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# Executive Privilege: The Clinton Administration in the Courts

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# EXECUTIVE PRIVILEGE: THE CLINTON ADMINISTRATION IN THE COURTS

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*Exploring the role of the judicial branch of the federal government in Clinton-era executive privilege claims, Neil Kinkopf suggests that courts have misunderstood executive privilege. Professor Kinkopf points out that federal courts have given different treatment to executive privilege claims asserted in judicial and congressional arenas, protecting the Judiciary from encroachment by the executive branch, while avoiding becoming involved in controversies among the political branches. He argues that the judicial confusion about executive privilege stems from the fact that courts have interpreted cases such as* Clinton v. Jones *to be about the separation of powers between the executive and judicial branches, rather than about the interpretation of federal jurisdictional statutes. Professor Kinkopf proposes judicial and legislative responses that could provide remedies for the problem of judicial misunderstanding of executive privilege in the future.*

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## INTRODUCTION

The Clinton Administration is fertile ground for an examination of executive privilege. No administration since President Nixon's has yielded such a spate of executive privilege controversies. These controversies play out in a variety of fora and are resolved most frequently through the process of political accommodation.[1] This Essay focuses on a relatively rare setting: the judicial treatment of executive privilege claims.[2]

Exactly what "executive privilege" means has never been entirely clear. While presidents since George Washington have asserted some form of the privilege, it is emblematic of the privilege's mutability that the phrase "executive privilege" was not coined until the Eisenhower Administration.[3] Executive privilege is remarkably

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[1] *See* MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 142-57 (1994); Dawn Johnsen, *Executive Privilege Since* United States v. Nixon: *Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1140 (1999).

[2] The Reagan and Bush Administrations spawned some relevant judicial doctrine, especially in connection with the investigation of the Iran-Contra scandal, but it does not compare in quality or quantity to the judicial response to the Clinton Administration.

[3] *See* Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's*

protean; it can assume a seemingly limitless array of forms and, consequently, is difficult to grasp. Regarding executive privilege as a heading for these multifarious claims is a standard account.[4] For the purposes of this Essay, "executive privilege" refers to the variety of privileges and immunities, grounded in the constitutional structure of the presidency, that allow the President to withhold information or refrain from participation in the processes of the other branches. These privileges and immunities include the state secrets privilege, the presidential communications privilege, and the presidential immunity from civil suit for official acts.[5] In addition to asserting several of the sanctioned categories of executive privilege listed above,[6] the Clinton Administration has claimed a number of privileges and immunities that had never before been the subject of judicial rulings, including the government attorney-client privilege[7] and temporary presidential immunity from civil suit.[8]

The Clinton Administration has seen two important developments in the judicial doctrine of separation of powers. First, in the twenty-five years since the Supreme Court held, in *United States v. Nixon*,[9] that executive privilege is grounded in the constitutionally created separation of powers, the Court has substantially developed

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*Shadow*, 83 Minn. L. Rev. 1069, 1069 (1999).

[4] *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 769-71 (3d ed. 2000).

[5] *See id.* It is tempting to add a category that arises by negative implication, an *ultra vires* privilege. Under this privilege, the President properly may refuse to comply with a demand for evidence that the requester has no authority to demand. The typical case involves a congressional demand for documents or testimony that do not fall within Congress' investigative or oversight authority. *See, e.g.*, Christopher H. Schroeder & Neil Kinkopf, *What about Burton's Contempt for the Constitution?*, LEGAL TIMES, Aug. 17, 1998, at 25. The *ultra vires* privilege would not fall within the definition offered above because it is grounded in the constitutional attributes of Congress rather than the presidency. For this reason, it is not a power or privilege inhering in the President.

[6] *See, e.g.*, Thomas W. Lippman, *Clinton Keeps Papers On Haiti From House; Executive Privilege Invoked in Panel's Probe of Killings*, WASH. POST, Sept. 26, 1996, at A20 (reporting on President Clinton's refusal to "turn over 47 documents subpoenaed by House investigators probing whether the administration knew that security agents of Haiti's U.S.-backed government had murdered political opponents");Walter Pincus, *Official Balks At Hearing On Bosnia*, WASH. POST, Apr. 17, 1996, at A6 (reporting on a Clinton Administration official's claim to executive privilege regarding an investigation into the Administration's "policy of tolerating Iran's shipment of arms to Bosnia's Muslim-led government in 1994 and 1995 in violation of a U.N. embargo").

[7] *See In re* Lindsey, 158 F.3d 1263, 1267 (D.C. Cir. 1998) (per curiam).

[8] *See* Clinton v. Jones, 520 U.S. 681, 684 (1997). The Supreme Court, of course, already had recognized absolute presidential immunity for acts taken within the broad parameters of office. *See* Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). In *Jones*, President Clinton asserted a temporary immunity from suits arising from events that preceded his election as President. *See Jones*, 520 U.S. at 681.

[9] 418 U.S. 683 (1974).

and consolidated its understanding of separation of powers.[10] Federal courts in the Clinton era have adapted the *Nixon* holding to this recently consolidated doctrine. When ruling on the Clinton claims, the courts have followed the standard account, regarding each claim as an application of the general separation of powers principle, rather than as a distinct privilege.[11] Thus, courts have accepted the notion that this welter of factually disparate claims actually forms a single doctrinal category.[12] Second, despite having identified the relevant framework and legal principles for resolving executive privilege claims, the courts repeatedly have misapplied the doctrinal framework to those claims.[13]

In resolving the Clinton-era claims of executive privilege, the courts have followed another element of the standard account of executive privilege—the validity of any specific claim of executive privilege will depend on whether it is asserted in the congressional or judicial arena.[14] When the privilege is asserted in response to a congressional inquiry, the President's claim is pitted against Congress' constitutional powers of investigation and oversight.[15] The courts are reluctant to get involved in

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[10] *See infra* notes 29-35 and accompanying text.

[11] According to this principle, no branch may act in a way that prevents another branch from performing its constitutionally assigned role. An action that threatens to do so is unconstitutional unless its impact is justified by an overriding need to promote objectives within the constitutional authority of the encroaching branch. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); *see also infra* notes 12-20 and accompanying text.

[12] A number of the novel privilege claims that the Clinton Administration asserted do not fall within this category because the Administration grounded them in the distinct category of common law privileges. Rule 501 of the Federal Rules of Evidence authorizes the federal courts to develop the common law of evidentiary privileges. These common law privileges are not constitutionally mandatory and may be repealed or altered by statute.

Thus, the Administration's claim of government attorney-client privilege did not raise a novel claim of constitutional executive privilege. Insofar as the government attorney-client privilege is asserted in the context of communications between the President and a government attorney acting within the scope of an attorney-client relationship, it is identical to the presidential communications privilege. The government attorney-client privilege's much broader application—to executive branch lawyering that does not implicate the President—is an instance of the common law evidentiary privilege. *See In re Lindsey*, 158 F.3d at 1267-68.

The protective function privilege raised by the Clinton Administration was not asserted to be a presidential privilege. Instead, the protective function privilege was raised as a privilege of the Secretary of the Treasury, who asked the court to recognize the privilege under its Rule 501 authority. *See In re* Sealed Case, 148 F.3d 1073, 1075 (D.C. Cir. 1998) (per curiam).

