

Justice Delayed is Justice Denied

*Erwin Chemerinsky**

There is a great irony in reading the *amicus* briefs filed in the Supreme Court in *Clinton v. Jones*.¹ While liberals generally favor narrow immunity for government officials, a group of unabashedly liberal law professors — Akhil Amar, Susan Bloch, Susan Estrich, Richard Fallon, Daniel Farber, Phillip Frickey, Paul Gewirtz, John Jeffries, Pamela Karlan, Sanford Levinson, Burke Marshall, Judith Resnik, Suzanna Sherry, Steven Shiffrin, Kathleen Sullivan and Laurence Tribe — have joined in an *amicus* brief urging the Court to grant President Clinton temporary immunity from Paula Jones' suit for sexual harassment.² At the same time, while conservatives generally have championed expanding immunity for government officials, a far more conservative group of law professors — Ronald Rotunda, Stephen Burbank, William Cohen, Geoffrey Miller, Robert Nagel, Richard Parker, L.A. Scot Powe, Stephen Presser and William Van Alstyne — have filed an *amicus* brief arguing that the President should have no immunity to

civil suits for conduct that occurred prior to taking office.³

One cannot help but wonder if there would have been the same line-up if suit had been against a Republican President. Yet, the constitutional question — whether a sitting President may be sued for actions that took place before election — must be resolved apart from the specific facts of this case and the identity of the particular parties. The case should not turn on whether one believes Paula Jones or whether one likes Bill Clinton. The issue now pending before the Supreme Court is about the meaning of the Constitution and will establish a precedent that will apply to Democratic and Republican Presidents in the future.

As a question of constitutional law, I believe that Presidents should be granted no immunity, even temporarily, to suits for actions unrelated to conduct in office. Thus, although I enormously respect and usually agree with the law professors who filed a brief on behalf of President Clinton, here I must part company

* Erwin Chemerinsky is the Legion Lex Professor of Law and Political Science, University of Southern California. Professor Chemerinsky would like to thank Amy Johnson for her excellent research assistance.

with them.

Much already has been written on the subject of whether a sitting President should have immunity to civil suits for conduct that occurred prior to taking office.⁴ My goal in this essay is not to rehash these arguments. Rather, I want to add to the debate some additional arguments that are not developed in either the *amicus* briefs or the law review commentary.

Specifically, two important considerations are absent from the discussion of whether a President should have immunity to suits for actions unrelated to conduct in office. First, the message of granting such immunity is important in itself and it is undesirable to send the message that any person is above the law. The briefs before the Supreme Court and the law review articles discuss, at length, whether granting President Clinton temporary immunity to Paula Jones' suit would place him above the law. But what is not considered is the message sent by according such immunity. President Clinton should be denied immunity so that the unequivocal message is that not even the President of the United States is above the law.

Second, granting the President even temporary immunity for actions that occurred

prior to election offends separation of powers because it undermines the ability of the federal judiciary to fulfill its essential function of providing redress for violations of federal law. Those who champion immunity for President Clinton argue that separation of powers is offended by allowing a sitting President to be civilly sued. But what is ignored is that separation of powers is even more gravely offended if the judiciary cannot decide the case before it.

Thus, Part I of this essay explores these arguments and explains why a sitting President should not be immune to civil suit for conduct unrelated to carrying out the presidency. Part II replies to the justifications offered for such presidential immunity. Finally, Part III explains why postponing the suit until after the President leaves office is not a desirable solution.

This essay does not focus on the specifics of Paula Jones' suit against Bill Clinton because they are irrelevant to the constitutional question of presidential immunity. Ms. Jones unquestionably has stated a cause of action under 42 U.S.C. §1983 for a denial of equal protection on the grounds that Bill Clinton sexually harassed and assaulted her. She also stated a cause of action under 42 U.S.C. §1985 against Clinton and

Arkansas State Trooper Danny Ferguson for conspiracy to violate her rights. Accepting the allegations in her complaint as true, as is required under the Federal Rules of Civil Procedure, there is no doubt that she has stated a claim upon which relief can be granted.

