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# President Trump and Civil Litigation: Executive Immunity and the Emoluments Clause

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PRESIDENT TRUMP AND CIVIL LITIGATION:  
EXECUTIVE IMMUNITY AND THE EMOLUMENTS CLAUSE

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### Abstract

President Trump has become immersed in civil litigation since announcing his candidacy for the United States presidency. These lawsuits, which include assertions of presidential immunity under state jurisdiction and claims of constitutional violations under the Emoluments Clauses, present unique legal concerns that have never been challenged in the Supreme Court. Precedent shows that the president has never been exempt from the judicial process for his unofficial actions, although this may have led to unforeseen consequences. An evaluation of the history of the Emoluments Clauses leads to the conclusion that the Framers wanted to prevent outside influence on the United States and its government officials, especially the president. Taking into consideration the legal and constitutional merits of the individual cases as well as the likelihood for politically motivated decision-making, I assert that the Supreme Court is likely to narrowly conclude that the president does not have temporary immunity in state tribunals. I apply similar analysis to the Emoluments Clause cases and determine that the Supreme Court would decide in opposition to the president considering the text and meaning of the Constitution or in favor of the president if they are motivated by their partisan interests. The civil litigation that is currently occurring could serve as a necessary restraint on the powers of the president or allow him to continue his abuses of power unchecked.

Key Words: Political science, law, civil litigation, President Trump, executive immunity, emoluments clause

### Dedication

I wish to thank my advisor, Dr. John Gruhl, for his tireless work to enhance my thesis and his constant support throughout this endeavor. I truly appreciate his insight and understanding. I also want to thank Dr. Tamy Burnett for her encouragement and compassion. Finally, I'd like to thank my family and friends who have lifted me up during this project.

President Trump and Civil Liability:  
Executive Immunity and the Emoluments Clause

**Introduction**

President Trump has become involved in considerable civil damages litigation since announcing his campaign for the presidency. More specifically, President Trump is involved in a defamation lawsuit in which he has claimed immunity from litigation and three suits concerning the foreign and domestic Emoluments Clauses in the Constitution that may prevent his private exchange of goods and services with foreign and state governments. In my paper, I will discuss how I believe the Supreme Court will decide if these cases come under its jurisdiction.

It is imperative to discuss the history of presidential immunity in order to successfully predict the outcomes of current cases in the Trump administration relating to presidential immunity. Executive immunity is not explicitly granted in the Constitution. Instead, it is justified by the inherent power of the separation of powers.<sup>1</sup> To determine the history of presidential immunity, we must turn to the Framers' intentions, previous cases for executive immunity, and relevant precedent, namely *Nixon v. Fitzgerald* and *Clinton v. Jones*. It is also necessary to discuss the result of the Supreme Court's decision in *Clinton v. Jones*.

Furthermore, a discussion of what civil liability entails is necessary to determine what falls under its scope. Assertions of presidential immunity for civil matters as well as the litigation derived from the Emoluments Clauses qualify as civil suits. There are two Emoluments Clauses in the Constitution drawn upon in the lawsuits against President Trump. The domestic Emoluments Clause and the foreign Emoluments Clause were included in the Constitution due to concern from the Framers that government officials may be manipulated by foreign and state

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<sup>1</sup> 457 U.S. 731, 732 (1982)

governments in their favor. There is no precedent to determine how these matters should be handled.

Finally, I will detail the factual basis for the current civil damages litigation involving President Trump in his official capacity. In the Emoluments cases, I will review the barriers to gaining access to the courts. I will discuss how the District Court and State Supreme Court have ruled in these cases. I will discuss how the Supreme Court might rule on these suits, with consideration of the legal and constitutional background and their personal political biases.

## **I. History of Presidential Immunity**

### **A. The Framers' Intentions**

Although the Framers' intentions are discussed in both *Nixon v. Fitzgerald* and *Clinton v. Jones*, I think earlier elaboration is warranted. Little is known about the opinion of the Framers on the issue of executive immunity. Statements are often contradictory, so it is difficult to conclusively state whether or not they believed the chief executive should be granted immunity for their actions. John Adams and Senator Oliver Ellsworth believed that the president was not subject to the judicial process because it may interfere with the functioning of government, while Senator William Maclay did not hold the same opinion. James Wilson, a delegate to the Constitutional Convention, agreed with Maclay. He stated that "Far from being above the laws, [the president] is amenable to them in his private character as a citizen."<sup>2</sup> At least three other Framers expressed the view that the president could be held accountable for his actions through a lawsuit.<sup>3</sup> The issue of executive immunity was not extensively debated by the Framers. The records suggest that slightly more people were opposed to executive immunity, but this does not necessarily translate into a widespread belief. It is certainly more helpful to draw on previous

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<sup>2</sup> 520 U.S. 681, 695-696 (1997)

<sup>3</sup> 457 U.S. at 773-775

cases to gain an understanding of the applicability of executive immunity to the actions of the president.