[13] *See infra* Pt. II.

[14] *See generally* ROZELL, *supra* note 1, at 142-57 (discussing the potential political nature of congressional response to claims of executive privilege).

[15] *See* Morrison v. Olson, 487 U.S. 654, 699-700 (1988) (asserting executive privilege in response to congressional oversight hearings into the administration of the Superfund by the EPA); Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In *Senate*

a dispute between the political branches.[16] When the President asserts the privilege in a judicial proceeding, the courts understand the primary separation of powers battle line to be drawn between the President's constitutional powers and those of the Judiciary.[17] This assumption, however, is a misunderstanding. The forum does not define the separation of powers combatants. Executive privilege cases arising in the judicial arena do not implicate significantly the Judiciary's constitutional role or authority. This misunderstanding has led courts astray during the Clinton era, especially in *Clinton v. Jones*.[18]

This Essay seeks to explain how the courts have misunderstood executive privilege and to propose remedies for that misunderstanding. The Essay will set forth the doctrine of separation of powers and locate executive privilege controversies within that doctrine, including those involving President Clinton. With this background, the Essay then will explain how the Judiciary's misperception that its own turf was at stake in these cases led it to misapply the separation of powers doctrine. Finally, this Essay will offer a specific legislative proposal to redress this error.

## I. EXECUTIVE PRIVILEGE

The Supreme Court has recognized that the categories of executive privilege flow from a common source—the constitutional separation of powers.[19] *United States v.*

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*Select Committee*, President Nixon had invoked executive privilege to protect recorded conversations between him and his aides that were the subject of a subpoena *duces tecum* by the Senate Select Committee investigating wrongdoing in connection with the 1972 presidential campaign and election. *See Senate Select Comm.*, 498 F.2d at 726-27.

[16] *See Senate Select Comm.*, 498 F.2d at 731 (applying a presumption of privilege when claimed by the President, unless Congress demonstrates that the requested evidence is critical to its function); *cf.* Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., concurring):

> [T]he contest here . . . is in substance an interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranch dispute between segments of Congress itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the Judicial Branch by embroiling the federal courts in a power contest nearly at the height of its political tension.

[17] *See* ROZELL, *supra* note 1, at 151-52.

[18] 520 U.S. 681 (1997).

[19] *See* United States v. Nixon, 418 U.S. 683, 708 (1974). Numerous commentators agree that the Court in *Nixon* was correct on this point. *See, e.g.*, ROZELL, *supra* note 1, at 142-57; Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1422 (1999) (arguing that the dispute in *Nixon* was nonjusticiable under the separation of powers doctrine); Johnsen, *supra* note 1, at 1140 ("[E]xecutive privilege is indispensable to the functioning of our system of checks and balances and separation of powers."). Nevertheless, some remain convinced that the Constitution's textual

*Nixon* expressly sets forth this position. *Nixon* recognized executive privilege as rooted in the constitution.[20]

Seven aides and advisers to President Richard Nixon, each serving on the staff of either the White House or the Committee to Re-Elect the President, were indicted for a variety of crimes.[21] Although the President was not indicted, he was named as an unindicted co-conspirator.[22] The district court granted the special prosecutor's motion for a subpoena *duces tecum* to the President requiring him to submit audio tapes of conversations with several of his indicted aides relating to their activities.[23] President Nixon refused to comply fully with the subpoena, asserting executive privilege.[24]

The Supreme Court concluded that the separation of powers encompasses the concept of executive privilege.[25] Although the Court did not articulate a specific separation of powers principle from which the privilege derives, it did conclude that the privilege is necessary to the proper functioning of the executive branch.[26] The Court further concluded that recognizing a qualified, rather than an absolute, privilege under the facts of *Nixon* would not violate the separation of powers doctrine.[27]

At the time *Nixon* was decided, the Supreme Court had not attempted to articulate a doctrinal framework to govern the resolution of separation of powers disputes. In the years since, however, the Court has set forth such a framework. Outside the limited group of cases in which a textual provision is directly controlling,[28] the Court looks to whether one branch has acted to aggrandize its own

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silence—buttressed by its structure and original understanding—refutes any claim of executive privilege. *See* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999). I accept as correct the Court's view, though it is beyond the scope of this Essay to attempt to resolve the disagreement in the literature.

[20] The Court declared, "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708.

[21] *See id.* at 687.

[22] *See id.*

[23] *See id.* at 687-88.

[24] *See id.* at 688.

[25] *See id.* at 703.

[26] *See id.*

[27] *See id.* at 706. As to Nixon's claim, the Court ruled that the qualified privilege was overcome by the demonstrated and particularized need of the criminal justice system. *See id.* at 713.

[28] *See, e.g.*, Clinton v. New York, 524 U.S. 417 (1998) (applying bicameralism and presentment requirements to a delegation to the President); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 946-51 (1983) (applying bicameralism and presentment requirements to a legislative veto); Buckley v. Valeo, 424 U.S. 1, 124-43 (1976) (per

power.[29] If a branch has acted to aggrandize its own power, the action—typically enactment of a statute—is unconstitutional.[30] For all other separation of powers cases, the Court applies a general separation of powers principle: no branch may "prevent[ ] [another] Branch from accomplishing its constitutionally assigned functions,"[31] unless it is justified by an overriding need to promote objectives within the constitutional authority of the acting branch.[32]

The general separation of powers principle, in its formulation and its application, is extremely deferential. The only instances in which a statute has been found unconstitutional under that principle involved congressional encroachments on the Judiciary.[33] When the Court's own power is not at stake, the Judiciary has deferred to the judgment of the political branches, expressed by enactment through bicameralism and presentment, that the statute or statutorily authorized action at issue does not prevent Congress or the President from fulfilling its constitutional roles.[34]

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curiam) (applying the Appointments Clause).

[29] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that the constitutional separation of powers was violated when a provision of the Securities Exchange Act directed courts to reopen final judgments).

[30] *See, e.g.*, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991); Bowsher v. Synar, 478 U.S. 714 (1986). In *Bowsher*, the Court struck down the Gramm-Rudman Balanced Budget Act, which authorized the Comptroller General to make cuts necessary to bring the federal budget into balance. Because Congress had statutory authority to remove the Comptroller, the Court concluded that Congress could control the Comptroller and, through him, could control the power to make budget cuts. Therefore, Congress had aggrandized its own power. This rationale would have been a more persuasive basis for the Court's holding in *Chadha*. *See* TRIBE, *supra* note 4, at 678-79. The Court also recharacterized one of its earlier cases, *Myers v. United States*, 272 U.S. 52 (1926), which declared unconstitutional a statute requiring the President to receive the advice and consent of the Senate before removing a postmaster first class. The Court in *Bowsher* contended that the constitutional defect of the removal provision was that it aggrandized Congress' power. *See Bowsher*, 478 U.S. at 724-26.

