CONSTITUTIONAL LAW FOR A CHANGING AMERICA

A SHORT COURSE

1995–1998 SUPPLEMENT

LEE EPSTEIN AND THOMAS G. WALKER

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LEE EPSTEIN
WASHINGTON UNIVERSITY

THOMAS G. WALKER
EMORY UNIVERSITY

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CONTENTS

In its three terms since the publication of *Constitutional Law for a Changing America: A Short Course,* the Supreme Court has handed down several particularly important constitutional rulings. These cases dealt with both government powers and individual liberties. The justices examined executive power in two cases involving President Bill Clinton. In *Clinton v. Jones* (1997) the justices looked at the president's immunity from civil lawsuits, and in *Clinton v. City of New York* (1998) the issue was the constitutionality of the line item veto. Federalism dominated a challenge to the constitutionality of the "Brady" gun control law in *Printz v. United States* (1997). The case asked whether the federal government could command state and local officials to implement federal policy.

In *Reno v. American Civil Liberties Union* (1997) the justices for the first time confronted government regulation of expression on the Internet. The explosive issue of physician-assisted suicide was the subject of *Washington v. Glucksberg* (1997). In *Romer v. Evans* (1996) the justices handed down their much anticipated ruling on a Colorado constitutional amendment that prohibited state and local governments from granting protected status to gays and bisexuals. This decision was the Court's first major statement on discrimination based on sexual orientation. And in *United States v. Virginia* (1996) the Court looked at the constitutionality of all-male state military schools. As these decisions demonstrate, each year the Supreme Court continues to hand down rulings that shape the government of the United States and the rights of its citizens.

Students wishing to read the full text of the Supreme Court opinions excerpted in this supplement will find them in the official *United States Reports,* available in all law libraries and at many college and public libraries. The opinions are also available on the Internet. Navigate to: *http://supct.law.cornell.edu/supct/index.html.*

CHAPTER 5

THE EXECUTIVE

PRESIDENTIAL IMMUNITY FROM CIVIL LAWSUITS

The case of *Clinton v. Jones* was surrounded by political intrigue and scandal. Paula Corbin Jones, a former state employee, had sued President Bill Clinton for making "abhorrent" sexual advances in a Little Rock hotel room while he was governor of Arkansas. Heated public arguments followed over whether this was a case of inexcusable sexual harassment or a groundless, politically motivated lawsuit designed to undermine and embarrass the president. Political rhetoric aside, the case presented a major constitutional issue: Can a sitting president be required to stand trial in a civil case on allegations concerning his unofficial conduct? Jones supporters argued that the president is not immune from lawsuit and that Jones, like any other citizen, has the right to have a prompt judicial determination on her claims of being unlawfully treated. Clinton supporters argued that the chief executive should be immune from standing trial during his term of office. Allowing a trial to proceed would divert the president's attention from his official duties, they claimed, and the situation would be made worse by the rash of civil lawsuits that inevitably would follow.

Clinton v. Jones

___ U.S. ___ (1997)

Vote: 9 (Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas)
0
Opinion of the Court: Stevens
Concurring opinion: Breyer

Bill Clinton was elected to the presidency in 1992 and reelected in 1996 to a term ending January 20, 2001. Prior to becoming president Clinton was the governor of Arkansas. In 1994 Paula Corbin Jones filed suit in federal district court in Arkansas against Clinton and Arkansas state trooper Danny Ferguson over an alleged incident that occurred May 8, 1991, at the Excelsior Hotel in Little Rock. On the day in question Jones, then an employee of Arkansas's Industrial Development Commission, was working at the registration desk for a management conference at which Governor Clinton had delivered a speech. According to her allegations, Ferguson approached Jones, indicated that the governor wished to see her, and escorted her to Clinton's hotel suite. Jones and the governor were left alone in the room. The suit claimed that Clinton made "abhorrent" sexual advances to Jones, including exposing himself to her, touching her inappropriately, and making unwelcome sexual remarks. Jones said she rejected Clinton's advances, and the governor ceased to make them. As she was leaving the room, Jones alleged, the governor told her, "You are smart. Let's keep this between ourselves." Jones's suit claimed that after she returned to her state job her superiors began to treat her rudely, and she was ultimately transferred to another position that had little advancement potential. She attributed this harsh treatment to retaliation for her rejection of the governor. The suit asked for actual damages of $75,000 and punitive damages of $100,000 in compensation for Clinton's violation of state and federal civil rights and sexual harassment laws.

