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**EXTRASE**

## PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

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*Abstract:* The article presents the institution of presidential immunity as settled in the Constitution of United States and in the American jurisprudence.

*Key words:* Presidency, immunity, Constitution.

The political institution of the president of United States is settled in Article II of the Constitution. Of all the issues confronting the members of the Philadelphia Convention, the nature of presidency ranks among the most important, for the framers chose to vest all the executive power in one person. We shall not continue to discuss the nature and scope of the presidential power, since our main goal is to analyze the institution of presidential immunity. Article II section 3 from the Constitution of United States does not refer explicitly to this institution, still the rich American jurisprudence in this particular field can offer a valid interpretation of the nature of presidential immunity.

By the decision of the Court in *Mississippi v. Johnson*, in 1867, the President was placed beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial.

An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their

unconstitutionality, was answered by Attorney General Stanberg, who argued, *inter alia*, the absolute immunity of the President from judicial process. The Court refused to permit the filing, using language construable as meaning that the President was not reachable by judicial process but which more fully paraded the horrible consequences were the Court to act. First noting the limited meaning of the term "ministerial," the Court observed that "very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. . . . The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'" "It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to

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perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion." . . . . "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." "The impropriety of such interference will be clearly seen upon consideration of its possible consequences." "Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?"

Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi v. Johnson*, and, in the Watergate tapes case, it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion.

The President's counsel had argued the President was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications."

However, the Court held, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." The primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and to accept the President's argument would disturb the separation-of-powers function of achieving "a workable government" as well as "gravely impair the role of the courts under Art. III".

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment. It was argued that the impeachment clause necessarily required indictment and trial in a criminal proceeding to follow a successful impeachment and that a President in any event was uniquely immune from indictment and these arguments were advanced as one ground to deny enforcement of the subpoenas running to the President.

Assertion of the same argument by Vice President Agnew was controverted by the Government, through the Solicitor General, but, as to the President, it was argued that for a number of constitutional and practical reasons he was not subject to ordinary criminal process.

Finally, most recently, the Court has definitively resolved one of the intertwined issues of presidential accountability. The President is absolutely immune in actions for civil damages for all acts within the "outer perimeter" of his official duties. The Court's close decision was premised on the President's "unique position in the constitutional scheme," that is, it was derived from the Court's inquiry of a "kind of 'public policy' analysis" of the "policies and principles that may be considered

implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."

While the Constitution expressly afforded Members of Congress immunity in matters arising from "speech or debate," and while it was silent with respect to presidential immunity, the Court nonetheless considered such immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."

Although the Court relied in part upon its previous practice of finding immunity for officers, such as judges, as to whom the Constitution is silent, although a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous, the Court's principal focus was upon the fact that the President was distinguishable from all other executive officials. He is charged with a long list of "supervisory and policy responsibilities of utmost discretion and sensitivity," and diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government."

Moreover, the presidential privilege is rooted in the separation-of-powers doctrine, counselling courts to tread carefully before intruding. Some interests are important enough to require judicial action; "merely private suit[s] for damages based on a President's official acts" do not serve this "broad public interest" necessitating the courts to act. Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity was to prevent; absolute immunity was required.

In *Clinton v. Jones*, the Court, in a case of first impression, held that the President did not have qualified immunity from suit for conduct alleged to have taken place

prior to his election to the Presidency, which would entitle him to delay of both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct — primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability — were inapplicable in this kind of case.

Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the Government at the expense of another.

However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President's powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President's schedule and his workload, so as not to impede the President's performance of his duties.

Finally, the Court stated its belief that allowing such suits to proceed would not generate a large volume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.

While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage or to compel by writ of mandamus the performance of a duty definitely required by law, such suits being usually brought in the United States District Court for the District of Columbia. In suits under the common law, a

subordinate executive officer may be held personally liable in damages for any act done in excess of authority, although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.

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