## B. Precedent

### 1. Previous Cases Involving Executive Immunity

Thomas Jefferson was the first president to claim executive immunity after political rival Aaron Burr, who was charged with treason for military actions, served him with a subpoena. Burr maintained the letters he subpoenaed were necessary to his defense, but Jefferson refused to release them because they contained military orders. Jefferson believed that, as president, he did not have to comply with the subpoena or the judicial process because it would distract from the official responsibilities of his office. In the circuit court decision *U.S. v. Burr*, Chief Justice John Marshall ruled that the president must submit to the judicial process because before and after taking office, presidents are ordinary citizens.<sup>4</sup> This decision was necessary to limit the power of the president to act as though he is above the law, but it did not prevent other presidents from claiming executive immunity.

### 2. *Nixon v. Fitzgerald* (1982)

On November 3, 1969, Ernest Fitzgerald testified before a congressional subcommittee that C-5A transport planes may result in over \$2 billion extra cost than originally anticipated due to technical issues.<sup>5</sup> The plane in question was so large that the wings were dismantled and had to be replaced every 200 hours of flight time.<sup>6</sup> His testimony displeased his superior officers. In January of 1970, Ernest Fitzgerald was fired from his job as a management analyst in the Air Force due to a department-wide reduction in staff and reorganization. Fitzgerald believed he was

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<sup>4</sup> Kasten, M. (1998). Summons at 1600: *Clinton v. Jones*' impact on the American presidency. *Arkansas Law Review*, 51, 555-556.

<sup>5</sup> 457 U.S. at 733-734 (1981).

<sup>6</sup> Gruhl, J. (2018, March 15). Lecture.

let go as a direct result of his testimony. The Subcommittee of Economy in Government investigated the situation. They found that Fitzgerald's superior officers recommended that Fitzgerald be fired and gave examples as to how this could be accomplished. President Nixon told the public he would personally investigate the matter and he attempted to find Fitzgerald another job. However, a White House aide circulated a memorandum which essentially stated that Fitzgerald was disloyal and should not be given a job. Fitzgerald filed a complaint with the Civil Service Commission. Nixon publicly admitted that he gave the order to fire Fitzgerald, but later denied his statements. He stated he merely confused Fitzgerald with someone else. The Civil Service Commission decided that Fitzgerald was unlawfully dismissed.<sup>7</sup>

Fitzgerald filed suit in the District Court alleging that he was fired in retaliation for his congressional testimony after the White House memorandum was publicized. Fitzgerald initially brought the complaint against the White House aide who wrote the memo and Department of Defense officials. In 1978, Fitzgerald also named Nixon as a defendant. Nixon asserted that he should be removed from the suit on the grounds of absolute executive immunity. The lower courts rejected this claim, and Nixon appealed.<sup>8</sup>

The Court ruled in a 5-4 decision that the President has absolute immunity from civil damages liability based on his official conduct. Justice Powell, Chief Justice Burger, Justice Rehnquist, Justice Stevens, and Justice O'Connor filed the majority opinion. Justices White, Brennan, Marshall, and Blackmun dissented.

a. Majority opinion

The justices must first distinguish between qualified immunity and absolute immunity before addressing the issue at hand. Qualified immunity is granted on a case-by-case basis to

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<sup>7</sup> 457 U.S. at 733-739

<sup>8</sup> 457 U.S. at 739-741

executive officials. Their responsibilities and the decisions they must make with respect to their position are considered in this endeavor. Absolute immunity, on the other hand, is total immunity and is only granted to officials with unique and vital responsibilities.<sup>9</sup> For example, a police officer can be granted qualified immunity for his actions, while judges are granted absolute immunity. The president has an obligation to carry out the laws of the nation and act in its best interest, often making decisions of the utmost importance. Other executive officials do not play the same role, which differentiates the president from them. Absolute immunity is an inherent power not articulated in the Constitution but instead established in the doctrine of separation of powers.<sup>10</sup> Intrusion upon the executive branch as a result of excessive litigation for official actions would violate separation of powers.<sup>11</sup> Absolute immunity is granted to the president for actions within the “outer perimeter of official responsibility.” In this situation, the president has immunity for his actions because the president is indirectly responsible for the Air Force, including its reorganization.<sup>12</sup>

Absolute immunity is necessary to ensure the president can effectively govern without fear of litigation. Withholding executive immunity for official actions would result in the president shying away from actions that may invoke anger from the public and lead to a lawsuit despite the fact that these actions may be necessary for the public good. The president holds a prominent office that is more likely to face scrutiny and therefore litigation.<sup>13</sup> This decision does not place the president above the law. The president’s actions can be “checked” through impeachment, reporting by the press, congressional oversight, and a desire for approval from the American people.<sup>14</sup>

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<sup>9</sup> 457 U.S. at 746

<sup>10</sup> 457 U.S. at 749-750

<sup>11</sup> 457 U.S. at 754

<sup>12</sup> 457 U.S. at 756-757

<sup>13</sup> 457 U.S. at 744-745, 751-753

<sup>14</sup> 457 U.S. at 757-758

b. Concurring opinion

Chief Justice Berger's concurring opinion reinforced the majority's finding that executive immunity is limited to civil liability. He also stated that in no circumstance would the president have immunity for actions taken outside the scope of his official duties. Chief Justice Berger believed that litigation could be used as a partisan vehicle to harass the president. The president will have to devote extensive time and incur costs to battle such lawsuits without immunity.<sup>15</sup>

c. Dissenting opinion

Justice White, Justice Brennan, Justice Marshall, and Justice Blackmun joined in the dissenting opinion. Granting the president absolute immunity places him above the law. It is well-established that the president cannot abstain from the judicial process, as is shown in *U.S. v. Burr*.<sup>16</sup> The president could take any unlawful action and violate the rights of others without fear of repercussion.<sup>17</sup> The immunity granted by the majority is too broad. Immunity issues should be decided based on the type of action performed, not merely granted because of the office of the individual.<sup>18</sup> The president should not be afforded immunity for his actions in this case because dismissal of employees is not a typical executive function as defined by the Constitution.<sup>19</sup>

The justifications provided for granting immunity are inadequate. Specifically, it is unlikely that litigation will divert attention away from the presidency. Litigation will not require so much time and energy that it violates the separation of powers. It is unlikely that the president's visibility will make him a target for litigation, and the majority's opinion that it might is undercut by the lack of historical record of civil lawsuits arising from the president's official

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<sup>15</sup> 457 U.S. at 759-763

<sup>16</sup> 457 U.S. at 781

<sup>17</sup> 457 U.S. at 765-766

<sup>18</sup> 457 U.S. at 792-793, 764

<sup>19</sup> 457 U.S. at 785

conduct.<sup>20</sup> The president is not entitled to absolute immunity based on his official conduct in office.

### 3. Previous Cases for Unofficial Acts Against the President

Only four presidents have experienced civil litigation for actions they took prior to assuming the office of the presidency: President Roosevelt, President Truman, President Kennedy, and President Clinton. President Roosevelt was sued as Chairman of the New York City Police Board, but the case was dismissed before he assumed the presidency. The decision was affirmed by the Court of Appeals three years after Roosevelt took office. President Truman also experienced civil litigation while in office for acts that had previously occurred concerning his allegedly inappropriate decision to commit the plaintiff to a mental institution while serving as a judge. Truman filed a motion to dismiss, which the court granted. The state Supreme Court upheld this decision a year into Truman's presidency. Neither President Roosevelt nor President Truman claimed executive immunity. Two suits were filed against President Kennedy by delegates to the Democratic Convention due to an automobile accident that occurred during his campaign. The California trial court dismissed the case and the Court of Appeals affirmed its decision.<sup>21</sup> In the other suit, Kennedy argued that he should be provided a stay under the Sailors' Civil Relief Act of 1940 as Commander in Chief, which was denied by the District Court. President Kennedy settled the matter out of court, as is true for most civil cases.<sup>22</sup> President Clinton was the fourth president who experienced a lawsuit as a result of unofficial actions that occurred before he became President of the United States. He claimed executive immunity

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<sup>20</sup> 457 U.S. at 780, 795

<sup>21</sup> Kasten, M. (1998). Summons at 1600: *Clinton v. Jones'* impact on the American presidency. *Arkansas Law Review*, 51, 559-560.

<sup>22</sup> 520 U.S. at 692

granted him the right to a stay of litigation in the Supreme Court case *Clinton v. Jones*, which merits further discussion.