Clinton denied the allegations and claimed the lawsuit was politically motivated. He filed motions requesting the district court to dismiss the case on the grounds of presidential immunity and to prohibit Jones from refiling the suit until after the end of his presidency. The district judge rejected the presidential immunity argument, allowing pretrial discovery activities to proceed. However, she ordered that the trial be postponed until after Clinton left office. Both Jones and Clinton appealed. Holding that

"the President, like all other government officials, is subject to the same laws that apply to all other members of society," the court of appeals ruled that the trial should not be postponed. Clinton asked the Supreme Court to reverse the decision.

JUSTICE STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, 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. . . .

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 inapplicable to unofficial conduct. 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. . . .

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," [*Nixon v.*] *Fitzgerald* [1982]. 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 with-

in 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."

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. . . .

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. . . .

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. . . .

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. . . . 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. . . . 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. . . .

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. 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. *United States v. Nixon* (1974). 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—as noted above—produced tapes in response to a subpoena *duces tecum*, President Ford complied with an order to give a deposition in a criminal trial, and President Clinton has twice given videotaped testimony in criminal proceedings. Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. . . .

In sum, "[i]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald.*

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. . . .

. . . [W]e 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. The proponent of a stay bears the burden of establishing its need. . . . 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. . . . 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.

It is so ordered.

JUSTICE BREYER, concurring in the judgment.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. Nor does the "doctrine of separation of powers . . . require federal courts to stay" virtually "all private actions against the President until he leaves office." Rather, as the Court of Appeals stated, the President cannot simply rest upon the claim that a private civil lawsuit for damages will "interfere with the constitutionally assigned duties of the Executive Branch . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit." To obtain a postponement the President must "bea[r] the burden of establishing its need."

In my view, however, once 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.

I recognize that this case does not require us now to apply the principle specifically, thereby delineating its contours; nor need we now decide whether lower courts are to apply it directly or categorically through the use of presumptions or rules of administration. Yet I fear that to disregard it now may appear to deny it. I also fear that the majority's description of the relevant precedents de-emphasizes the extent to which they support a principle of the President's independent authority to control his own time and energy. . . .

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 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.

I concede the possibility that district courts, supervised by the Courts of Appeals and perhaps this Court, might prove able to manage private civil damage actions against sitting Presidents without significantly interfering with the discharge of Presidential duties—at least if they manage those actions with the constitutional problem in mind. Nonetheless, predicting the future is difficult, and I am skeptical. . . .

. . . The District Court in this case determined that the Constitution required the postponement of trial during the sitting President's term. It may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed; and I also agree that, in the absence of that explanation, the court's postponement of the trial date was premature. For those reasons, I concur in the result.

The Court's ruling in *Clinton v. Jones* was a significant defeat for the president. The justices held that a citizen's right to have a timely resolution of alleged legal wrongs was superior to the president's claim that he be immune from civil suits during his term of office. It is important to keep in mind that the ruling applies only to lawsuits involving the president's *unofficial* activities. Also note that the Court recognized the authority of the trial court judge to make adjustments in trial scheduling and procedures to accommodate the demands of the presidency.

CONSTITUTIONALITY OF THE LINE ITEM VETO ACT

In the 1996–1997 term the Court heard a challenge, *Raines v. Byrd* (1997), to the Line Item Veto Act. The act allowed the president to cancel certain tax and spending benefits after they had been signed into law. The Court dismissed the case, holding that the members of Congress who brought the suit had not "alleged a sufficiently concrete injury to have established Article III standing." In his concurring opinion, Justice David Souter expressed his belief that the day would eventually come when a party suffered a sufficient loss of federal funds to maintain a suit.