[31] Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

[32] *See id.* This formulation has been repeated often. *See, e.g.*, Clinton v. Jones, 520 U.S. 681 (1997); Loving v. United States, 517 U.S. 748 (1996); Mistretta v. United States, 488 U.S. 361, 381 (1989); Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

[33] *See Plaut*, 514 U.S. at 240.

[34] *See generally* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 348-57 (1998) (outlining the major court decisions on separation of powers).

## II. APPLYING THE DOCTRINAL FRAMEWORK TO THE CLINTON ADMINISTRATION

### A. *The* Espy *Case*

In the recent spate of cases involving the Clinton Administration, the courts consistently have applied this general separation of powers principle to determine whether to recognize a privilege and how to define the parameters of the privilege.[35] The most significant case dealing with a claim of the presidential communications privilege did not involve an investigation of the President himself; instead, it concerned an investigation of the Administration's first Secretary of Agriculture, Mike Espy.

Espy was the subject of allegations that he had received illegal gifts from lobbyists and entities subject to the Department of Agriculture's regulatory jurisdiction.[36] These allegations led to the appointment of an independent counsel to investigate and, ultimately, prosecute Espy.[37] President Clinton also responded to the allegations. He ordered the White House Counsel to conduct a separate investigation to determine whether the President should take any disciplinary or executive action.[38] These distinct investigations collided when the grand jury, at the behest of the independent counsel, subpoenaed all of the records, notes, and documents that the White House Counsel had compiled in the course of its investigation.[39]

The President asserted privilege over eighty-four documents covered by the grand jury subpoena, including documents that were not prepared for the President and were never viewed by the President personally.[40] The court thus was asked to determine: "How far down the line does the presidential communications privilege go?"[41] To resolve this question, the court applied the general separation of powers principle: "The ultimate question is whether restricting the presidential communications privilege to communications that directly involve the President will 'impede the President's ability to perform his constitutional duty.'"[42] The court then concluded

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[35] *See* Clinton v. Jones, 520 U.S. 681; *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); *In re* Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998); *In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) [hereinafter *Espy*].

[36] *See Espy*, 121 F.3d at 734.

[37] *See id.* Espy was acquitted on all 30 counts that were submitted to the jury; the judge dismissed eight additional counts. *See* Neil A. Lewis, *Espy is Acquitted on Gifts Received While in Cabinet*, N.Y. TIMES, Dec. 3, 1998, at A1.

[38] *See Espy*, 121 F.3d at 735. The White House Counsel recommended that the President take no action in large part because Espy already had tendered his resignation and made payments reimbursing all of the questionable gratuities. The President accepted his counsel's recommendation. *See id.*

[39] *See id.*

[40] *See id.*

[41] *Id.* at 746.

[42] *Id.* at 751 (quoting Morrison v. Olson, 487 U.S. 654, 691 (1988)). Judge Wald's

that the general separation of powers principle required that it apply the presidential communications privilege to communications received by presidential advisors within the scope of their advisory roles.[43]

As in *United States v. Nixon*, the court in *Espy* ruled that the presidential communications privilege is a qualified privilege.[44] The court returned to *Nixon* for guidance in determining whether the President ultimately could withhold the subpoenaed documents.[45] The court read *Nixon* to require a balance between the President's interest in confidentiality and the public interest in disclosure.[46] The public interest, however, is described in terms of the judicial role, as it was in *Nixon*.[47] The court in *Espy* cited *Nixon* in characterizing the interest that weighs against the President's interest as the "need for evidence in a pending criminal trial" in which the evidence bears on, or is relevant to, "an accurate *judicial* determination."[48]

The court in *Espy* then concluded that the balance would require the President to disclose privileged information whenever the evidence is "directly relevant" and is not available "with due diligence" from another source.[49] The first requirement—that the evidence be directly relevant—does not obviously yield a significant change from the generally applicable discovery requirement that evidence be relevant. The opinion itself concedes, "In practice, this component can be expected to have limited impact."[50] Thus, the court in *Espy* reduced the separation of powers to a rule of etiquette: a prosecutor should approach the President only if the evidence sought is not reasonably available elsewhere.

### B. In re Lindsey *and* In re Sealed Case

In two of the most widely reported Clinton-era cases, the Administration asked the courts to recognize previously untested privilege claims: the government attorney-client privilege and the protective function, or secret service, privilege. Neither case

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opinion poses this question within the broad separation of powers framework, first noting 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.'" *Id.* (quoting Loving v. United States, 517 U.S. 748, 757 (1996)).

[43] *See id.* at 751-52.

[44] *See id.* at 752.

[45] *See id.* at 753-54.

[46] *See id.* at 753.

[47] For a discussion of this aspect of *Nixon*, see *infra* notes 75-79 and accompanying text.

[48] *Espy*, 121 F.3d at 753-54 (emphasis added). The court made these statements in the course of denying an argument that the judicial "need" for the evidence be greater—specifically that it be "critical" to an accurate judicial determination. *See id.* at 754.

[49] *Id.* at 754.

[50] *Id.* (citing FED. R. CRIM. PRO. 17(c)).

yielded a Supreme Court opinion. The Administration did not contend in either case that the privilege was constitutionally based. Instead, the Administration asked the District of Columbia Circuit to recognize the privilege under Federal Rule of Evidence 501, which authorizes the federal courts to develop common law evidentiary privileges.[51]

The court recognized the government attorney-client privilege, but held that the privilege dissolves in the context of a criminal proceeding.[52] In this setting, the relevant inquiry focuses on the presidential communications privilege as expounded in *Espy*.[53] Thus, the availability of the privilege comes under the general separation of powers principle.[54] The President did not assert the protective function privilege. Instead, the Secretary of the Treasury asserted this privilege to prevent Secret Service officers from being required to testify before the grand jury.[55] Because the President was absent from this proceeding and the Treasury Department did not raise the separation of powers issue, the court did not discuss the general separation of powers principle and resolved the case under its common law precedents as authorized by Rule 501.[56]

### C. Clinton v. Jones

The lone case to draw an opinion on the merits from the Supreme Court is also the most prominent privilege case of the Clinton Administration: *Clinton v. Jones*.[57] In *Jones*, President Clinton asserted temporary immunity from civil suit for actions undertaken before he took office as President.[58] Thus, he sought to extend a qualified application of *Nixon v. Fitzgerald*.[59] In *Nixon*, the Supreme Court held that the President enjoys absolute immunity from civil suit for actions undertaken within the broad parameters of his official capacity.[60] The Court rejected President Clinton's claim of temporary immunity.[61]

President Clinton's principal argument relied on the separation of powers principle. He contended that requiring the President to submit to civil litigation while

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[51] *See In re* Lindsey, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (per curiam); *In re* Sealed Case, 148 F.3d 1073, 1075 (D.C. Cir. 1997).

[52] *See In re Lindsey*, 158 F.3d at 1271-73.

[53] *See In re Lindsey*, 158 F.3d at 1268; *In re Sealed Case*, 148 F.3d at 1075.

[54] *See supra* notes 19-20 and accompanying text.

[55] *See In re Sealed Case*, 148 F.3d at 1074. The Secret Service is a bureau within the Department of the Treasury.

[56] *See In re Sealed Case*, 148 F.3d at 1075-79.

[57] 520 U.S. 681 (1997).

[58] *See id.* at 684.

[59] 457 U.S. 731 (1982).

[60] *See id.* at 757-58.

[61] *See Jones*, 520 U.S. at 684.

in office would undermine seriously his ability to fulfill his constitutional role, thus violating the general separation of powers principle.[62] The Supreme Court agreed that the President had identified the relevant question.[63] In articulating the general separation of powers test, the Court "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.'"[64] The Court, however, was unpersuaded by the President's contention that submitting to civil litigation would undermine impermissibly his ability to perform his constitutional duties.[65]

The Court believed that requiring the President to defend a civil lawsuit would not place a substantial burden on him. It found support for this view in history; only three presidents had ever been subject to suit for their private conduct.[66] The Supreme Court also anticipated that the district court would be capable, through sensitive case management, to accommodate the schedule and other exigencies of the presidential defendant.[67] As to the President's concern that his amenability to suit would "generate a large volume of politically motivated harassing and frivolous litigation," Justice Stevens assured that "[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant."[68]

The Supreme Court, however, did not stop at rejecting the President's "predictive judgment" that allowing civil lawsuits to proceed against him while in office would disrupt his presidency seriously.[69] The Court also asserted what it perceived as the Judiciary's own institutional interest in the question: the vitality of its "traditional Article III jurisdiction."[70] The Court saw two components of that traditional constitutional jurisdiction implicated in *Jones*. First, "[W]hen the President takes official action, the Court has the authority to determine whether he has acted within the law."[71] Second, the President is subject to judicial process in "appropriate

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[62] *See id.* at 697.

[63] *See id.* at 698.

[64] *Id.* at 701 (quoting Loving v. United States, 517 U.S. 748 (1996)).

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *Id.* at 708. For a criticism of this assurance, see *infra* notes 136-40 and accompanying text.

[69] *See Jones*, 520 U.S. at 708.

[70] *Id.* at 703-04 ("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.") (emphasis added).

[71] *Id.* at 704. The Court offered no citation for this proposition and it directly contradicted its holding in *Dalton v. Specter*. 511 U.S. 462, 472-74 (1994) (finding that "claims simply alleging that the President has exceeded his authority are not 'constitutional' claims subject to judicial review under the" *Franklin* exception for review

circumstances."[72] Here, the Court is referring to instances in which the President has been required to testify or make information available in the context of a judicial proceeding. These grounds illuminate the Court's position: the President will be subject to the judicial process—as a party, or a witness, or a source of evidence—in those instances that implicate the Court's "traditional Article III jurisdiction."[73]

## III. JUDICIAL CONFUSION

The Judiciary's confusion stems from a simple misunderstanding: judges fail to remember that it is *a statute* they are expounding.[74] In each of the Clinton-era privilege cases, the courts have viewed the separation of powers dispute as placing the President against the Judiciary. Properly construed, these cases set the President against the operation of a statute.

### A. United States v. Nixon

The seed of this confusion was sown in *United States v. Nixon*.[75] In *Nixon*, the Supreme Court viewed the President's assertion of privilege as being in tension with "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions[, which] would plainly conflict with the function of the courts under

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of constitutional claims). The Court later referred to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but, in *Dalton*, it construed these cases as limited to the question of whether the President had violated the Constitution. *See Dalton*, 511 U.S. at 463. The Court in *Dalton* expressly rejected the proposition that the courts have the authority to review presidential action merely to determine whether the action is within the law. *See id.* at 472. A claim that presidential action is *ultra vires* is not sufficient to invoke the court's jurisdiction, according to the *Dalton* decision. *See id.* The claim must assert an independent constitutional violation. *See id.* The Courts pronouncement in *Dalton* is deeply flawed. First, it ignores a fundamental commitment of the Constitution's structure: that the federal government is a government of limited and enumerated powers. The *Dalton* decision offers no response to the argument that *ultra vires* action is unconstitutional as a violation of this component of the Constitution's structure. Even taking a clause-bound approach, *ultra vires* action by the President violates the Take Care Clause: the President's duty to take care that the law be faithfully executed includes taking care to comply with the Constitution and the limits it imposes on governmental action. *See* U.S. CONST. art. II, § 3; *see also* Neil Kinkopf, *The Progressive Dilemma*, 75 NOTRE DAME L. REV. (forthcoming 2000). Nevertheless, the Court only recently had decided *Dalton* and ought to have attempted to explain how it squared with the broad assertion in *Jones*.

[72] *See Jones*, 520 U.S. at 703.

[73] *Id.* at 702.

[74] *See* McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 407 (1819).

[75] 418 U.S. 683 (1974).

Article III."[76] The Court elaborated, "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."[77]

It may have been that the President's assertion of privilege would have conflicted with the goals of criminal justice. It is odd, though, to conceptualize this conflict as implicating Article III. If withholding the evidence—in *Nixon*, the Watergate tapes—would have thwarted a prosecution, this would have prevented the effectuation not of Article III, but of the provisions of the federal criminal code that the Watergate defendants were charged with violating. Article III does not create a criminal justice system or, with one exception, define criminal law.[78] Nothing in Article III required prosecution of the Watergate defendants. Thus, President Nixon's position with regard to turning over the Watergate tapes was in conflict with a congressional enactment, and not with any requirement of Article III.[79]

B. Clinton v. Jones

The Court followed *Nixon* decision's lead in *Clinton v. Jones*.[80] It saw the case as "merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies."[81] This formulation oversimplified the source of federal jurisdiction. Article III does not confer jurisdiction on the federal courts to hear cases such as the *Jones* lawsuit. Instead, Article III generally looks to Congress to determine whether, and to what extent, to grant the federal courts jurisdiction to hear cases.[82]

The *Clinton v. Jones* decision did not implicate jurisdiction conferred directly by the Constitution. The authority of the federal courts to hear the *Jones* case was based not on Article III, but on the two statutes that confer the vast majority of federal jurisdiction: the general federal question statute[83] and the diversity of citizenship

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[76] *Id.* at 707.

[77] *Id.* at 709.

[78] The lone exception comes in Section 3, which defines treason. *See* U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

[79] Indeed, the Supreme Court invoked Article III, but never cited the provision of Article III with which President Nixon's position conflicted. This failure to cite authority has led a variety of commentators to denounce the opinion as an unfounded assertion of judicial superiority. *See, e.g.*, Akhil Reed Amar, Nixon*'s Shadow*, 83 MINN. L. REV. 1405, 1411 (1999) ("[*Nixon*] imperialized the Judiciary and marginalized the legislature.").

[80] 520 U.S. 681 (1997).

[81] *Id.* at 682.

[82] *See* U.S. CONST. art. III.

[83] *See* 28 U.S.C. § 1331 (1994).

statute.[84] As a result, the *Jones* case did not involve a tension between Article III and Article II. Rather, the case raised a conflict between the constitutional attributes of the presidency and the application of a congressional enactment. The question in *Jones* was whether the operation of a statute would yield to the President's institutional interests.[85]

The Court of Appeals fell into this same trap in *Espy*. The court declared, "The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings."[86] Regrettably, Judge Wald's opinion does not identify what these different considerations might be.[87]

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[84] *See* 28 U.S.C. § 1332. Even though these statutes use the language of Article III, neither confers jurisdiction to the fullest extent that Article III permits. For example, Article III allows jurisdiction in any case that presents a federal question. Section 1331, however, limits federal question jurisdiction to federal questions asserted in a well-pleaded complaint. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908). It does not extend jurisdiction to any case in which a significant federal law defense, including a constitutional defense, is asserted if the plaintiff did not raise a federal question in pleading its claim. *See id.*

Section 1332 limits diversity jurisdiction even more sharply from the baseline of constitutional permissibility. It imposes an amount-in-controversy threshold, currently $75,000, that must be exceeded to invoke federal jurisdiction. *See* 28 U.S.C. § 1332(a). Moreover, the statute also requires complete diversity of the parties to establish jurisdiction; if any plaintiff is a citizen of the same state as any defendant, § 1332 denies jurisdiction. *See* 28 U.S.C. § 1332(a)(1); *see also* Strawbridge v. Curtiss, 7 U.S. (1 Cranch) 267, 267 (1806). Yet, the Constitution allows jurisdiction under conditions of minimal diversity, where at least one claimant is diverse from a defendant. *See* U.S. CONST. art III, § 2. Congress enacted the federal interpleader statute on this understanding. *See* 28 U.S.C. § 1335.

[85] *See Jones*, 520 U.S. at 685.

[86] *Id.* at 753.

[87] The opinion cites two academic treatments of executive privilege, neither of which establishes the proposition for which the court cites them. *See* ROZELL, *supra* note 1, at 142-57; Norman Dorsen & John Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L. REV. 1 (1974). Professor Rozell draws the same distinction as the court but similarly fails to explain why the arena in which the claim of executive privilege is asserted should affect the constitutional analysis. Professor Rozell aptly notes that Congress has political tools available to force disclosure. *See* ROZELL, *supra* note 1, at 148-49. These tools are not available to the Judiciary. *See id.* at 151. Yet, it is not clear why or how this bears on the question of whether the privilege applies and, if so, whether it is overcome by countervailing considerations. Vague intimations of Richard Nixon's lawyer, James St. Clair, aside, no President has defied a court order to submit to judicial process. *See* Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 134-49 (1999). At least one commentator, however, apparently believes that this would be permissible. *See id.*

### C. *Constitutional Structure*

Readers of the *Federalist* should not have been surprised at the Court's confusion, or that its confusion would influence its separation of powers analysis. Madison anticipated that each branch would be ambitious and would seek to expand its power.[88] Moreover, each branch was expected to be vigilant in protecting its turf against incursions by the other branches.[89] The Constitution is designed to cultivate and to capitalize on these institutional instincts.[90]

In the privilege cases, however, the Judiciary's self-defense instinct leads it to conceptual confusion. In each case involving the Clinton Administration, the Judiciary saw the asserted privilege as representing a threat to the constitutional powers of the judicial branch.[91] Having perceived a threat, the Judiciary naturally placed little weight on the asserted privilege.

Because the Constitution structures the branches in opposition to one another, the power of each can be understood only in relation to the power of the others.[92] By minimizing the importance of the presidential privilege, the Judiciary can be understood to have placed relatively greater weight on its own institutional interests and to have asserted its own power. Thus, the courts responded to the threats to their own position as the Constitution's structure anticipates they will—by acting in self-defense and according little value to the competing interests of the other branches.[93]

## IV. STATUTORY CONSTRUCTION: THE CLEAR STATEMENT RULE

Dispelling the illusion that claims of executive privilege implicate the Judiciary's constitutional position, we find a recurring issue of statutory construction: a broadly applicable statute that presents genuine separation of powers concerns if applied to the President. In construing such statutes, the Court repeatedly has invoked the Clear Statement Rule: a court interprets the statute to apply to the President only if it clearly expresses this application.[94] The reason for this rule is simple and sound.[95]

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[88] *See* THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

[89] *See id.* at 321-22.

[90] *See* THE FEDERALIST NOS. 47, 48, 51 (James Madison).

[91] *See supra* Pt. II.

[92] *See* THE FEDERALIST NO. 51, *supra* note 88, at 322-23 (James Madison).

[93] This is also how the general separation of powers principle has been applied. The only two cases in which the Court has held that a statute violates the general separation of powers principle have involved legislative encroachment on the Judiciary. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982); Hayburn's Case, 2 U.S. (2 Dall.) 408, 412 (1792).

[94] The requirement that the separation of powers concern be genuine is an important qualification, although the executive branch sometimes overlooks it. *See* Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Jack Quinn, Counsel to the President (Dec. 18, 1995) (visited Apr. 9, 2000) <http://www.usdoj.gov/olc/

Due regard for separation of powers dictates that Congress and the President expressly consider the ramifications of applying a general statute to the President and provide assurances that the statute will not apply in a way that impairs the President's ability to function within the constitutional structure of government.[96] Once a statute's scope is clearly determined to include the President, the Court is extremely deferential to the implicit judgment of the political branches that such application is consistent with the constitutional separation of powers.[97] When it is not evident that Congress ever considered whether the statute would apply to the President, the justification for deference is attenuated because the enactment of the statute no longer clearly implies a judgment by the political branches that applying the statute to the President will not upset the constitutional balance of power between the branches.[98]

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mem_ops.htm> (stating that statutes "'are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive.'" (quoting Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Egil Krogh, Staff Assistant to the Counsel to the President (Apr. 1, 1969))); *see also* The Constitutional Separation of Powers Between the President and Congress, Op. Off. Legal Counsel (visited Apr. 9, 2000) <http://www.usdoj.gov/olc/mem_ops.htm>. This qualification is important because it distinguishes the rule of construction from Richard Nixon's famous assertion that "When the President does it that means it is not illegal." *Excerpts from Interview with Nixon about Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16 (interview by David Frost).

[95] This is not to say that clear statement rules generally are appropriate or sound. *See generally* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985); William Eskridge & Phillip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

[96] Similarly, the Court has adopted the Clear Statement Rule for questions involving the vertical separation of powers—that is, federalism. In that context, the Clear Statement Rule is designed also to accord due regard to the sovereignty of the states and to ensure that the federal government has considered the ramifications of applying a generally applicable statute in that unique setting. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that the Age Discrimination in Employment Act would apply to the mandatory retirement age of state judges only if the statute clearly covered this situation); *see also* WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 354-62 (2000) (discussing interpretive canons used to protect state authority from federal encroachment).

[97] *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding the independent counsel statute, which clearly was designed to limit the President's control over prosecutorial functions vested in the independent counsel); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (applying a highly deferential standard to determine whether the Presidential Records Act violated the separation of powers doctrine).

[98] This rule of construction is closely related to the so-called avoidance canon, under which the courts will construe a statute to avoid raising constitutional questions if there is an alternative ground on which to decide the case. For example, the Supreme Court refused to interpret the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 § 1 *et seq.* (1994), which requires open meetings by advisory committees that comprise members who are not federal officials, as applying to the American Bar Association's Committee on Judicial Nominations. The Court's rationale was to avoid the serious separation of powers

The federal Judiciary is not a political branch. The judicial branch is designed to be insulated from politics in order "to secure a steady, upright, and impartial administration of the laws."[99] The Constitution grants federal judges life tenure, during good behavior, and provides that their salaries may not be reduced while in office.[100] Because federal judges may be removed only in extraordinary circumstances, they are not subject formally to the supervision and control of any other political actor or constituency. The federal Judiciary's independence and insulation from politics render it institutionally the least competent branch to make political judgments.

Following the implications of this design, the courts have at times strained the text of a statute to conclude that it does not cover the President. For example, the Supreme Court in *Franklin v. Massachusetts*[101] held that the Administrative Procedure Act's (APA)[102] provision of judicial review of final agency action does not apply to final administrative action undertaken by the President.[103]

The APA grants to the Judiciary the jurisdiction to review final agency actions.[104] The APA defines an "agency" to be:

> each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.[105]

On a straight textual analysis, the term agency would seem to encompass the Office of the President.[106] That office is, under any natural usage, an "authority of the

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concerns that would arise if this advisory function could not be performed in confidence. Achieving that construction, however, meant significant interpretive contortions. *See* Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 443 (1989) ("[W]e cannot believe that [FACA] was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice."). The District of Columbia Circuit also employed the avoidance canon to FACA in holding that the First Lady is a government official; therefore, the President's health care task force was not subject to FACA. *See* Association of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (1993). For a criticism of this approach, see Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (1995).

[99] THE FEDERALIST NO. 78, *supra* note 88, at 465 (Alexander Hamilton).

[100] *See* U.S. CONST. art. III, § 1.

[101] 505 U.S. 788 (1992).

[102] 5 U.S.C. § 551 *et seq.* (1994).

[103] *See Franklin*, 505 U.S. at 796.

[104] *See* 5 U.S.C. § 704 (1994).

[105] 5 U.S.C §§ 551(1), 701(b)(1).

[106] The Office of the President is an administrative unit that encompasses the President

Government of the United States."[107] Under the maxim, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the express exception of other potentially covered authorities strengthens the textual case that the term agency includes the Office of the President. The heads of the other branches of the federal government are excluded under the first two exceptions.[108] Application of the *expressio unius* maxim would suggest that the two exceptions were strong evidence that the head of the branch that was not excepted—the President—is included. Nevertheless, the Court in *Franklin* refused to read the APA's judicial review provisions to cover the President unless expressly provided by the statute.[109] To support this position, the Court cited *Nixon v. Fitzgerald*,[110] which it characterized as holding that the "Court would require an explicit statement by Congress before assuming Congress had created a damages action against the President."[111]

The *Jones* case presented a peculiarly apt setting for the application of the Clear Statement Rule. The Court pointed to the two major federal jurisdiction statutes as the source of federal court authority to hear the lawsuit.[112] Federal courts have "jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[113] Federal courts also have "jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states."[114] Neither of these jurisdictional statutes states that it applies to the President. Indeed, the primary setting in which these statutes operate likely involves civil litigation among private individuals or corporations. The APA, by contrast, operates exclusively in the context of federal administrative action.[115]

The clear statement rule avoids interpreting legislation to alter the balance of governmental power when Congress has not expressed statutorily such an intention

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and his closest staff. It is a subset of the Executive Office of the President. *See* Kissinger v. Reporter's Comm. for Freedom of the Press, 455 U.S. 136 (1980); *see also infra* note 144.

[107] 5 U.S.C §§ 551(1), 701(b)(1).

[108] *See id.*

[109] *See* Franklin v. Massachusetts, 505 U.S. 788 (1992).

> Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

*Id.* at 800-01.

[110] 457 U.S. 731 (1982).

[111] *Franklin*, 505 U.S. at 801.

[112] *See* Clinton v. Jones, 520 U.S. 681, 685 (1997).

[113] 28 U.S.C. § 1331 (1994).

[114] 28 U.S.C. § 1332.

[115] *See Franklin*, 505 U.S. at 796-801.

and thus has not rendered, even implicitly, a judgment that the alteration is constitutionally permissible. In fact, because Congress appears to have made an exhaustive review of the APA's applicability to the spectrum of federal authorities, it is conceivable that Congress also considered the possibility that the statute might apply to the President.[116] The federal question and diversity jurisdiction statutes, by contrast, do not waive the sovereign immunity of the federal government or operate primarily as mechanisms to regulate the behavior of federal agencies or officials.[117] Nothing on the face of these statutes would draw Congress' attention to the separation of powers question that President Clinton raised in *Jones*.[118]

The *Jones* case also directly implicated the clear statement rule's competency rationale. The President's arguments in *Jones* were political, as is inevitable with such a separation of powers issue. He argued that the burdens of civil litigation would substantially distract him from the duties of his office and that civil litigation would be used as a political weapon.[119] The Supreme Court responded that, "Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant."[120] It is difficult to imagine a group of nine lawyers believing this assertion at the time the opinion was written.[121] In hindsight, each of the President's assertions seems powerful, while the Court's response appears preposterous and naive. In light of subsequent events, the

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[116] *See id.* For example, the list of exceptions demonstrates that Congress thought about how the statute should apply to Congress, the territories, and the District of Columbia. It is not much of a leap to conclude that Congress probably thought about whether the APA might also apply to the President.

[117] Of course, the jurisdiction statutes regulate the Article III Judiciary by defining the cases to which the judicial power extends. The APA is designed to grant the federal Judiciary the authority to review the administrative actions of federal agencies. *See* 5 U.S.C. § 581. The federal question and diversity jurisdiction statutes are designed to grant the federal Judiciary jurisdiction to hear a broad range of controversies, mainly involving parties that are wholly private. *See* 28 U.S.C.§§ 1331-1332.

[118] Shifting the focus to the federal statutes creating the federal causes of action at issue in *Jones* (Title VII and § 1983) would not alter this point. The application of these statutes to a sitting president is far removed from the context in which each would typically operate.

[119] *See* Clinton v. Jones, 520 U.S. 681, 692-706 (1997).

[120] *Id.* at 708.

[121] It may not be implausible, however, in the case of the nine justices that decided *Clinton v. Jones*. The relevant background for *Jones* would have included significant experience with contemporary litigation and a substantial political office. None of the justices possessed either. By virtue of the experience of each of the individual justices, the Court was singularly unqualified to comprehend the issues and arguments involved in that case. *See* Verbatim, The Chron. Higher Educ., Sept. 24, 1999 ("If [the Supreme Court] is going to settle politically charged cases, it seems to me the relevant experience is politics. If you go back to the Supreme Court of the 40s and 50s, justices had substantial experience . . . . Today we have these kind-of virgins—nine justices whose cumulative political experience is slight.").

prospect of politically motivated litigation against a President seems anything but remote.[122]

The most significant error in *Jones*, however, was not the Court's political judgment. Rather, the most important misstep was the Court's decision to attempt a political judgment at all. The Clear Statement Rule reflects the understanding that the Judiciary is not well-equipped to make political judgments; indeed, it is designed to be ill-equipped to make such determinations.[123] For this reason, the Court repeatedly defers to the expressed, or fairly implied, judgment of the political branches in separation of powers cases,[124] and it abstains from supplying a judgment in cases in which the political branches cannot be fairly understood to have spoken. Distracted by the misperception that its own turf was at stake, the Court in *Jones* failed to recognize that the political branches had never made the judgment that the general federal civil jurisdiction statutes would not upset the separation of powers if applied to the President, even for suits arising from occurrences that pre-date his term in office.

The Court in *Nixon*, by contrast, came to the correct conclusion because it involved enforcement of the criminal law.[125] It simply presents no genuine separation of powers issue to say that the President is subject to the prohibitions of the federal criminal code. Thus, the President may not commit mail fraud or bribery. Applying these proscriptions to the President in no way threatens any separation of powers value.

The ratification debates demonstrate the understanding that the President would be subject to the criminal laws.[126] Opponents of the Constitution's ratification raised as a chief objection the prospect of a President who, like a monarch, would not be

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[122] To its speculation that summary judgment would prove an effective defense against political harassment, the court added its conclusion, "History indicates that the likelihood that a significant number of such cases will be filed is remote." *Jones*, 520 U.S. 681, 709 (1997). History now demonstrates that "a significant number of such cases" is one.

[123] *See supra* notes 94-100 and accompanying text.

[124] Where the political branches, through bicameralism and presentment, have determined that an institutional arrangement does not upset the proper balance of governmental power, the Court will not second guess their assessment. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 381 (1989) (holding that a court will invalidate an act of Congress only for compelling constitutional reasons); Morrison v. Olson, 487 U.S. 654 (1988) (emphasizing the importance of a congressional determination). Even when applying an anti-aggrandizement analysis, the Court does not make a judgment about whether a given measure will in fact yield a shift in power among the branches. *See* Bowsher v. Synar, 478 U.S. 714, 730 (1986) (refusing to engage in a "judicial assessment" of how a statute might, as a "practical result," affect the balance of power between the branches).

[125] *See* United States v. Nixon, 418 U.S. 683 (1974).

[126] This Essay does not offer an opinion as to whether a criminal indictment may be issued, or a trial commenced, against a President while still in office.

subject to the proscriptions of the criminal law.[127] Advocates of ratification repeatedly highlighted the President's amenability to law as an important feature of the document.[128] These considerations find expression in the text of the Constitution.

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, *but the party convicted shall nevertheless be liable to indictment, trial, judgment and punishment, according to law.*[129]

It is a fundamental premise of the structure of the presidency that the President is not exempt from the criminal law.

The *Nixon* case presented these fundamental considerations. The investigation in that case centered on criminal wrongdoing by the President and his close aides and advisers.[130] President Nixon had been named an unindicted co-conspirator.[131] Compelling the President to comply with a subpoena *duces tecum* under these circumstances does not generate tension with the constitutional separation of powers. Given the fundamental commitment that the President be subject to criminal proscriptions, compliance with the subpoena was consonant with the constitutional structure of the office.

The problem with *Nixon* is not the decision itself, but the way it has come to be understood, especially in *Espy*. The court in *Espy* did not pay careful attention to the factual setting of the prosecutor's request for information. The investigation of Secretary Espy did not implicate even remotely the possibility of presidential involvement. Absorbed by concern for its own constitutional turf, the District of Columbia Circuit asserted the mechanisms of criminal law enforcement as a proxy

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[127] *See, e.g., The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania*, PENNSYLVANIA PACKET AND DAILY ADVERTISER, Dec. 18, 1787, *reprinted in* THE ESSENTIAL ANTIFEDERALIST 53, 66 (W.B. Allen & Gordon Lloyd eds., 1985) (espressing the fear that the President may use his power to "screen from punishment the most treasonable attempts that may be made on the liberties of the people");George Mason, *Objections to the Constitution of Government formed by the Convention, 1787, reprinted in* THE ESSENTIAL ANTIFEDERALIST, *supra*, at 11, 12 (expressing the fear that the President might use his power to "screen from punishment those whom he had secretly instigated to commit [a] crime, and thereby prevent discovery of his own guilt").

[128] *See, e.g.*, THE FEDERALIST NO. 69 vol. 2, at 40, 41 (Alexander Hamilton) ("The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.").

[129] U.S. CONST. art. I, § 3 (emphasis added).

[130] *See* United States v. Nixon, 418 U.S. 683, 687-88 (1974). Although President Nixon was not a named defendant, he was an unindicted co-conspirator.

[131] *See id.* at 687.

for its own Article III powers.[132] This led the court to discount the force of the President's privilege claim. The court ignored the possible chilling effect of overriding executive privilege in a context like *Espy*. Future presidents will be hamstrung in their ability to conduct any sort of internal investigation into allegations of wrongdoing. Undermining the ability of the President to root out misfeasance within the executive branch does not advance the values underlying the constitutional structure of an independent executive.

*Espy*'s formulation of the standard governing executive privilege in the criminal law context—that evidence be "directly relevant"[133]—is less troublesome than how courts understand that standard. As long as courts erroneously see their own constitutional position at stake in these disputes, they predictably will undervalue legitimate assertions of need to keep presidential communications confidential. Judges should understand that their constitutional position is not implicated significantly when they accommodate generally applicable criminal procedure statutes, which were enacted without regard for the peculiar setting of investigations of the executive branch, to that unique and delicate setting.

## V. PROPOSAL

### A. *Judicial Response*

The Court's approach to constitutional privilege claims is basically sound. Conceptualizing the issue as one of separation of powers is appropriate. Within the separation of powers setting, the Judiciary typically and properly defers to the judgment of the political branches.[134] Problems arise when the Court mischaracterizes the separation of powers issue as implicating the constitutional functions of the Judiciary. This leads the Court to be less deferential and, as seen in *Jones*, to venture political judgments on questions that the political branches have not addressed.[135] The Clinton-era privilege litigation demonstrates how important it is for the Court to characterize properly the nature of the separation of powers issue before it and to apply its Clear Statement Rule in order to refrain from filling a void with its own political judgment.

The specific harm of *Jones*—that civil litigation is available as a political weapon against the President—remains on the books.[136] An exploration of all the possible systemic ramifications of political litigation is beyond the scope of this Essay.[137] The

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[132] *See* Espy, 121 F.3d 729, 753-54 (D.C. Cir. 1997).

[133] *Id.* at 754.

[134] *See supra* note 124.

[135] *See supra* notes 119-24 and accompanying text.

[136] *See* Clinton v. Jones, 520 U.S. 681 (1997).

[137] Political litigation may have some salutary consequences. For example, subjecting the President to the various discovery mechanisms authorized by the Federal Rules of Civil

*Jones* litigation and its aftermath—the Lewinsky investigation and the impeachment proceedings—show that there are some significant problems with political litigation. The most pernicious consequence may be what can be referred to as distraction. By occupying the time and attention of the President and Congress for such a lengthy period, the matter necessarily displaced other policy items from the agendas of those institutions.