#### 4. *Clinton v. Jones* (1997)

The question of presidential immunity arose once again in the Supreme Court case *Clinton v. Jones* (1997). In 1994, Paula Jones filed suit in federal district court against President Bill Clinton for making unwanted sexual advances toward her while he served as Governor of Arkansas. Jones alleged that Clinton requested her presence in his hotel room while she worked at an event as an employee of the Arkansas Industrial Development Commission. He proceeded to expose himself and touch Jones inappropriately. Jones rejected Clinton. She claimed that her rejection of Clinton caused her superiors to treat her disrespectfully and resulted in her transfer to a job with little opportunity for advancement. However, Jones' career advancement was similar to others in her position.<sup>23</sup>

Clinton filed a motion to dismiss the case on the grounds of presidential immunity. He requested that all pleadings and motions be deferred until the issue of presidential immunity was decided. The court granted his request and Clinton then filed a motion to dismiss and suspend the statute of limitation until the end of his presidency. The District Court judge denied dismissal on the grounds of immunity. The judge ruled that pretrial discovery could proceed but that trial could not commence until the end of Clinton's presidency.<sup>24</sup> Her decision was guided by the ruling in *Nixon v. Fitzgerald* in which the Court advocated that a stay in a presidential trial was permissible under certain circumstances or if necessary. The judge also tried to balance the need for a speedy trial and the probable negative effect a trial would have on the ability of the President to effectively govern.<sup>25</sup> The decision was appealed. The Eighth Circuit Court of

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<sup>23</sup> Gruhl, J. (2018, March 20). Lecture.

<sup>24</sup> 520 U.S. at 681

<sup>25</sup> 520 U.S. at 687

Appeals ruled that the trial could not be postponed as that would be “the ‘functional equivalent’ of a grant of temporary immunity.” Their reasoning was that every citizen is subject to the same laws, even the president. The fact that there was no precedent allowing the president immunity for his unofficial acts, or personal and private actions outside the scope of their office, also impacted their decision. The Court of Appeals ruled that a trial would not constitute judicial interference in the executive branch, therefore not violating separation of powers.<sup>26</sup>

The Supreme Court ruled in a 9-0 decision that a stay was not constitutionally required for private actions against the President until he leaves office. Justice Stevens, joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg, gave the majority opinion. Justice Breyer filed a concurring opinion. The majority opinion discussed executive immunity for unofficial acts based on precedent, the historical record, and the structure of the Constitution. They also examined the necessity of temporary executive immunity in relation to national security concerns and the likelihood of a “litigation nation.”

a. Majority opinion

The justices first addressed the merits of Clinton’s suggestion that the president has temporary immunity from civil litigation by looking at precedent and the historical record. They turned to the cases of Roosevelt, Truman, and Kennedy, which were discussed earlier. As these matters were either dismissed or settled out of court, they did not contribute to the justices’ decision. The justices stated that public officials are provided immunity for their official actions in order to ensure they can act impartially and without fear of retribution, as was shown in *Nixon v. Fitzgerald*. This explanation cannot be used to provide immunity for actions that occur outside the scope of public office. The justices hold that “immunity is grounded in the nature of the function performed, not the identity of the actor who performed it,” as was held in the Supreme

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<sup>26</sup> 520 U.S. at 681

Court case *Forrester v. White*.<sup>27</sup> Therefore, precedent does not provide that the chief executive is afforded immunity for conduct unrelated to his official duties. The justices examined the historical record, which was also discussed earlier, to determine if the president is entitled to a stay for private actions. They conclude that the Framers' intentions on presidential immunity are murky and thus provide no conclusive evidence on the question of immunity.<sup>28</sup>

The petitioner, Clinton, claims that separation of powers would be violated by allowing the trial to proceed. Petitioner also argues that "he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties."<sup>29</sup> The majority submits that the president must be able to carry out the duties of his office, but they do not believe that a trial will occupy so much time that it will be detrimental to his obligations. The fact that only three presidents have been subject to civil damages litigation does not provide much support for the petitioner's claim. The principle of separation of powers is not violated because this decision does not widen or restrict the powers of the executive branch, transfer an executive function to the judiciary, and litigation would not overwhelm the president to such an extent that he would no longer be able to carry out his duties. The Court has an obligation to determine the law per its Article III power to decide cases and controversies. This ability is extended to the actions of the president. No one person is above the law and granting the president temporary immunity without justification would place the president in this situation.<sup>30</sup>

The justices address several practical concerns in their decision to prohibit a stay for civil litigation arising out of unofficial presidential actions. The justices ruled that the District Court's

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<sup>27</sup> 520 U.S. at 692-695

<sup>28</sup> 520 U.S. at 695-697

<sup>29</sup> 520 U.S. at 697

<sup>30</sup> 520 U.S. at 697-706

decision to grant a stay of trial but allow discovery to proceed was unnecessary and could be harmful to the respondent's case. A stay of the entire length of the president's term in office significantly increases the likelihood that evidence will be lost or forgotten.<sup>31</sup> Finally, the justices address the possibility that their decision will lead to an increase in litigation brought against the president or harm national security interests. They believed it was highly unlikely that their decision would result in more politically-motivated suits against the president, and that litigation for this purpose would easily be dismissed early in the judicial process. The justices also stated that civil suits would not distract the president from his duties. The courts would be understanding of the president's responsibility to govern when considering motions of continuance.<sup>32</sup> The precedent, historical record, structure of the Constitution, and other practical concerns do not provide rationale for granting the chief executive immunity from suits in their unofficial conduct. The trial was allowed to proceed.

b. Concurring opinion

Justice Breyer wrote a concurring opinion that emphasized the necessity of postponing a trial if the president could explain a legitimate conflict of interest between the judicial process and his ability to effectively govern. He wrote that the text of the Constitution and precedent support his opinion. Unlike the legislative and judicial branch, executive power is vested solely in the president. Not only does the president have an unusually busy schedule in relation to the average citizen, but the entire nation depends on him to protect and defend the nation. *Nixon v. Fitzgerald* provides justification for executive immunity on the grounds that litigation is a distraction from the president's responsibilities and that the president is a visible target, making it likely that an inordinate amount of litigation will arise. Although the decision in *Nixon* was

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<sup>31</sup> 520 U.S. at 706-708

<sup>32</sup> 520 U.S. at 708-710

applied to official conduct, the justification for providing presidential immunity carries over to unofficial conduct. The majority did not believe that litigation against the president would substantially increase. Justice Breyer disagreed, and stated that the number of lawsuits filed each year as well as the cost of such lawsuits had increased exponentially. The potential harm the nation faces as a result of presidential distraction from his duties needs to be considered in questions of temporary immunity. The president should be afforded the opportunity to convince a judge of the necessity of a stay of trial, and the judge should be allowed to exercise their discretion in these matters.<sup>33</sup>

### c. Aftermath

Justice Breyer's opinion that litigation could significantly hinder the President's ability to fulfill his official duties was proven true in the aftermath of *Clinton v. Jones*. The Supreme Court announced its decision in *Clinton* on May 27, 1997.<sup>34</sup> On the same day, the agreement to expand the NATO alliance into the former Soviet Union was signed by President Clinton and Russian president Yelstin. President Clinton had worked tirelessly to negotiate an arrangement with Russian leaders for nearly two and a half years prior to the agreement.<sup>35</sup> This accomplishment was overshadowed by the Supreme Court's ruling. Additionally, instead of being present during the questioning of Paula Jones during discovery, President Clinton's attention was focused on Iraq's removal of United Nation weapons inspectors. This situation could have easily escalated to war. Throughout discovery, the president had to dedicate significant time to deal with Congress' unwillingness to provide funds for International Monetary Fund, nominating and defending his choice for the Assistant Attorney General for Civil Rights, and even preparing the

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<sup>33</sup> 520 U.S. at 710-724

<sup>34</sup> Welch, S. et al. (2001). *American government (5<sup>th</sup> ed.)*. Boston, MA: Wadsworth Thomson Learning.

<sup>35</sup> Dobbs, M. (1997, May 27). For Clinton, sticking with Yelstin sealed agreement on NATO. *The Washington Post*.

State of the Union address.<sup>36</sup> It is clear that the litigation process considerably limited the ability of the president to effectively govern while also being able to fully partake in his defense.

Not only did the Supreme Court's decision occupy a substantial amount of the president's time, it also had drastic political repercussions. Paula Jones replaced her attorneys with those from the Rutherford Institute, a known conservative think tank, who encouraged her to engage with the media.<sup>37</sup> Jones asserted that she could prove the truthfulness of her claims because Clinton's genitals had distinct characteristics. This resulted in the media and the public obsessing over the exact features of his genitals. Furthermore, Jones' attorneys decided to investigate other sexual relationships Clinton had with women in order to substantiate Jones' allegations and leaked this information to the media. This led to the discovery of White House intern Monica Lewinsky.<sup>38</sup>

Subsequent to the ruling in *Clinton v. Jones*, Clinton offered Jones the original amount she sued for in order to settle the lawsuit before court. Jones decided to proceed to trial. The trial judge dismissed the case because there was insufficient evidence. She stated that Clinton's alleged actions could not be defined as sexual harassment. Jones appealed, and shortly after Clinton's affair with Monica Lewinsky became public knowledge. President Clinton attempted to negotiate another settlement and offered Jones \$850,000. This was \$150,000 more than she originally requested. Jones accepted.<sup>39</sup> The suit could no longer be used as a partisan vehicle to embarrass the president, but it was not the end of President Clinton's problems.

