced confinement. Nor is it normally possible in a criminal case, unlike many civil cases, to provide the plaintiff with interest to compensate for scheduling delay.

The remaining precedent to which the majority refers does not seem relevant in this case. That precedent, *Youngstown Sheet & Tube Co. v. Sawyer*, concerns *official* action. And any Presidential time spent dealing with, or action taken in response to, that kind of case *is* part of a President's official duties. Hence court review in such circumstances could not interfere with, or distract from, official duties. Insofar as a court orders a President, in any such a proceeding, to act or to refrain from action, it defines, or determines, or clarifies, the legal scope of an official duty. By definition (if the order itself is lawful), it cannot impede, or obstruct, or interfere with, the President's basic task--the lawful exercise of his Executive authority. Indeed, if constitutional principles counsel caution when judges consider an order that directly requires the President properly to carry out his official duties, see *Franklin v. Massachusetts (1992)* (SCALIA, J., concurring in part and concurring in judgment) (describing the "apparently unbroken historical tradition...implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular Executive acts); so much the more must those principles counsel caution when such an order threatens to *interfere* with the President's properly carrying out those duties.

Case law, particularly, *Nixon* v. *Fitzgerald,* strongly supports the principle that judges hearing a private civil damages action against a sitting President may not issue orders that could significantly distract a President from his official duties. In *Fitzgerald*, the Court held that former President Nixon was absolutely immune from civil damage lawsuits based upon any conduct within the "outer perimeter" of his official responsibilities. **The holding rested upon six determinations that are relevant here.**

First, the Court found that the Constitution assigns the President *singularly* important duties (thus warranting an "absolute," rather than a "qualified," immunity). Second, the Court held that "recognition of immunity" does not require a "specific textual basis" in the Constitution. Third, although physical constraint of the President was not at issue, the Court nevertheless considered Justice Story's constitutional analysis as "persuasive." Fourth, the Court distinguished contrary precedent on the ground that it involved criminal, not civil, proceedings. Fifth, the Court's concerns encompassed the fact that "the sheer prominence of the President's office" could make him "an easily

identifiable target for suits for civil damages." Sixth, and most important, the Court rested its conclusion in important part upon the fact that civil lawsuits "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."

The majority argues that this critical, last-mentioned, feature of the case is dicta. In the majority's view, since the defendant was a former President, the lawsuit could not have *distracted* him from his official duties; hence the case must rest entirely upon an alternative concern, namely that a President's fear of civil lawsuits based upon his official duties could *distort* his official decisionmaking. The majority, however, overlooks the fact that *Fitzgerald* set forth a single immunity (an absolute immunity) applicable *both* to sitting *and* former Presidents. Its reasoning focused upon both. Its key paragraph, explaining why the President enjoys an absolute immunity rather than a qualified immunity, contains seven sentences, four of which focus primarily upon time and energy *distraction* and three of which focus primarily upon official decision *distortion*. Indeed, that key paragraph begins by stating:

> "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."

Moreover, the Court, in numerous other cases, has found the problem of time and energy distraction a critically important consideration militating in favor of a grant of immunity...The cases ultimately turn on an assessment that the threat that a civil damage lawsuit poses to a public official's ability to perform his job properly. And, whether they provide an absolute immunity, a qualified immunity, or merely a special procedure, they ultimately balance consequent potential public harm against private need. Distraction and distortion are equally important ingredients of that potential public harm. Indeed, a lawsuit that significantly distracts an official from his public duties can distort the content of a public decision just as can a threat of potential future liability. If the latter concern can justify an "absolute" immunity in the case of a President no longer in office, where distraction is no longer a consideration, so can the former justify, not immunity, but a postponement, in the case of a sitting President.

The majority points to the fact that private plaintiffs have brought civil damage lawsuits against a sitting President only three times in our Nation's history; and it relies upon the threat of sanctions to discourage, and "the court's discretion" to manage, such actions so that "interference with the President's duties would not occur." I am less sanguine. Since 1960, when the last such suit was filed, the number of civil lawsuits filed annually in Federal District Courts has increased from under 60,000 to about 240,000; the number of federal district judges has increased from 233 to about 650; the time and expense associated with both discovery and trial have increased*;* an increasingly complex economy has led to increasingly complex sets of statutes, rules and regulations, that often create potential liability, with or without fault. And this Court has now made clear that such lawsuits may proceed against a sitting President. The consequence, as the Court warned in *Fitzgerald,* is that a sitting President, given "the visibility of his office," could well become "an easily identifiable target

for suits for civil damages." The threat of sanctions could well discourage much unneeded litigation, but some lawsuits (including highly intricate and complicated ones) could resist ready evaluation and disposition; and individual district court procedural rulings could pose a significant threat to the President's official functions...

A Constitution that separates powers in order to prevent one branch of Government from significantly threatening the workings of another could not grant a single judge more than a very limited power to second guess a President's reasonable determination (announced in open court) of his scheduling needs, nor could it permit the issuance of a trial scheduling order that would significantly interfere with the President's discharge of his duties--in a private civil damage action the trial of which might be postponed without the plaintiff suffering enormous harm. As Madison pointed out in The Federalist No. 51, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." I agree with the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I believe to be an **understatement of the "danger."** And I believe that ordinary case-management principles are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based require-ment that district courts schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities...