

Presidential Immunity: A Survey of United States Cases¹

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There are ... incidental powers, belong 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, without any obstruction of impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention while he is in the discharge of the duties of his office ...

*Justice Joseph Story, 1833*²

Introduction

The concept of immunity is not new or limited to the President in the United States. The earliest concept of “sovereign immunity” provided absolute immunity for the monarch – that is, “the king can do no wrong.” In a democracy, however, the President is no longer the sovereign (which is vested in the people) and the doctrine of sovereign immunity applies to limitation of government (rather than personal) liabilities.

This does not mean, however, that no immunity should apply to the President. It is true that in a democracy governed by the rule of law, no one is

¹ This article uses the Blue Book format citation.

² 3 Joseph Story, Commentaries on the Constitution of the United States Sec. 1563.

above the law. The President, however, is a unique office – as the chief executive, the head of state, and commander-in-chief. Unlike the other branches of government, all Executive power is vested in one person – the President. He is thus both a person subject to the same treatment of law and justice at the same time an equal branch of the government. The principle of separation of powers may provide justification for immunity for the President. As discussed later, however, the Supreme Court has not extended immunity to the President on that ground.

Another reason for providing immunity for the President (and indeed, other government officials) is for public policy consideration and the need for effective governance. In carrying out their effective functions, government officials may have adversely impacted a variety of individuals, each of whom may have a potential claim of liability against the government officials. Without official immunity, there will be an atmosphere of intimidation that would conflict with public servants' ability to perform their duties effectively. This immunity is not unique to the President, as shown later. The earlier version of such an immunity is the "Speech and Debate" clause etched in the first ratified Constitution of the United States. The Speech and Debate clause provided Senators and Representatives protection from civil arrest while the Congress is in session, and also provided immunity against liabilities arising from their speeches and debate in Congress.

As the only expression of immunity in the U.S. Constitution, the Speech and Debate clause provide two distinct types of immunities – one temporary and the other permanent. We will discuss to what extent, and based on what rationale, should the President be entitled to these immunities.

To What Immunity Is the President Entitled?

Only two Supreme Court cases addressed the issue of Presidential immunity in civil suits. The first one, *Nixon v. Fitzgerald* 457 U.S. 731 (1982),

concerns the remedy of a government employee who, after testifying before a U.S. congressional sub-committee about defense project cost-overruns, was fired from his post. Fitzgerald subsequently filed a complaint before the Civil Service Commission, alleging retaliatory firing. While the Civil Service Commission rejected Fitzgerald's claim, it concluded that Fitzgerald's dismissal violated applicable regulations because it was due to "reasons purely personal to" him. Fitzgerald later filed civil suits against the various Defense Department and White House officials, later adding former President Nixon as a defendant. The case eventually went before the Supreme Court on the question of *whether the President is entitled to absolute immunity from damages liability*.

Another case is *Clinton v. Jones*, in which Paula Jones, a former employee of Arkansas filed sexual harassment suits against then-President Bill Clinton for incidents occurred while Bill Clinton was the Governor of Arkansas. The case went before the Supreme Court on the question of *whether the sitting President is entitled to temporary immunity from civil damage litigations arising out of events that occurred before he took office*.

The two cases address two different types of immunities. In *Fitzgerald*, the question is whether a President shall be liable at all – a question of permanent immunity, where as in *Clinton*, the questions is whether the mere fact of the defendant in the civil action is a sitting president justifies delay of the civil trial until after the term of the President's office. The two cases also address immunity for different actions.

Creation of the Presidential Immunity – *Nixon v. Fitzgerald*

When it comes to immunities, the U.S. Constitution contains only one expressed immunity clause. Article I Section 6 of the U.S. Constitution states that:

“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.”³

The U.S. Constitution goes no further in enumerating any additional immunity for the Executive Branch (in Article II) or the Judiciary Branch (in Article III). Some have argued that such a lack of expressed immunity implies that the U.S. Constitution does not provide for any immunity protection for the President. One canon of statutory interpretation states that “*expressio unius est exclusio alterius*” (“the express mention of one thing excludes all others.”) The proponent of the “*expressio unius*” reading of the constitutional immunity argues that, because the Speech and Debate Clause provides a textual basis for congressional immunity, the Framers of the U.S. Constitution must be assumed to have rejected any similar grant of executive immunity. Indeed, the counsel for Fitzgerald made that same argument before the Supreme Court. In a detailed footnote, the Supreme Court rejected the argument, stating “a specific textual basis has not been considered a prerequisite to the recognition of immunity.”⁴ The Supreme Court then pointed to the examples of judicial immunity under cases such as *Bradley v. Fisher*, 13 Wall. 335 (1872) and *Stump v. Sparkman*, 435 U.S. 349 (1978), in which the Supreme Court provided judges and prosecutors with immunity from civil liability despite the lack of express clauses in the U.S. Constitution. In addition, the Supreme Court has also extended absolute immunity to certain officials of the Executive Branch in cases such as *Butz v. Economou*, 438 U.S. 478 (1978) (granting qualified immunity for federal executive officials for “prosecutorial acts.”)

The main consideration of the Supreme Court in granting qualified immunity for executive officials in cases is to free officials to discharge their duties without concern that a particular action may result in civil damage

³ U.S. Const Art. I §6.

⁴ *Fitzgerald* at 750 n. 31.

liabilities against them arising from their actions. In one of the earlier immunity cases, the Supreme Court reasoned that in the absence of immunity, executive officials would hesitate to exercise their discretion in a way “injuriously affecting the claims of particular individual, even when the public interest required bold and unhesitating action.”⁵ Later, the Supreme Court adopted more detailed qualification on whether a particular action should be immune from damage liability in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Scheuer*, the scope of the defense varied depending upon “the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.”⁶ In other words, an executive official’s claim of immunity is proportional to the nature and of their official functions and the range of decisions that may be taken “in good faith.” The Supreme Court, however, later carved out an exception of absolute immunity for state judges for all judicial acts⁷ and state prosecutors with respect to the initiation and pursuit of prosecutions.⁸ The Supreme Court then extended absolute immunity to federal executive officials that serves similar prosecutorial and judiciary roles in *Butz*.⁹

While recognizing that there is no absolute immunity for all federal executive officials, the Supreme Court went on to note the President’s unique status in the Executive Branch. In cases such as *Butz*, the scope of the immunity for executive officials is limited to “acts in performance of particular functions of his office.”¹⁰ That is, in examining whether an official is immune from civil litigation arising from his activities, the Supreme Court (and not the executive official) makes the final decision on whether such an activity is a part of the “particular functions” of that position.

⁵ *Id.* at 744-45, citing *Spalding v. Villas*, 161 U.S. 481, 499 (1896).

⁶ *Scheuer* at 247.

⁷ *Stump*.

⁸ *Imbler v. Pachtman*, 424 U.S. 409 (1976).

⁹ *Butz* at 508-516.

¹⁰ *Id.* at 508-517.

Here, the Supreme Court argues, is how the President is unique from other executive officials. The Supreme Court recognizes that “the President has discretionary responsibilities in a broad variety of areas” and that “in many cases it would be difficult to determine which of the President’s innumerable ‘functions’ encompassed a particular action.”¹¹ Applying it to the specific facts of *Fitzgerald*, the Supreme Court recognizes that it is within the President’s power to implement reorganization. *Fitzgerald*’s allegations that such reorganization was motivated by personal reasons against him would require inquiring into the President’s motives under the “functional” qualified immunity approaches of *Butz* and related cases. Such an inquiry would be highly intrusive. This difficulty in determining the President’s official act, and the burden such scrutiny will place upon the Chief of the Executive Branch would “subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose.”¹² Applying the “functional” qualified immunity standard will defeat the intended effect of having the immunity in the first place.¹³ As such, the President should be entitled to absolute immunity for actions that lay within the outer perimeter of his authority.

Limitations of Presidential Immunity

In *Clinton v. Jones*, a different immunity was sought by the sitting President. After Ms. Jones filed the lawsuit in the federal district court, attorneys for President Clinton filed a motion to dismiss without prejudice on Presidential immunity grounds and to toll any applicable statutes of limitation until after Clinton’s presidency. The district court rejected the motion and allowed discovery process to begin; however, the district court postponed any

¹¹ *Fitzgerald* at 756.

¹² *Id.*

¹³ *Id.*

trial until after Clinton's presidency had ended. On appeal, the appellate court affirmed the dismissal, but reversed the trial postponement as a functional equivalent of a grant of temporary immunity to which the President is not entitled. In its opinion, the Supreme Court distinguished *Fitzgerald* on the grounds that the absolute Presidential immunity under *Fitzgerald* does not provide immunity for unofficial acts.

In *Clinton*, the Supreme Court applied the same limit to the Presidential immunity as immunities for other public servants. Tracing back the reason for granting such immunity in the first place, the Supreme Court stated that "the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability."¹⁴ Noting that in *Fitzgerald*, the Supreme Court extended the immunity for the President for his official acts to the "outer perimeter" of the President's authority due to the President's broad range of responsibilities. *Fitzgerald*, the Supreme Court concludes, does not provide the ground for the temporary immunity that President Clinton sought for his unofficial acts.

The Supreme Court then addressed the argument that President is entitled to temporary immunity based on the principle of separation of power. The doctrine of separation of powers places limits on the authority of the judiciary branch to interfere with the executive branch.¹⁵ The question is whether by allowing the civil action to proceed would violate the separation of powers doctrine. The separation of powers doctrine addresses allocation of official power among the judiciary, legislative, and executive branches. Thus, Congress may not exercise the judiciary power to revise final judgments,¹⁶ and the President may not exercise the legislative power to authorize the seizure of

¹⁴ *Clinton* at 693.

¹⁵ *Id.* at 697-98.

¹⁶ *Id.* at 699-700, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

private property for public use.¹⁷ Further, the separation of powers doctrine also “requires a branch not impair another in the performance of its constitutional duties.”¹⁸

President Clinton’s counsel argued that, by allowing such civil actions to proceed would impose an unacceptable burden on the President’s time and energy and thus impair his effective performance of his constitutional duties.¹⁹ The Supreme Court rejected such a reasoning, noting that judiciary process has in many ways demanded the President’s time and energy. First, the Supreme Court has reviewed the legality of Presidential action, giving the most dramatic example of a case where the Supreme Court held that President Truman exceeded his constitutional authority when he directed the Secretary of Commerce to take possession of and operation most of the nations’ steel mills.²⁰

Second, the Supreme Court pointed out several incidences where the judiciary process may impose such burdens on the President, including directing subpoena to produce evidence. The Supreme Court noted prior judiciary insistence for President Nixon to produce the tape recording of conversation with his aids.²¹ The Supreme Court also noted several incidences where presidents have given disposition and videotaped testimony.²² If the judiciary may review the legality of the President’s official conduct and to direct process to the President himself, then it follows, that the judiciary may review the President’s unofficial conduct. At the end, the Supreme Court rejected President Clinton’s assertion of temporary immunity from civil actions. In a concurring opinion, Justice Beyer argues that presidential immunity would apply only if the President could show that a private civil lawsuit would

¹⁷ *Id.* at 700, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁸ *Id.* at 701, citing *Loving v. United States*, 517 U. S. 748, 757 (1996).

¹⁹ *Id.* at 701.

²⁰ *Id.* at 703, citing *Youngstown*.

²¹ *Id.* at 704, citing *United States v. Nixon*, 418 U.S. 683 (1974).

²² *Id.* at 704-5.

somehow interfere with the President's constitutionally-assigned duties.²³

With *Fitzgerald* and *Clinton*, the President enjoys absolute immunity from civil damage actions for official conducts and no immunity for unofficial conducts. Yet these two cases draw an incomplete picture of the President's immunity. Are there circumstances where the President is entitled to temporary immunity?

Presidential Privilege from Criminal Prosecution – 1973 and 2000 OLC Memorandums

No case ever addressed the question of immunity for the President from criminal prosecution. Indeed, no sitting President of the United States have been indicted.²⁴ There are, however, numerous cases of federal officials being criminally prosecuted while still in office, including two vice presidents.²⁵ When Vice President Agnew filed a motion asserting his immunity from criminal indictment as the vice president, the solicitor general filed a brief arguing that the Vice President is not entitled to temporary immunity from criminal indictment. The solicitor-general, however, argued in the same brief that the President may be distinguished from the vice president and other impeachable federal officials and that the President should enjoy temporary immunity from indictment and criminal prosecution. Prior to filing the brief, the Office of Legal Counsel of the Department of Justice (OLC)²⁶ had

²³ *Id.* at 710.

²⁴ The closest a President ever come to face with criminal prosecution maybe President Nixon, who was later pardoned by President Ford after he resigned from office.

²⁵ Vice President Aaron Burr was indicted while he was in office for murder in both New York and New Jersey after he mortally wounded Alexander Hamilton in the famous duel. Vice President Agnew was also indicted on (and later pleaded no contest to) the charges of tax evasion and money laundering for allegedly accepting bribes as the governor of Maryland.

²⁶ While not a judiciary body, the OLC "is the most important government office you've never heard of. ... Within the executive branch, . . . the OLC acts as a kind of mini-Supreme Court. Its carefully worded opinions are regarded as binding precedent -- final say on what the

concluded in a memorandum that, while the vice president and other civil officials are not immune from federal indictment and criminal prosecution, the President is unique and thus entitled to temporary immunity from indictment and criminal prosecution while he is in office.²⁷ In that memorandum, the OLC concluded that the indictment or criminal prosecution of a sitting President would be unconstitutional because it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure.

In 2000, the OLC re-examined the 1973 OLC Memo on the issue of a sitting President's amenability to indictment and criminal prosecution.²⁸ After reviewing the 1973 OLC Memo, the OLC concluded that its analytical approach in 1973 is consistent with analysis of Supreme Court cases since 1973 and that a sitting President is constitutionally immune from indictment and criminal prosecution.²⁹ In the 1973 OLC Memo, the OLC first examine the plain text of the Impeachment Clause in the U.S. Constitution, which states that:

Judgment in Case of Impeachment shall not extend further than to remove 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 and subject to Indictment, Trial, Judgment and Punishment, according to Law.³⁰

Some have argued, based on this clause, that the impeachment process

president and all his agencies can and cannot legally do." ("Palace Revolt" by Daniel Klaidman, Stuart Taylor Jr. and Evan Thomas. *Newsweek*, February 6, 2006, Pg. 34)

²⁷ Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel (OLC), Re: Amenability of the President Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973) ("1973 OLC Memo").

²⁸ See Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Re: A Sitting President's Amenability Indictment and to Criminal Prosecution (Oct. 16, 2000) ("2000 OLC Memo").

²⁹ 2000 OLC Memo Sec. III.

³⁰ U.S. Const. Art I. Sec. 3 Cl. 7.

should proceed prior to indictment and trial of the criminal process. The use of the word “nevertheless” in the clause, however, cast doubt that the Judgment clause was intended as a bar for criminal prosecution until the termination of the impeachment proceeding. The OLC took the view that, the word “nevertheless” was meant only to signify that conviction by the Senate in an impeachment proceeding would not bar subsequent criminal prosecution, rather than to signify the necessity that such criminal prosecution not to take place until after the conclusion of the impeachment proceeding. It was intended to forestall an argument of double jeopardy. In another memorandum, the OLC examined whether a former president may be indicted and tried for the same offenses for which he was acquitted in an impeachment proceeding and concluded based on this interpretation of “nevertheless” that the double jeopardy doctrine does not bar subsequent criminal prosecution after a president has left office.³¹ Further, if such a reading of the Impeachment Clause bars criminal indictment of the President, then it would have also barred criminal indictment of other impeachable federal officials.

The reasoning for granting temporary immunity for the President therefore came from a different line of reasoning. The OLC memorandum then examined the approach of the 1973 OLC Memo “to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency.”³² The 1973 OLC Memo examined whether criminal indictment of the President is inconsistent with the structure of the U.S. Constitution, as the President is the Chief Executive official that also oversees the prosecution. In addition, the ability of the President to assert Executive Privileges may create a scenario where the assertion of such a privilege in the criminal proceeding by a sitting President may be seen as suppressing evidence

³¹ See OLC Memorandum re: Whether a Former President May be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate (August 18, 2000).

³² 2000 OLC Memo Sec I.3.a, citing 1973 OLC Memo at 24.

unfavorable to him, yet making available evidence favorable to him may prejudice the ability of future Presidents to claim similar privilege.³³ At the end, as noted by the 2000 OLC Memo, the 1973 OLC Memo did not resolve the questions of a sitting President's immunity from criminal prosecution based on these potential incompatibilities.

Next, as discussed in the 2000 OLC Memo, the 1973 OLC Memo examined whether criminal proceedings against a sitting President should be barred by the doctrine of separation of powers because such proceedings would "unduly interfere in a direct or formal sense with the conduct of the Presidency."³⁴ First, the 1973 OLC Memo noted that the President may claim the privilege from attending court in person.³⁵ In the criminal process, however, such a privilege is incompatible with the practical requirement that the defendant be present for pleas and trial.³⁶ While the privilege against personal appearance is only a general rule and is thus not determinative of the essential question (i.e. whether the President has temporarily immunity from criminal proceeding), the 1973 OLC Memo concluded that the necessity of appearance for the defendant in the criminal proceeding is of great relevance in determining whether initiation of the criminal process may "unduly interfere with the conduct of the Presidency." Due to the need for personal appearance, the 1973 OLC Memo concluded that "in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation."³⁷ Under this rationale, minor offenses leading to a short trial and a fine are not as serious an interference as those that would require protracted personal involvement of the President.

³³ 1973 Memo at 26 (cited by 2000 OLC Memo).

³⁴ *Id.* at 27.

³⁵ *Id.* (citing *United States v. Burr*, 25 F. Cas. 187 (C.C.D.Va. 1807)).

³⁶ *Id.*

³⁷ *Id.* at 29.

The inquiry does not end here, however. The 1973 OLC Memo also considered “non-physical yet practical interferences” of the President’s performance, in terms of the capacity to govern. The memo explained that “the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs.”³⁸ A criminal proceeding against the President is necessarily political in a way that criminal proceeding against other civil officers would not be. In this way, it is “incongruous” for a “jury of twelve” to undertake the “unavoidably political” task of rendering judgment in a criminal proceeding against the President.³⁹ “Surely, the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidable by the nature of the ‘defendant.’”⁴⁰ The 1973 OLC Memo then went on to compare the impeachment proceeding and the typical criminal proceeding. Contrary to the typical criminal proceeding where the decision is made by a jury of twelve and where such decision is subject to appeal, “the whole country is represented at the impeachment trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.”⁴¹ Based on these analyses, the 1973 OLC Memo concluded that the impeachment process is the “only appropriate way to deal with a President while in office.”⁴²

The 1973 OLC Memo was written in the historical context of the Watergate, and prior to Supreme Court cases such as *United States v. Nixon*, 418 U.S. 683 (1974), *Nixon v. Fitzgerald*, and *Clinton v. Jones*. In its 2000 memorandum, the OLC examined whether the conclusion of the 1973 OLC Memo is still valid in light of subsequent Supreme Court cases. In examining these cases, the 2000 OLC Memo noted that the Supreme Court is consistent in

³⁸ *Id.* at 30.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 31.

⁴² *Id.* at 32.

applying the methodology of constitutional balancing (i.e. by balancing “the constitutional interests underlies a claim of presidential immunity against the governmental interests in rejecting that immunity.”)⁴³

Adopting the same methodology of constitutional balancing, the 2000 OLC Memo then considered three types of burdens associated with the criminal proceeding against the sitting President: (1) the imposition of incarceration, which would make it physically impossible for the President to carry out his duties; (2) the stigma associated by the initiation of criminal proceeding, which would hamper the President’s constitutional leadership role with respect to foreign and domestic affairs; and (3) the mental and physical burdens of assisting in the preparation of the defense, which would severely interfere with the President’s performance of his official duties.⁴⁴ In addition to these three burdens, the memorandum noted the two features of the U.S. Constitution: (1) that the U.S. Constitution specifies a mechanism for accusing a sitting President of wrongdoing and removing him from office (i.e. via impeachment by the House and removal upon conviction by the Senate); and (2) that the President occupies a unique position in the constitutional scheme.⁴⁵ After carefully examining the implication of these burdens upon the President, the 2000 OLC Memo reached the same conclusion as the 1973 OLC Memo that these burdens will pose a significant interference on the President’s ability to perform his constitutionally assigned functions. The OLC, however, went on to consider whether such burdens are “justified by an overriding need to promote legitimate governmental objectives.”⁴⁶

The OLC Memo outlined the three government interests that might be impaired by deferring indictment under the President is no longer in office: (1) to avoid the bar of the statute of limitation; (2) to avoid weakening of the

⁴³ 2000 OLC Memo, Sec. II.B.

⁴⁴ *Id.* Sec. II.B.2.

⁴⁵ *Id.* (quoting *Fitzgerald*, 457 U.S. At 749).

⁴⁶ *Id.* Sec. II.B.3. (citing *Nixon v. Administrator of General Services*, 433 U.S. 425 at 443 (1977)).

prosecutions case due to passage of time; and (3) to uphold the rule of law. In considering the first governmental interest (to avoid the bar of statute of limitation), the OLC identified the possibility that the court may simply toll the statute of limitation either as a constitutional implication of temporary immunity or under equitable principles and that the Congress may simply overcome any such obstacle by imposing its own tolling rule. At the end, the OLC concludes that prosecution would be delayed rather than denied.⁴⁷ In considering the second governmental interest, the OLC applied the balancing test and concluded that the interest in immediate prosecution did not provide an “overriding need” to overcome the justification for temporary immunity.⁴⁸ Lastly, noting that the temporary immunity only result in the delay but not the forbearance of any criminal trial, the OLC concludes that the temporary immunity does not put the President above the law. In addition, the OLC noted that the President is still subject to the impeachment process, and that, upon removal, subject to criminal prosecution.⁴⁹ Upon its separate analysis, the OLC concludes that subsequent Supreme Court cases, including the ruling in *Clinton*, do not alter the same conclusion in its 1973 memorandum that the President has temporary immunity from criminal indictment and prosecution.

Analysis of Immunity Applications

Analysis of the two cases and the OLC memorandums shows that there are two different types of immunities. One is the absolute immunity from liabilities discussed in *Fitzgerald*. The other one is the temporary, procedural immunity from judicial process discussed in *Clinton* and the two OLC memorandums. Absolute immunity is an extension of other similar immunities granted to certain government officials, including prosecutors and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

judges. Temporary immunity, on the other hand, is based on the doctrine of separation of powers, and is limited only to the President. In addition, different standards applied in the consideration of whether the President is entitled to immunity. In the case of absolute immunity, the inquiry is whether a particular action is considered an “official act” of the President. This approach is consistent with cases dealing with judicial immunity and the qualified immunity of other civil servants.⁵⁰ In case of temporary immunity, the inquiry is whether the judicial action may impose an unreasonable burden upon the President’s constitutional function in such a way as to violate the doctrine of separation of powers. As discussed in *Clinton* and the OLC memorandums, the distinction is the burden on the President between civil action and criminal proceedings. In the case of civil action, the Supreme Court has ruled that the burden imposed is not significant enough to warrant a temporary immunity for the President, whereas the OLC had made a convincing case that a criminal proceeding would. *See Figure 1.*

There remains, however, certain question in the area of immunity not covered by the cases or the OLC memorandums. Are there cases where a particular action is covered by both the absolute immunity and also temporary immunity? *See Table 1.* To ask the question another way, can the President raise the issue of absolute immunity in a criminal proceeding based on the argument that his action is within the official function of his duty as the President?

As we see from *Figure 1*, different types of immunity sought leads to two different essential questions. In the case of permanent immunity, the question is whether the particular action is within the scope of “official function” or “official capacity” while the essential question in the case of temporary immunity, the questions depends on the type of action against the President, i.e. is it a civil action or a criminal prosecution.

Depending on the order that these questions are asked, we may come to a

⁵⁰ See *supra*, discussion re *Butz*.

different conclusion regarding the immunity protection of the President in a criminal proceeding. If one considers the question of civil versus criminal matters first, there is only temporary immunity for the President based on the analysis of the OLC memorandums. *See Figure 2.* If one consider the question of whether a particular action is within the official function first, the President is entitled to absolute immunity. *See Figure 3.* Either one of these pictures are incomplete.

First, Temporary immunity only applies to the sitting President. In a practical sense, if a question of criminality arose for a sitting President, he is likely to assert the procedural, temporary immunity before even arguing the substantive, absolute immunity based on the official function. The inquiry therefore does not end in *Figure 2.* Upon removal from office (through the impeachment process) or leaving office (either through resignation or by finishing the terms of the office), the now former President may be subject to criminal indictment and prosecution. We are still left with the question of whether the President can raise the defense of absolute immunity in *Fitzgerald.* *See Figure 4.*

Then, in the second case (pictured in *Figure 3*) where a certain action is deemed to be within the official function, some may argue that *Fitzgerald* is distinguishable because the controversy underlying *Fitzgerald* is a civil action for damages.⁵¹ *See Figure 5.* The rationale in *Fitzgerald*, however, is not depending on the question of civil versus criminal matters. It is important to note that *Fitzgerald* is an extension of a long line of cases addressing the immunity of federal officials in their various capacity. The Supreme Court, in granting these qualified immunity for federal officials so that officials may act without worrying that they will become personally liable to the limited numbers

⁵¹ In case of a sitting President, again, there is temporary immunity. Putting the question of temporary immunity aside, we will consider whether a former President may claim absolute immunity. While the focus of the analysis is on the former President, it is not hard to argue that if absolute immunity applies to a former President, surely the same can be said to a sitting President.

of individuals impacted by the implementation of policies or by carrying out their official duties.

The analysis in granting temporary immunity, however, is based on the structure of the constitution and the doctrine of separation of powers. Temporary immunity is thus limited to the President in his role as the head of the Executive branch. No other official in the United States is entitled to such an immunity, even the Vice President (as discussed above). It is only in this context that the criminal versus civil matter becomes important as the Supreme Court and the OLC weight the burden of such proceedings upon the Executive Branch. The Supreme Court in *Fitzgerald* is not dealing with a sitting President and as such, does not enter into an analysis of separation of powers (and thus does not make a distinction between criminal or civil cases.)

Ultimately, the question becomes “can a President be criminally liable for actions within his official function?” This question seems odd at first because it is hard for the President to argue that commission of a criminal act is within his official function. Given the broad authority of the President, however, the line is not always so clear. As we seen in the line of cases dealing with qualified immunity for judiciary or executive officials, it should be up to the court to decide whether a particular action is within official function, precisely because the lines are not always clear. If the Supreme Court decides that a particular action falls within the official function, *Fitzgerald* provides immunity in the civil litigation context. To allow a criminal proceeding to proceed despite such an immunity would have defeated the purpose for which *Fitzgerald* created such an immunity in the first place.⁵² It is thus essential that the rationale underlying *Fitzgerald* be applied across criminal and civil actions

⁵² In addition, such a case is most likely to be brought after the President has finished his term, leaving open the possibility of criminal prosecution of past official actions of a former President may invite politically motivated prosecution. The rationale underlying *Fitzgerald* is thus even more important to ensure that a President may carry out his constitutional duties with worrying that, upon leaving office, he maybe subject to the prosecution by former political enemies.

alike.

Contrary to the creation of the temporary immunity for the sitting President, the absolute immunity created by the Supreme Court is not a special privilege enjoyed solely by one person by the nature of his office. Instead, it is an area carved out by the courts to ensure the official effectively pursues the interests of the public and to perform his functions without fear that his certain action may draw personal civil or criminal liabilities. Extending this immunity to the broad power of the President is the necessary step to allow the leader chosen by the people to fulfill the function bestowed by the U.S. Constitution.

Conclusion

Careful reading of the cases and rationales underlying the two different types of immunity provides a proper understanding of balance that the Supreme Court has tried to strike in two different contexts – one addressing the need for effective public policy and the other the separation of powers. The proper interpretation is to not just ensure that the letter and the spirit of the U.S. Constitution is fulfilled as in the case of granting temporary immunity under the doctrines of the separation of powers. By limiting both civil and criminal liabilities of the President only to those actions that are outside of his official function, it ensures that the purpose of the U.S. Constitution – ensuring a functional government of the people, by the people and for the people – be fulfilled in the interpretation of that Constitution.