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<sup>36</sup> Welch, S. et al. (2001). *American government (5<sup>th</sup> ed.)*. Boston, MA: Wadsworth Thomson Learning.

<sup>37</sup> Yampert Jr., J.D. (2001). The death of constitutional law: A critique of the *Clinton v. Jones* decision. *Thurgood Marshall Law Review*, 185, 200.

<sup>38</sup> Welch, S. et al. (2001). *American government (5<sup>th</sup> ed.)*. Boston, MA: Wadsworth Thomson Learning.; Yampert Jr., J.D. (2001). The death of constitutional law: A critique of the *Clinton v. Jones* decision. *Thurgood Marshall Law Review*, 185, 200.

<sup>39</sup> Welch, S. et al. (2001). *American government (5<sup>th</sup> ed.)*. Boston, MA: Wadsworth Thomson Learning.

Clinton admitted to his sexual relationship with Lewinsky on August 17, 1998. However, this did not stop the intense media scrutiny about the president's personal life. The media continued to barrage Clinton with questions about his affair, even during meetings with foreign leaders. The media chose not to focus on issues more pertinent to the state of the nation like the U.S.'s military intervention in Afghanistan and Sudan to suppress al-Qaeda.<sup>40</sup> The media and the public were unable to focus on Clinton's political achievements, and Clinton's ability to effectively govern was eroded.

At the same time as the negotiations between Clinton and Jones, the Office of Independent Council began investigating the president's depositions. Independent Counsel Kenneth Starr's Report to Congress released on September 9, 1998 primarily contained intimate details of Clinton's affairs with women, specifically Monica Lewinsky. Starr recommended that Clinton be impeached for perjury, obstruction of justice, tampering with witnesses, and abuse of power.<sup>41</sup> The entire report was released to the public and published on CNN.com, giving Americans ample reading material at 445-pages long.<sup>42</sup> Congress later charged the President with articles of impeachment, but Clinton was ultimately acquitted by the Senate.<sup>43</sup> It is clear that the *Jones* case morphed into a politically-motivated lawsuit that directly led to the impeachment of President Clinton, hampered his ability to devote time to both the pressing issues of the nation as well as the lawsuit, and reduced his success throughout the rest of his presidency.

## II. Civil Liability in Personal Matters

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<sup>40</sup> Kasten, M. (1998). Summons at 1600: *Clinton v. Jones'* impact on the American presidency. *Arkansas Law Review*, 51, 573.

<sup>41</sup> Van Natta Jr., D. (1998, September 11) Starr report is said to claim perjury and abuse of power by president in Lewinsky case. *The New York Times*, 51(277).

<sup>42</sup> Kasten, M. (1998). Summons at 1600: *Clinton v. Jones'* impact on the American presidency. *Arkansas Law Review*, 51, 571.

<sup>43</sup> Yampert Jr., J.D. (2001). The death of constitutional law: A critique of the *Clinton v. Jones* decision. *Thurgood Marshall Law Review*, 185, 200-201.

In the United States criminal justice system, there are two different types of liability: criminal and civil. Criminal law prohibits actions that are harmful to the well-being of society and the state. In a criminal lawsuit, legal action can only be brought by the government and is usually against private individuals. Conversely, civil law regulates injurious activities that occur within interpersonal and private disputes. These lawsuits are brought by individual citizens rather than the government.<sup>44</sup> There are four types of civil law: torts, contracts, property, and domestic relations. Criminal cases require evidence beyond a reasonable doubt, or that the judge or jury be 99% sure that the accused committed the crime before sentencing. Civil cases only require a preponderance of the evidence, which means that it must be more likely than not that the person committed the harmful action. Punishment in criminal cases can include imprisonment, while the result of civil lawsuits is typically monetary compensation.<sup>45</sup>

The Supreme Court only addressed civil liability in *Nixon v. Fitzgerald* and *Clinton v. Jones*. The Court ruled in *Nixon* that the president has executive immunity from civil damages within the outer perimeter of his official conduct, but they held in *Clinton* that the president could be tried for civil damages while in office for conduct unrelated to the official duties of the executive. There are certainly other potential legal issues President Trump is facing, but I am choosing to discuss civil liability and President Trump. The precedent in *Nixon* and *Clinton* will allow me to draw conclusions about how the current Supreme Court will decide on ongoing civil liability issues that President Trump is facing. Additionally, I believe it would be exceptionally difficult to evaluate criminal liability and the Trump administration due to a lack of concrete knowledge about the situation and the continuous release of information from the Mueller investigation. I will address the sexual harassment claims against President Trump in state court

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<sup>44</sup> Siegel, L.J. & Welsh, B.C. (2018). *Juvenile delinquency: Theory, practice, and law* (13<sup>th</sup> ed.). Boston, MA: Cengage Learning.