That day came in the very next term. In *Clinton v. City of New York* (1998), the justices found that the litigants had standing to challenge the act, and the Court decided the case on its merits. Read *Clinton* in conjunction with domestic powers of the president on pages 154–168 of *Constitutional Law for a Changing America: A Short Course.*

Clinton v. City of New York

_____ U.S. _____ (1998)

Vote: 6 (Ginsburg, Kennedy, Rehnquist, Souter, Stevens, Thomas)
3 (Breyer, O'Connor, Scalia)

A fundamental feature of the U.S. system of government is the way laws are made. Since the days of George Washington, Congress has passed bills and the president has been forced to decide whether to accept or reject them in their entirety. But this arrangement has not been wholly satisfactory to presidents. Beginning with Ulysses S. Grant, virtually all have sought to exercise what is commonly called a "line item veto"—a mechanism that would allow the president to cancel certain tax and spending benefits after they have signed them into law.

Presidents have offered various reasons for wanting the line item veto, but a common one is that because members of Congress must face periodic electoral checks, they often include in the federal budget "pork barrel" projects—those designed to appease constituents but that waste federal dollars. Examples of such unnecessary expenditures in the 1995 budget, according to the Clinton administration, included $70 million for a military housing facility, $58 million for university research facilities, and $1 billion for water resources. Because members of Congress are unable

to take fiscal responsibility and omit such items from the budget, the president should take on this responsibility by "canceling" particular expenditures. Or so the argument goes.

In 1996 Congress finally agreed, enacting the Line Item Veto Act, which stated:

> [T]he President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit; if the President—
>
> (A) determines that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and
>
> (B) notifies the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies].

The act contained two other important provisions. First, although it gave the president the power to rescind various expenditures, it established a check on his ability to do so. Congress could consider "disapproval bills"—those that would render the president's cancellation "null and void." In other words, Congress could restore presidential cuts but, it is worth noting, new congressional legislation would be subject to a presidential veto. Second, the act stated, "Any Member of Congress or any individual adversely affected by [this act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution."

On January 2, 1997, just one day after the act went into effect, six members of Congress who voted against it took advantage of this provision, and brought suit in federal court against Secretary of the Treasury Robert E. Rubin and Director of the Office of Management and Budget Franklin D. Raines. These legislators argued that the act violated Article I of the Constitution (see, especially, Article I, section 7). In their view, it "unconstitutionally expands the President's power," and "violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to 'cancel' and thus repeal provisions of feder-

al law." They further asserted that the act injured them "directly and concretely . . . in their official capacities" by (1) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items; (2) divesting them of their constitutional role in the repeal of legislation; and (3) altering the constitutional balance of powers between the legislative and executive branches.

Attorneys for the executive branch officials disagreed. They argued that the legislators lacked standing to sue and that their claim was not ripe, meaning that the president had not yet used the new veto authority.

The lower court agreed with the members of Congress, and executive branch officials appealed to the U.S. Supreme Court. Because the act directed the Court to hear as soon as possible any suit challenging its constitutionality, the justices established an expedited briefing schedule. They heard oral argument in the case of *Raines v. Byrd* on May 27, 1997, a little more than a month after the lower court's decision.

But, after all this, the Court dismissed the case. Writing for the majority, Chief Justice Rehnquist held that the suit was not a real case or controversy because the members of Congress were "not the right" litigants. After the Court's decision, President Clinton invoked the line item veto to cancel more than eighty items, including a provision of the Balanced Budget Act of 1997, which provided money for New York City hospitals, and a section of the Taxpayer Relief Act of 1997, which gave a tax break to potato growers in Idaho. These steps were immediately challenged by the affected parties. Those in the first case were the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The parties in the second were a farmers' cooperative and one of its members.

A federal district court consolidated the cases, determined that at least one of the plaintiffs in each case had standing under Article III, and ruled that the Line Item Veto Act violated the Presentment Clause (Article I, section 7, clause 2.

JUSTICE STEVENS delivered the opinion of the Court.

Less than two months after our decision in [*Raines*], the President exercised his authority to cancel one provision in the Balanced Budget Act of 1997 and two provisions in the Taxpayer Relief Act of 1997. Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court again held the statute invalid and we again expedited our review. We now hold that these appellees have standing to challenge the constitutionality of the Act, and, reaching the merits, we agree that the cancellation procedures set