Whether Ms. Jones' factual allegations are true or false

Whether Ms. Jones was the victim of outrageous sexual harassment . . . is simply irrelevant.

cannot be, and should not be, assessed at this stage or considered relevant to the case before the Supreme Court. Whether Ms. Jones was the victim of outrageous sexual harassment, or whether she is making all of it up for political reasons, is simply irrelevant to analyzing the issue presented to the Supreme Court: may a sitting President be civilly sued for conduct that occurred prior to taking office?

I. Suits for Acts Unrelated to the Presidency

A. "No Person is Above the Law"

In recent years, the Supreme Court has increasingly become sensitive to the rhetorical aspect of government actions. The message sent by government conduct, and Supreme Court decisions, matters. For

example, in the affirmative action context, in *Adarand Constructors v. Peña*,⁵ the Court stressed the message sent about race as part of its justification for invalidating a federal affirmative action program.⁶ Similarly, in current establishment clause analysis, many

Justices emphasize the message sent by government action and whether it is likely to be

perceived as symbolic endorsement for religion. For instance, in *Capitol Square Review Commission v. Pinette*, in deciding whether a large cross could be placed in a public park across from a state capitol, several Justices engaged in a lengthy discussion of whose perspective matters in deciding what constitutes symbolic endorsement of religion.⁷

Whether one agrees or disagrees with the results in these particular cases, they powerfully illustrate that government conduct sends a message and that messages matter. How people perceive their government is enormously important because these views shape how people will think and act. In the late 20th century, it should hardly require elaboration to say that messages and perceptions are often even more important than reality.

According to the President immunity from suit for conduct that occurred prior to taking office would send the message that the President is above the law. No other person in the country has the right to have a lawsuit stayed or dismissed until out of a political office or a particular job. Although government officials always have some form of immunity to suit, such immunity *always* has been for conduct in office and has been to protect the exercise of discretion in carrying out government responsibilities.⁸ Paula Jones' suit against Bill Clinton concerns conduct that occurred entirely before he was elected President and Clinton's alleged behavior obviously has nothing to do with the exercise of presidential power. Therefore, granting Clinton immunity would send the message that a President is above the law; that even where the conduct is completely unrelated to the presidency, the President — unlike every other individual — is immune from suit.

This is a highly undesirable message and one that is at odds with fundamental constitutional principles. Indeed, one need only reread *Marbury v. Madison* to see how basic it is that no person be perceived as above the law.⁹ The second issue posed by the Supreme Court was whether “the laws afford

Marbury a remedy.” Chief Justice Marshall answered this question by declaring that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”¹⁰ The specific issue was whether the Court could give *Marbury* a remedy against the executive branch of government. The Court answered this by declaring that “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”¹¹ In other words, no person — not even the President — is above the law.

On countless occasions since *Marbury*, the Supreme Court has reaffirmed that no person can be shielded from the reach of the law. Indeed, what is striking about

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the Court's declarations is that they cut across the ideological spectrum; both conservative and liberal Justices have recognized this basic aspect of the rule of law. For instance, William Rehnquist powerfully stated: “Accountability of each individual for individual conduct lies at the

core of all law — indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development: [w]e have moved away from ‘The King can do no wrong.’ This principle of accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice.”¹²

Likewise, from the opposite end of the political spectrum, William Brennan declared: “The principle that our Government shall be of laws and not of men

is so strongly woven into our constitutional fabric that it has found recognition in not just

We have moved away from ‘The King can do no wrong.’