<sup>45</sup> Conley, C. (2017, January 24). Lecture.

as well as President Trump's legal issues regarding the Emoluments Clause. As the completion of this research is under a time restriction, it is only updated to actions that occurred before November 30, 2018.

### III. The Emoluments Clauses

The Framers of the Constitution were extremely concerned with the ability of foreign actors to manipulate or corrupt American officials.<sup>46</sup> As a result, they included two different clauses to prevent conflicts of interest. The foreign Emoluments Clause of the Constitution states that “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”<sup>47</sup> An emolument is any profit or gain, including rewards, salary, advantages, or benefits.<sup>48</sup> Not only are government officials forbidden from accepting advantages from foreign states, they are also prohibited from accepting emoluments from the United States. The domestic or presidential emoluments clause states that “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”<sup>49</sup>

The foreign Emoluments Clause was first articulated in the Articles of Confederation and its need was restated during the Constitutional Convention. Framer Edmund Randolph stated the clause was absolutely necessary to avoid foreign influence. In the late 1700s, it was custom for foreign diplomats to be given gifts. For example, a gold box encrusted with diamonds and a

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<sup>46</sup> Eisen, N.L. et al. (2016). The Emoluments Clause: Its text, meaning, and application. *Governance Studies at Brookings*, 4-10.

<sup>47</sup> U.S. Constitution. Article I, § 9, cl. 8.

<sup>48</sup> Eisen, N.L. et al. (2016). The Emoluments Clause: Its text, meaning, and application. *Governance Studies at Brookings*, 11.

<sup>49</sup> U.S. Constitution. Article II, § 1, cl. 7.

picture of King Louis XVI was bestowed upon Benjamin Franklin in 1785 after serving as an ambassador to France. Due to the Emoluments Clause, Franklin had to request that Congress permit him to keep the gift. At the Constitutional Convention, Edmund Randolph pointed to Benjamin Franklin's situation as a prime example of the ability of foreign governments to persuade through gift-giving.<sup>50</sup> If the gift was given to a diplomat that was not as loyal as Franklin, the United States could have been compromised. There is no doubt that the Framers regarded anti-corruption measures such as the Emoluments Clause as absolutely necessary to prohibit foreign interference in the new government and ensure politicians acted in the best interest of the American nation.

The Supreme Court has never considered a case regarding the Emoluments Clause. There is no precedent to guide their decision. Traditionally, presidents have sold or divested their property in order to avoid conflicts of interest.<sup>51</sup> Perhaps the most well-known example of this is when President Jimmy Carter placed his family peanut farm in a blind trust. Before receiving the Nobel Peace Prize, President Obama asked the Department of Justice's Office of Legal Counsel if acceptance would infringe upon the Emoluments Clause. President Jackson, President Van Buren, President Tyler, President Lincoln, President Harrison, and President Kennedy were all offered emoluments from foreign leaders during their time in office. Each and every one of them respected the Emoluments Clause by asking for the consent of Congress or the Office of Legal Counsel.<sup>52</sup> President Trump has declined to follow suit. This has led to a multitude of situations that put him at risk for civil liability.

#### **IV. Current Situations**

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<sup>50</sup> Trickey, E. (2018, September 28). Move over, Trump. This president's two lions set off the greatest emoluments debate. *The Washington Post*.

<sup>51</sup> Gruhl, J. (2018, March 15). Lecture.

<sup>52</sup> 17-1154 F.Supp. 1, 32-34 (D.D.C., 2017) [Complaint]

### A. President Trump and Defamation

In 2005, Summer Zervos competed on the popular television show *The Apprentice*. The reality show was produced by and starred Donald Trump. Although Zervos did not win that season, she reached out to Trump in 2007 regarding a potential job opportunity. She met with Trump at the New York Trump Tower, where he allegedly unwantedly kissed her multiple times. At the end of the evening, he offered her a job. Trump later asked Zervos to dine with him at the Beverly Hills Hotel. Trump's security guard escorted Zervos to his private bungalow, where Trump proceeded to sexually assault her. Zervos claimed that Trump kissed her and touched her breasts. Zervos rejected his advances, but Trump persisted. He continued to attempt to caress Zervos and even pressed his genitals against her. Zervos insisted he cease his actions, and the two continued to dine together. Trump asked Zervos to leave early and requested her presence at his golf course the following day. Trump introduced Zervos to the golf course manager, who later offered her a job offer with a salary substantially lower than what she expected. She declined.<sup>53</sup>