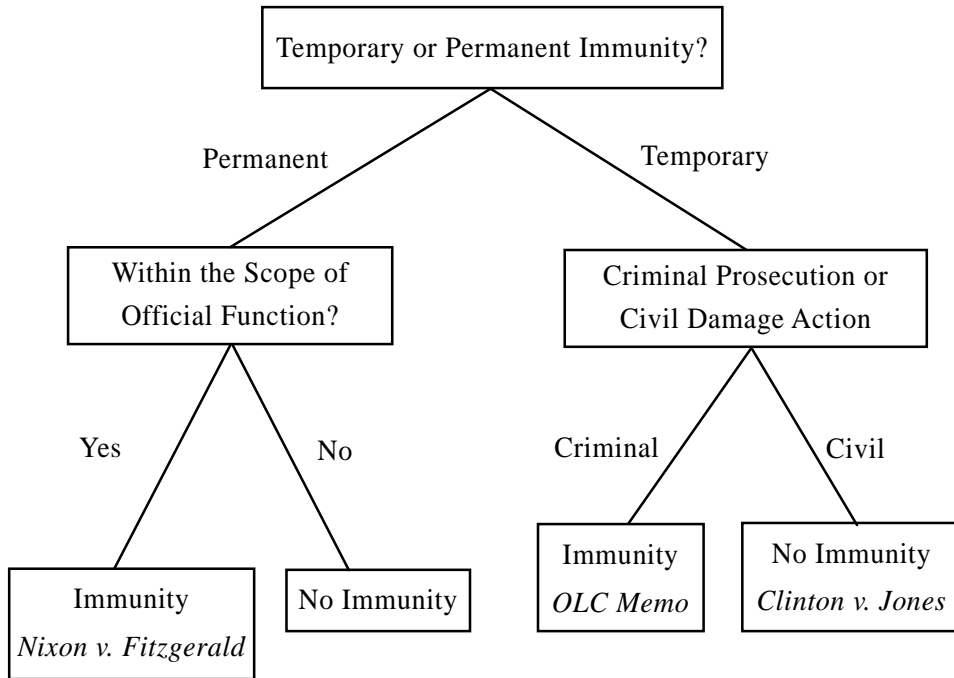
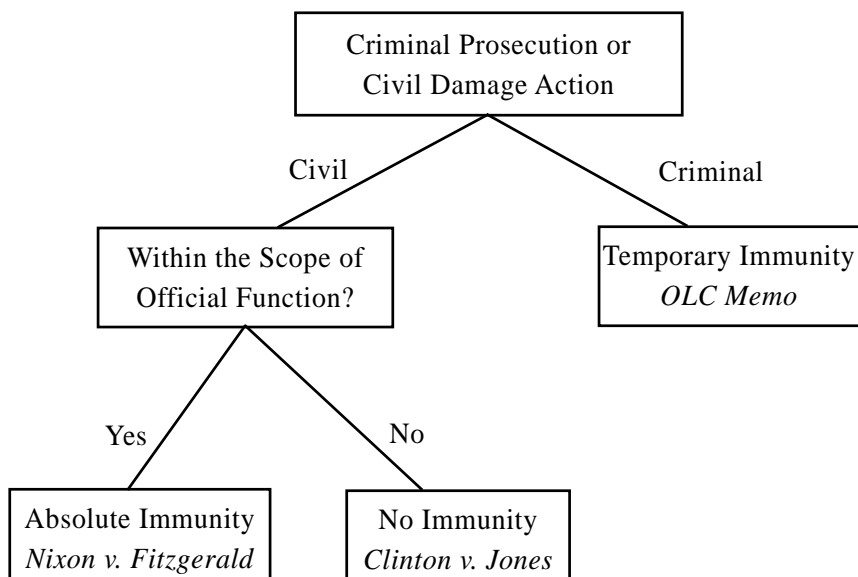