one but several provisions of the Constitution.”¹³

Holding that a President cannot be sued for acts unrelated to conduct in office would send the message that the President is above the law because that is precisely what the decision would mean — everyone else can be sued for sexual harassment and assault, but not the President of the United States. Justice Byron White explained that “attaching immunity to the Office of the President, rather than to particular activities

that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong.”¹⁴

It is precisely for this reason that the United States Court of Appeals for the Eighth Circuit ruled that President Clinton was not entitled to immunity. The Court stated: “We start with the truism that Article II of the Constitution, which vests the executive power of the federal government in the President, did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the

contrary, the President, like all other government officials, is subject to

the same laws that apply to all other members of our society.”¹⁵

Those who support President Clinton’s position argue that temporary immunity would not place the President above the law; temporary immunity only delays the suit, it does not preclude recovery. There are several problems with this argument. First, it ignores the message sent by such a grant of immunity. According the President temporary immunity to all civil suits would say that no matter how wrongful, how

injurious, how outrageous a President's actions, the President simply cannot be sued.

What if the lawsuit was by a person paralyzed in an automobile accident caused by a President before taking office and the plaintiff was desperately in need of money for medical bills and living costs? What if the lawsuit was a paternity action for child support to ensure the care of a child allegedly fathered by the President? What if the lawsuit was for an intentional tort that caused serious injuries? According the President immunity to all civil actions would mean that in all of these cases the lawsuit could not go forward. Such a holding undoubtedly would be perceived as saying that the President is above the law. It seems enormously important to send the opposite message: no one, not even the President of the United States, is above the law.

Second, in addition to this message, the reality of such a holding is that it would place the President above the law. No other person in the country can avoid, for a period of years, a suit for causing an automobile accident or for fathering a child or for an intentional tort or for sexual harassment. Every other person in the country can be sued and is accountable for such tortious conduct. The President, too, must be held

responsible for the harms caused by his or her actions.

Finally, as discussed in more detail in Part III, delaying a suit often can mean the denial of recovery. Evidence may be less available as witnesses die or memories fade. In fact, even plaintiffs may die and some causes of action, such as defamation, do not survive death.

Thus, it is no answer to say that temporary immunity does not place the President above the law because there might be a later lawsuit when the person leaves office. The only way to send the message that the President is not above the law is to allow the President to be sued like any other person. If the President, before taking office, committed a tort or breached a contract or violated someone's constitutional rights, the President should be accountable in the courts.

B. Undermining the Judicial Power

President Clinton's brief in the Supreme Court, and the *amicus* brief filed by law professors supporting him, emphasize that allowing a President to be sued while in office would offend separation of powers principles by subjecting the President to the jurisdiction and control of the court. Apart

from the flaws in this argument, which are discussed in Part II, this claim ignores the separation of powers implications from granting the President total immunity to all civil actions while in office.

A core judicial function is hearing the claims of those whose rights have been violated and according them a remedy. As quoted above long ago, in *Marbury v. Madison*, the Court recognized this in its declaration that “it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”¹⁶ Chief Justice John Marshall stated:

Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court . . . [But where the head of department] is directed by law to do a certain act affecting the absolute rights of individuals . . . it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual.¹⁷

According the President total immunity to all civil actions would prevent

the federal court from fulfilling this duty to an injured individual. It is firmly established that separation of powers is violated if one branch keeps another from performing its constitutionally assigned duties. Justice Powell explained that “the doctrine [of separation of powers] may be violated in two ways. One branch may impermissibly interfere with the other’s performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.”¹⁸

It was exactly this approach that led the Court in *United States v. Nixon* to hold that executive privilege does not allow the President to refuse compliance with a lawful subpoena.¹⁹ In *Nixon*, the Supreme Court recognized that Presidents do have executive privilege. But the Court said that an absolute privilege would interfere with the ability of the judiciary to perform its constitutional function. The Court explained: “The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III.”²⁰ The Court thus concluded that the need for evidence at a

criminal trial outweighed executive privilege. The Court said that allowing “the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.”²¹

Likewise, just as absolute executive privilege unduly interferes with the essential functioning of the judiciary when the evidence is necessary at a criminal trial, so does absolute immunity for the President to all civil suits interfere with the essential functioning of the judiciary. The judicial role of providing redress for violations of law is undermined if the President cannot be held accountable for his or her wrongful behavior.