Political scientists write about the importance of agenda-setting. First, whoever controls the agenda—the order and timing in which matters are considered—can control outcomes. Second, Congress and the President can complete a finite set of business, which is markedly smaller than the set of demands for action placed on those institutions. Consequently, the ability to set the agenda and determine what actions will be considered, and in what order, can shape and, under certain circumstances, even control which actions are taken and which are neglected or rejected.[138]

The *Jones* precedent allows any individual or organization that can muster a colorable civil lawsuit to exert substantial influence over, or even to commandeer, the agenda of the federal government. Yet, these litigants are private individuals or organizations which are not democratically accountable. Thus, *Jones* grants unaccountable actors significant control over the agenda of the federal government.

The *Jones* case itself provides an illustration. The lawsuit would not have proceeded without the funding of a political organization that was opposed to the President—the Rutherford Institute.[139] It would be difficult to overstate the extent to which the decisions of this organization reshaped the agenda of the federal government over a period of several years.

Temporary presidential immunity from civil lawsuits would not mean that the President is entirely immune from investigation of wrongdoing that falls outside the category of criminal wrongdoing. Congress holds vast investigative and oversight jurisdiction and is not shy about asserting it.[140] A major difference between a congressional inquiry and a civil lawsuit is that Congress is democratically accountable. If oversight and investigation of the Administration occupy too significant a position on the federal agenda, the public can demand that Congress curtail or scale back its inquiries and turn its focus to matters the public deems more worthy of governmental attention. The public ultimately can enforce its demand at

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Procedure is apt to afford the public access to a greater quantum of information about the President.

[138] *See, e.g.*, KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963).

[139] *See* Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 681 (1999) ("The Jones case was at this point being prolonged and financed by ideological opponents of the President, the Rutherford Institute.").

[140] Though vast, this jurisdiction is not unlimited. *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168 (1880); *see also* Schroeder & Kinkopf, *supra* note 5, at 25.

the ballot box, but it has no corresponding leverage over a private entity, such as the Rutherford Institute.

B. *A Legislative Response*

Edified by the spectacle that followed the Supreme Court's decision in *Jones*, Congress should respond by enacting appropriate legislation. For an analogy, Congress might look to the statutory regime governing public access to federal documents. The generally applicable statute is the Freedom of Information Act (FOIA).[141] FOIA grants to the public a right of nearly immediate access to a wide range of federal information.[142] The Supreme Court held that FOIA does not apply to the Office of the President.[143] The statute covers the Executive Office of the President,[144] but the Supreme Court relied on legislative history to carve the Office of the President out of the Executive Office of the President and then to exempt the Office of the President from FOIA.[145] Subsequently, Congress enacted the Presidential Records Act (PRA)[146] to regulate the public disclosure of presidential records.[147] The PRA allows the President to maintain all presidential records and their confidentiality throughout his term or terms of office and for up to twelve years thereafter.[148]

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[141] 5 U.S.C § 552 (1994). Other statutes—such as the Federal Records Act, 44 U.S.C. § 2901—are important to the overall system of federal record maintenance and disclosure, but are not sufficiently analogous to illuminate the issue of temporary presidential immunity from civil suit.

[142] FOIA requires that the agency subject to a request for information make a determination on the request within 10 days, absent unusual circumstances. *See* 5 U.S.C. § 552(a)(6). FOIA requesters know that in practice it takes much longer to get an actual response. In addition, FOIA excludes significant categories of information from its disclosure requirements. *See* 5 U.S.C. § 552(b).

[143] *See* Kissinger v. Reporters' Comm. for Freedom of the Press, 445 U.S. 136, 138 (1980).

[144] The Executive Office of the President (EOP) is a more encompassing entity than the Office of the President. The EOP includes some of the permanent agencies, staffed largely by civil servants, that are housed administratively within the White House, such as the Office of Management and Budget and the Council of Economic Advisers. *See White House Offices and Agencies* <http://www.whitehouse.gov/WH/EOP/html/EOP_org.html>. The Office of the President consists of the President's immediate staff and advisers.

[145] *See Kissinger*, 445 U.S. at 156.

[146] 44 U.S.C. §§ 2201-2206.

[147] *See* 44 U.S.C. § 2201.

[148] At the conclusion of his presidency, the President must turn over all records to the Archivist. The President may designate that records containing certain sensitive categories of information be withheld from access for up to 12 additional years. All other records are to be disclosed within five years or once the Archivist finishes cataloging them, if that is completed earlier. *See* 44 U.S.C. §§ 2203-2204.

In the context of civil litigation, Congress should recognize that the unique status of the President requires a specifically tailored jurisdictional regime, just as the generally applicable FOIA does not account adequately for the special sensitivity of presidential records. As the PRA grants immunity to presidential records from disclosure during the President's term in office, while at the same time recognizing that orderly public disclosure thereafter serves a significant public benefit, Congress should recognize that the President should be immune from civil lawsuits during the term of his office. Once that term ends, however, it is proper for the President to be subject to civil lawsuit. The PRA prevents the system of public disclosure from being used as a political weapon against the President. Congress also should provide a deterrent against the system of civil litigation being used in a similar fashion.

The plaintiff in *Jones* raised legitimate concerns regarding the potential effects of a temporary immunity that could last as long as eight years.[149] The plaintiff's concerns centered on the possibility that evidence might be lost or difficult to discover after the temporary immunity finally elapses.[150] The Court chose to vindicate these interests and to look to "case management" to accommodate the President's concerns.[151] Having seen that the tools of case management are ineffective, Congress should instead try to accommodate the legitimate concern of plaintiffs in the context of temporary presidential immunity.

This accommodation can be made by requiring the President, should he decide to invoke the temporary immunity, to post a bond to compensate the plaintiff for any losses that might result from delaying discovery and trial. The decision whether to require a bond in a given case and the amount of the bond should be left to the discretion of the trial judge, who would examine the particular circumstances of the case and its evidentiary setting. This requirement would be similar to the provision allowing a judge to require that a plaintiff post a bond as a condition to receiving a preliminary injunction.[152]

The following is a draft of what temporary presidential immunity legislation might look like:

> SECTION 1. Once filed, all legal proceedings that may prejudice the unofficial legal rights of the person serving as President shall be suspended temporarily during the period for which the person serves as President without regard to when the events giving rise to such legal proceedings may have occurred.[153]

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[149] *See* Jones v. Clinton, 72 F.3d 1354, 1363 (1996).

[150] *See id.*

[151] *See* Clinton v. Jones, 502 U.S. 681, 702 (1997).

[152] *See* FED. R. CIV. P. 65(c).

[153] This language is modeled on the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. app. 510 (1994).

SECTION 2. If a party files a cause of action covered by Section 1, the district court may, in its discretion, order the President to give security, in such sum as the court may deem proper, for the payment of such costs and damages as may be incurred or suffered as a result of the delay occasioned by the temporary immunity granted by Section 1.

## CONCLUSION

The executive privilege cases arising from the Clinton Administration have raised important separation of powers issues. The judicial misperception that these cases significantly involved the constitutional role of the judiciary has been a source of real harm to our political system. Nevertheless, it is not too late for Congress and the courts to take appropriate action to prevent mischief in the future.