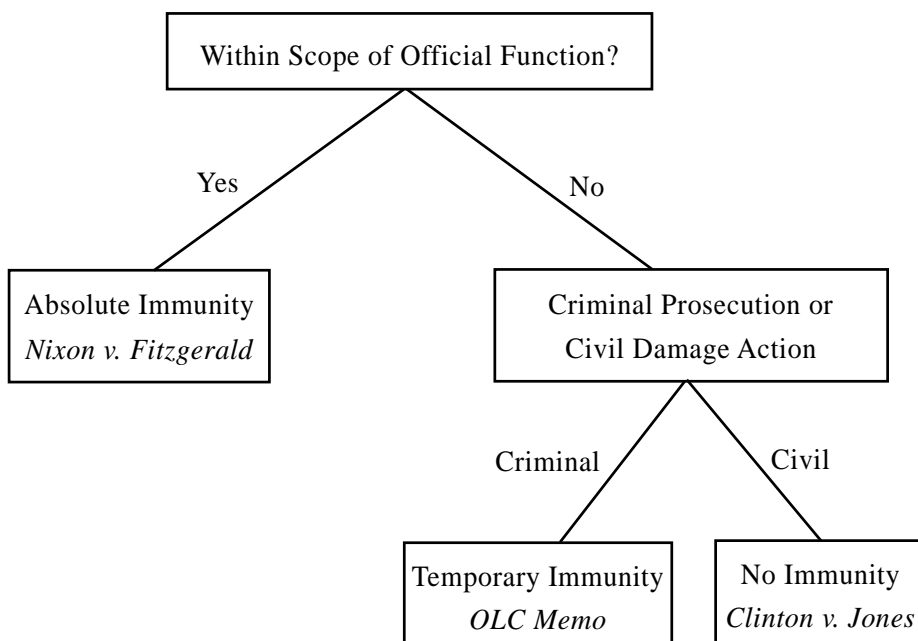
Figure 1

Table 1

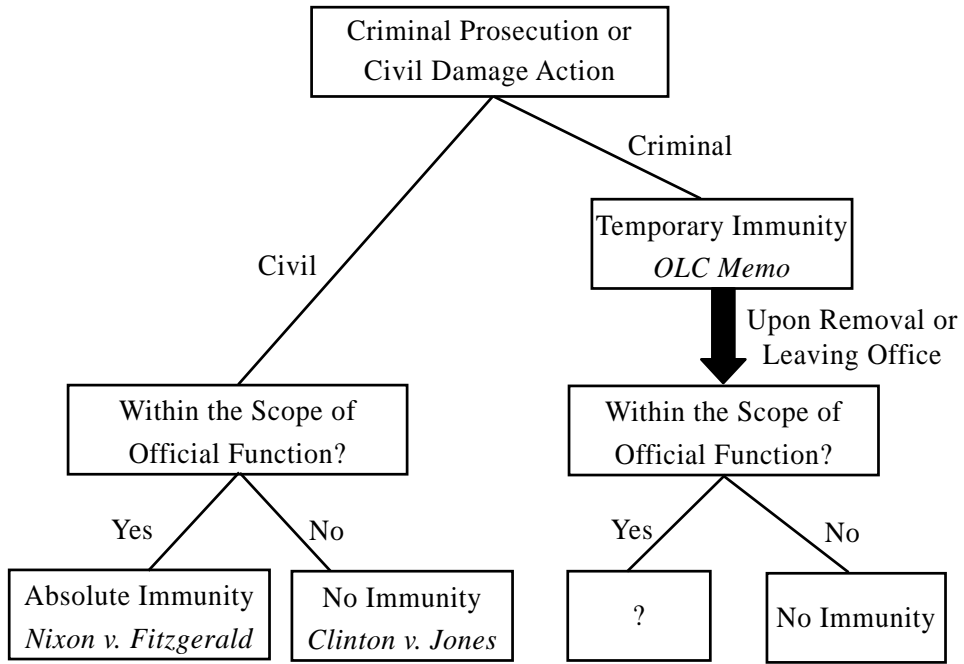
	<i>Criminal</i>	<i>Civil</i>	
<i>Official</i>	?	<i>Nixon v. Fitzgerald</i>	Absolute Immunity
<i>Non-Official</i>	OLC Memorandums	<i>Clinton v Jones</i>	
	Temporary Immunity		



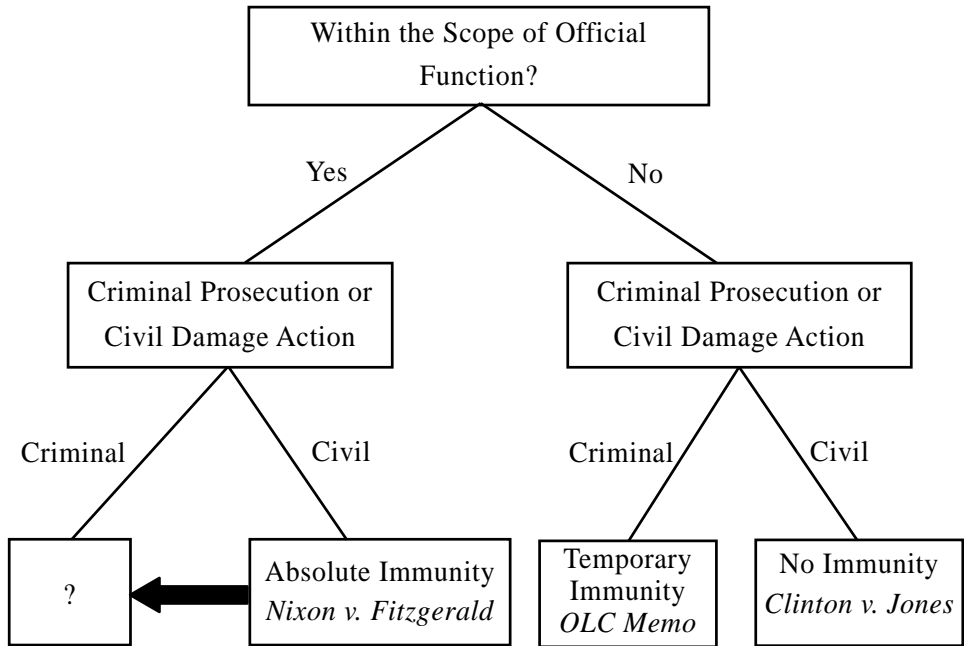
Figures 2



Figures 3



Figures 4



Figures 5