II. Is Temporary Immunity Necessary?

Thus far, I have explained why I believe that it is important that the President be subject to civil suits for conduct that occurred prior to taking office. In order to defend this position, it is necessary to consider the arguments advanced in favor of according such immunity. There are three major types of arguments for according total immunity to sitting Presidents. One set of arguments is based on textual provisions that are said to justify such immunity. A second

group of arguments is based on history and precedent. Finally, there are arguments based on structure and separation of powers; claims that allowing suit would unduly interfere with the functioning of the presidency.

Although some of these arguments, especially the textual one, seem specious, others have merit. But I suggest that none of these arguments, individually or collectively, outweighs the reasons discussed above as to why Presidents should be subject to civil suit for conduct unrelated to the presidency. I will consider each set of arguments in turn.

A. Textual Argument for Total Immunity

The Constitution is silent as to whether a President may be sued or prosecuted; no provision of the Constitution mentions presidential immunity from criminal or civil suits. Thus, it would seem that the issue of presidential immunity for conduct unrelated to the presidency, like so many constitutional questions, will have to be resolved on non-textual grounds.²²

However, the constitutional clause concerning immunity for members of Congress has been invoked as a basis for

presidential immunity. Article I, Section 6, states: “The Senators and Representatives . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.”

Akhil Reed Amar and Neal Kumar Katyal have argued that this clause provides a basis for temporary immunity for the President to all civil suits while in office.²³ They write that “[i]f Representatives and Senators should not be impeded (‘arrested’) by certain private litigation while performing the people’s business (while ‘at session’), this Arrest Clause immunity should not bar, and if anything might invite, analogous immunities for members of coordinate branches while performing the people’s business.”²⁴

Specifically, Amar and Katyal contend that the “arrest clause” was meant to apply to civil arrest and that lawsuits are the modern functional equivalent of civil arrest. They maintain that the constitutional principle that protects members of Congress applies equally forcefully to the President and thus conclude that the President should have

temporary immunity to all civil suits.

As a textual argument, Amar and Katyal’s position is weak. There may be policy reasons, such as those discussed below, why the President should be accorded immunity like that granted by the Constitution to members of Congress. But the clause that Amar and Katyal invoke hardly seems a textual basis for doing so. First and most obviously, the clause speaks only of Senators and Representatives. It would seem that the Framers would have said so if they wanted to provide the same immunity for the President.

Amar and Katyal expressly respond to this and claim that the silence in the Constitution should not be interpreted as a decision to reject similar immunity for the President. They say, for example, that such reasoning would preclude any immunity for the President, even for conduct that occurred in office, or immunity for any officials other than representatives and senators. They rightly point out that Article I, Section 6, “nowhere explicitly rejects coordinate immunities” and observe that the Framers may just have provided more details about the legislative branch because the other two branches would be entrusted with enforcing and adjudicating its issues.²⁵

Amar and Katyal explain why the silence does not necessarily mean that the Framers rejected immunity for the President; but that does not establish that the text or the Framers intended such immunity. At best, Amar and Katyal show that the text should be regarded as silent and why no inference should be drawn from this silence. But no *textual* argument can be made that a provision in Article I that concerns Congress and that expressly is about immunity for representatives and senators should be interpreted as protecting the President.

Second, even as to members of Congress, the clause is limited in scope: it speaks of “arrest” and also applies only when Congress is in session. To make a textual argument for presidential immunity, Amar and Katyal must convert “arrest” to “civil suits” and must extend the immunity to the entire duration of an individual’s presidency. Again, there might be policy reasons for according such immunity for the President, but it seems far fetched to base it on this textual provision. There is an enormous difference between arresting and suing a person.

The concept of “arrest” has not changed in the 200 plus years since the Constitution was written. The difference now is that arresting people in civil cases is

unheard of, except when there is contempt of court, whereas arrests in civil cases did occur when the Constitution was written. But this change hardly justifies equating “arrest” and “litigation.” Indeed, the Supreme Court’s construction of this clause is at odds with the interpretation offered by Amar and Katyal.

In *Long v. Ansell*, the Court considered whether Senator Huey Long had immunity from service of process in a civil case by virtue of the arrest clause.²⁶ Justice Brandeis, writing for the Court, rejected such immunity and stressed the narrow meaning of the language in Article I, Section 6. He stated that the clause’s “language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant.”²⁷ He declared: “History confirms the conclusion that the immunity is limited to arrest . . . When the Constitution was adopted, arrests in civil suits were still common. It is only to such arrests that the provision applies.”²⁸

In fact, the Supreme Court has held that the arrest clause does not provide members of Congress complete immunity even in criminal cases. In *Williamson v. United States*, the Court held that the arrest clause did not prevent a member of Congress

from being sentenced after being convicted of suborning perjury.²⁹

The Supreme Court addressed the meaning of the arrest clause, and the precedents construing it, in *Gravel v. United States*, which concerned the possible criminal liability of a Senator for reading classified documents (the Pentagon Papers) into the public record.³⁰ The Court said: “It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of ordinary criminal laws, even though imprisonment may prevent or interfere with performance of their duties as members.”³¹ The Court buttressed its conclusion with the views of Thomas Jefferson: “Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.”³²

Therefore, it seems clearly incorrect as a textual matter to convert a very narrow provision that protects members of Congress solely from arrest into a broad provision that insulates the President from all civil suits while in office. If Jefferson is correct that the clause was intended to ensure that legislators are

bound by the law as are ordinary people, it hardly is plausible that the Framers, who above all did not want to create a King, intended by their silence to give the President broader immunity.

Finally, even if the Supreme Court’s interpretation of the arrest clause is rejected and it is given very broad meaning for members of Congress, it should not be extended to the President. As those who argue for presidential immunity point out, the President is unique in American government. The President is the most visible officeholder and thus the most scrutinized official in the nation. Therefore, for the reasons discussed in Part I, it seems especially important to send the message that not even this person — the most powerful person in the country, if not the world — is above the law.

B. History and Precedent

History and precedent are simply silent as to whether a sitting President may be sued for conduct that occurred prior to taking office. English history is of no relevance because the presidency obviously did not exist in England and if anything is clear about the Framers, it is that they were not creating an executive with the powers and prerogatives of a King. Nor was there

discussion at the Constitutional Convention about the President's amenability to civil suit.

The strongest support for immunizing the President to all civil suits while in office can be found in Justice Joseph Story's famous Commentaries on the Constitution of the United States. Story wrote:

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."³³

However, it is unclear whether Story meant that the President simply could not be arrested in civil cases, as Article I, Section 6, provides, or whether Story meant to say that the President had complete immunity to all civil suits while in office. If the latter, there is not case law support for it and, most importantly, it is highly doubtful that Story was contemplating the issue of a President

being sued for conduct that occurred prior to taking office.

Nor does the leading Supreme Court case provide a basis for finding the President to be immune from all civil actions. In *Nixon v. Fitzgerald*, the Court held that a President has absolute immunity to civil suits for money damages for conduct that occurred in office while discharging the duties of the presidency.³⁴ Fitzgerald, an analyst in the defense department, claimed that he was fired in retaliation for testimony he gave to Congress about cost overruns in the military. The Court recognized immunity for the President but also limited its scope. Justice Powell, writing for the majority in the 5-4 decision, held that a President has "absolute immunity from damages liability predicated on his official acts."³⁵

The Court emphasized that "[i]n defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purpose."³⁶ The Court identified the primary purpose of immunity as preserving the President's willingness to exercise discretion in office without fear of suit. Justice Powell explained:

As is the case for prosecutors and judges — for whom absolute immunity now is established — a President must concern himself with matters likely to ‘arouse the most intense feelings.’ Yet as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official ‘the maximum ability to deal fearlessly and impartially with’ the duties of his office. The concern is most compelling when the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.”³⁷

In a footnote, Justice Powell elaborated: “Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties.”³⁸

Nixon v. Fitzgerald thus based absolute immunity on the need to protect the President in making decisions while in office. The Court’s holding was thus limited in scope and concluded: “In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity

from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”³⁹

Therefore, neither the holding nor the rationale of *Nixon v. Fitzgerald* support extending absolute immunity to conduct that occurred before the person was elected President. The decision is entirely about ensuring that presidential acts be immunized from civil suit.

C. Policy Justifications for Absolute Immunity

At the very least, the text, history, and precedent are silent and do not support granting the President absolute immunity to civil suits unrelated to conduct in office. The argument in favor of immunity thus has to be based on policy considerations. The claim is that allowing the President to be sued would violate separation of powers.

There are many ways in which it is contended that civil suits are inconsistent with the constitutional powers and prerogatives of the presidency. In part, the concern is that civil suits will engage a significant amount of the President’s time and thus divert from his or her ability to govern. In *Nixon v. Fitzgerald*, the Court also stated: “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 functioning of government.”⁴⁰ Indeed, the central argument offered by Clinton’s attorneys in their brief to the Supreme Court is that “a personal damages action against an incumbent President would interfere with discharge of a President’s Article II responsibilities and jeopardize the separation of powers.”⁴¹ Likewise, the law professors’ *amicus* brief in support of total temporary immunity stresses separation of powers principles.⁴²

The separation of powers argument also is based on concern that the President would be subject to the jurisdiction, and even the whims, of any judge who was assigned the case. The judge, by scheduling and other orders, could exercise great control over the conduct of the presidency.

These are serious concerns. The question, however, is whether they justify absolute immunity for all suits against the President. At most, the argument is that separation of powers protects the President “from specific demands on his time that would actually interfere with his duties.”⁴³ There is no reason to assume that every suit, in all of its aspects, unduly intrudes on the presidency. The appropriate solution is case

management to minimize burdens on the presidency — not absolute immunity.

Nor is there reason to think that there would be more than the occasional suit. Civil suits against sitting Presidents have rarely occurred in over 200 years of American history. According to the Eighth Circuit, there are only three known instances, prior to Paula Jones’ suit against Bill Clinton, where Presidents were sued for conduct that occurred prior to taking office: suits against Theodore Roosevelt, Harry S. Truman, and John F. Kennedy.⁴⁴ The Eighth Circuit observed that “[i]n each case, the action was filed before the defendant began serving as President, and the suits against Presidents Roosevelt and Truman were already on appeal before those men assumed the office of the President” and the suit against President Kennedy, for a car accident, settled.⁴⁵ This is hardly a history that supports the fear that Presidents will be deluged with lawsuits and especially where frivolous suits can be dismissed at an early stage under the usual mechanisms provided by the Federal Rules of Civil Procedure.

Presidents, like other clients, can delegate many aspects of the handling of litigation to their attorneys. Also, it is obviously incorrect to think that Presidents

spend all of their waking moments discharging the duties of their office. For example, "Presidents spend considerable time fundraising and campaigning, which draws time and attention away from pressing national and international matters, but business at the White House continues."⁴⁶

An analogy can be drawn to the distinction between facial attacks on laws and as applied challenges. There is no reason for a blanket absolute immunity for the President, but there may be a need for protection from aspects of a suit that actually interfere with the discharge of the presidency. For instance, courts should be — and likely would be — deferential in scheduling to ensure that the President can attend to needed matters of state. In fact, when Presidents have been deposed as witnesses, as already has been done with President Clinton and earlier was done with President Jimmy Carter, scheduling has been careful and accommodating to the Presidents' needs.

The response is that this puts the presidency at the mercy of the judge and that this, in itself, offends separation of powers. Again, though, the question is whether absolute immunity is the only way to protect the presidency. The alternative

would seem to be liberal availability of interlocutory appeals when the President claims that functioning of the office is compromised by aspects of a civil suit. Already, under *Mitchell v. Forsyth*, the law provides for interlocutory appeal of the denial of immunity.⁴⁷ This certainly can be applied, and extended if necessary, to provide greater protection to the President.

This does mean, however, that the President is subject to the powers of another branch of government. But it simply goes too far to say that separation of powers requires that the President be immune from all scrutiny by the other branches of government. *Nixon v. United States* expressly rejected that proposition in holding that even materials protected by executive privilege are subject to subpoena when needed as evidence in a criminal trial. Moreover, congressional oversight surely can absorb presidential time, but cannot be seen as a violation of separation of powers. The Senate's Watergate Hearings in the summer of 1973 undoubtedly occupied a great deal of President Richard Nixon's attention, but no one has suggested that they violated separation of powers.

Finally, in evaluating the separation of powers argument, it must be remembered

that according absolute immunity undermines the powers of the judiciary. As argued in Part I, an essential function of the judiciary is to provide a remedy to those injured by a violation of the law. Granting the President total temporary immunity would frustrate this power, while allowing suits that compromise separation of powers only if the judicial power is exercised unwisely.

III. Why Not Temporary Immunity?

Those who advocate immunity for the President argue that it is not absolute immunity; rather, it is simply postponement of the suit until after the President completes his or her term in office. First, delaying suit for as much as eight years, can mean the denial of relief and there is no way to predict in advance whether, in a given case, the temporary immunity will mean absolute immunity. Over a period of years, key witnesses might become unavailable because of death, moves, or just disappearance. Memories can fade and impeachment is much easier when it is testimony about events that occurred long ago. In fact, even the plaintiff could die in the interim and some causes of action, such as defamation, do not survive death. Justice delayed can be justice denied and there is no way to foretell the

consequences of delay in advance.

Second, delay can cause great harms. Paula Jones may not suffer much injury from waiting, but imagine the plaintiff who needs compensation for serious injuries in order to pay medical bills or just the costs of survival. In a paternity action, the money may be essential for the child's food, shelter, or medical care. Making a tragically injured person or a child wait for eight years is not only unfair, it denies their due process right of access to the courts for redress.⁴⁸

Finally, delay sends the message that the President, while in office, is above the law. No matter how egregious the President's conduct or how serious the injuries, the President would not be amenable to suit until leaving office. No other officeholder has such a privilege and it is essential that, above all, the message be that not even the President is immune from the law.

Conclusion

Law students learn from the first day of law school of the importance of a case's facts in understanding it. But sometimes the facts can divert attention from proper analysis of the legal issues. It is easy to react to Paula Jones' civil suit by questioning her motives

or the accuracy of her account of the events. It is easy for Democrats to rush to Clinton's defense and for Republicans to oppose him on this issue.

But the issue before the Court in *Clinton v. Jones* must be addressed without regard to this factual context. The question is whether absolute immunity for the President should be extended to temporary immunity to all civil suits, even for conduct that occurred prior to taking office.

In this essay, I have argued that to send the message that no one, not even the President of the United States is above the law, and to protect the essential functions of the judiciary, the Supreme Court should hold that Presidents are not immune to suits for conduct unrelated to the presidency. Paula Jones, like every other plaintiff alleging sexual harassment and assault, should have her day in court and it should be now, not in four years.

¹ 72 F.3d 1354 (8th Cir. 1996), reh'g en banc denied, 81 F.3d 78 (8th Cir. 1996), cert. granted, 1996 U.S.Lexis 4252 (1996).

² This *amicus* brief is found at 1996 WL

448092.

³ This *amicus* brief is found at 1996 WL 509509.

⁴ In addition to the *amicus* briefs, there are several law review articles addressing the topic. See Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701 (1995); Note, (Michael T. Matraia), Running for Cover Behind Presidential Immunity: The Oval Office as Safe Haven from Civil Suits, 29 Suffolk L. Rev. 195 (1995); Note, (Laurier W. Beaupre), Birth of a Third Immunity?: President Bill Clinton Secures Temporary Immunity from Trial, 36 B.C. L. Rev. 725 (1995); Note, (William F. Allen), President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air, 11 J.L. & Pol. 555 (1995); Note, (Joseph R. Jeffrey), Temporary Presidential Immunity: Adhering to the Separation of Powers Doctrine and the Will of the Framers for Civil Damages Litigation Involving the President — The Jones v. Clinton Case, 40 St. Louis U.L.J. 833 (1996); Note, (Bradford E. Biegon), Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History, and Blackstone's Commentaries, 82 Va. L. Rev. 677 (1996).

⁵ 115 S.Ct. 2097 (1995).

⁶ For a discussion about the relevance of messages in affirmative action analysis, see Richard H. Pildes & Richard G. Neimi, Expressive Harms, Bizarre Districts and Voting Rights; Evaluating Election District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483 (1993).

⁷ 115 S.Ct. 2440 (1995).

⁸ See Note (Matraia), supra note 4, at 200-201 (describing purpose of immunity in preserving discretion).

⁹ 5 U.S. (1 Cranch) 137 (1803).

¹⁰ Id. at 163.

¹¹ Id.

¹² Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 429 (1981) (Rehnquist, J., dissenting).

¹³ McGautha v. California, 402 U.S. 183, 252-253 (1971).

¹⁴ Nixon v. Fitzgerald, 457 U.S. 731, 766 (1982).

¹⁵ 72 F.3d at 1358.

¹⁶ Id. at 166.

¹⁷ Id. at 170-71.

¹⁸ INS v. Chadha, 462 U.S. 919, 963 (1982).

¹⁹ 418 U.S. 683 (1974).

²⁰ 418 U.S. at 707.

²¹ Id. at 712.

²² There is a statutory provision that conceivably could be invoked to support absolute presidential immunity. The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. ss 501-93, provides for stays of civil suits against those in active military service. The President as Commander-in-Chief of the armed forces might invoke this provision. However, such a claim would be at odds with the strong American tradition of *civilian* control over the military. The President, though Commander-in-Chief, is not in the military and this civilian control over the military long has been applauded as a virtue of the American system of government. Thus Clinton's brief to the Supreme Court understandably says that the "President does not claim, and has not claimed, relief under the Act." Brief for the Petitioner, 1996 WL 448096 at 36.

²³ Akhil Reed Amar & Neal Kumar Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701 (1995).

²⁴ Id. at 706.

²⁵ Id. at 707.

²⁶ 233 U.S. 76 (1934).

²⁷ Id. at 82.

²⁸ Id. at 82-83.

²⁹ 207 U.S. 425 (1908).

³⁰ 408 U.S. 606 (1972).

³¹ Id. at 615.

³² Id.

³³ 3 J. Story, Commentary on the Constitution of the United States, §1563, pp. 418-419 (1st ed. 1833), quoted in *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

³⁴ 457 U.S. 731 (1982).

³⁵ Id. at 749.

³⁶ Id. at 755.

³⁷ Id. at 752 (citations omitted).

³⁸ Id. at 751 n.32.

³⁹ Id. at 755.

⁴⁰ Id. at 751.

⁴¹ Brief for the Petitioner, 1996 WL 448096 at 11.

⁴² 1996 WL 448092.

⁴³ Brief Amicus Curiae of Law Professors in Support of Respondent, 1996 WL 509509 at 14.

⁴⁴ 72 F.3d at 1362 n.10.

⁴⁵ Id.

⁴⁶ Note (Matraia), supra note 4, at 226.

⁴⁷ 472 U.S. 511 (1985).

⁴⁸ See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977).