On October 8, 2016, a 2005 conversation between *Access Hollywood* host Billy Bush and Donald Trump was released by *The Washington Post*. Among other horrifying statements, Trump can be heard saying, "You know I'm automatically attracted to beautiful – I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything...Grab 'em by the pussy. You can do anything." Then-candidate Trump apologized for his statements, calling them "locker room banter."<sup>54</sup> Zervos cited the release of this recording as her motivation for coming forward.<sup>55</sup> She issued a public statement

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<sup>53</sup> 150522 P.2d 1, 1-4 (New York, 2018); North, A. (2018, March 26). The Summer Zervos sexual assault allegations and lawsuit against Donald Trump, explained. *Vox*.

<sup>54</sup> Fahrenthold, D.A. (2016, October 8). Trump recorded having extremely lewd conversation about women in 2005. *The Washington Post*.

<sup>55</sup> Bekiempis, V. (2018, October 17). Presidential immunity shields Trump from Zervos lawsuit, attorneys to argue. *The Guardian*.

about the aforementioned 2007 incidents on October 14, 2016, which Trump promptly denied. On his campaign website, Trump stated he had “never met [Zervos] at a hotel or greeted her inappropriately.” He continued to publicly claim the sexual harassment and assault allegations were false at several different rallies and over Twitter, often singling out Zervos although she is only one of twenty-three women who have accused him since the 1970s.<sup>56</sup>

### 1. *Zervos v. Trump*

Zervos filed a defamation suit against Trump on January 17, 2017. She asserted that Trump’s statements in which he accused her of fabricating the sexual misconduct caused her irreparable emotional harm and resulted in monetary loss to her business. President Trump filed a motion to dismiss or impose a stay for the private action until he leaves office on the grounds of executive immunity. His request was denied by the New York State Supreme Court. The judge cited precedent in *Clinton v. Jones*, stating that the president is not automatically granted temporary immunity for private acts. The judge agreed that allowing a civil suit against the president to proceed does not infringe upon separation of powers. She ruled that the precedent in *Clinton* was applicable in state jurisdiction, despite being a federal ruling. All actions taken in an unofficial capacity to the executive’s duties are subject to judicial scrutiny. The Supremacy Clause, which grants that federal government supersedes state government and federal law supersedes state law, does not prevent this. The state is not violating the distinction between state and federal powers because they are not mandating and prohibiting the President to take or refrain from specific actions in his role as the chief executive. The judge, like the justices in

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<sup>56</sup> 150522 P.2d at 4-8 (New York, 2018); Relman, E. (2017, December 11). The 23 women who have accused Trump of sexual misconduct. *Business Insider*.

*Clinton*, does not believe that litigation will hinder the president's ability to perform his duties.<sup>57</sup> President Trump appealed the ruling.<sup>58</sup>

## 2. How is the Supreme Court Likely to Decide?

In *Clinton v. Jones*, the Supreme Court specifically chose not to address if the president was entitled to absolute immunity for civil suits for unofficial actions in a state court.<sup>59</sup> If *Zervos v. Trump* makes its way to the Supreme Court, they would be allowed to settle this matter. There are three justices on the Supreme Court who ruled in *Clinton v. Jones*: Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. It is my opinion that the Supreme Court would determine that, even under state court jurisdiction, the president is not entitled to a stay of trial for his unofficial actions. However, I think it is fair to conclude that the decision will be closer, perhaps 5-4 or 6-3. There are legal and political reasons to suggest the Court might be swayed towards granting the president immunity.

The aftermath of the decision in *Clinton v. Jones* certainly calls into question the Supreme Court's opinion that litigation will not take up a substantial amount of the president's time. It seems likely that Justice Breyer would rule that the president should be granted immunity if he is able to provide a reasonable explanation on the necessity of a stay, as he notated in his concurring opinion. Other justices might also submit to this interpretation and provide the president with temporary immunity on a case-by-case basis, especially if it is possible that the litigation is driven by politically motivated actors. It is possible they may determine that excessive litigation has encompassed the presidency and rule that the judiciary has encroached upon the president's ability to fulfill his duties to the best of his ability, thereby violating the

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<sup>57</sup> 150522 P.2d at 9-14 (New York, 2018)

<sup>58</sup> Jones, A. (2018, May 23). Trump legal team's move sets stage for possible presidential deposition in Zervos case. *CNN News*.

<sup>59</sup> 520 U.S. at 681

doctrine of separation of powers. For instance, as of June 1, 2016, then-candidate Trump was involved in 120 civil cases that continued into his presidency. Seventy of these were filed after he announced he was running for president.<sup>60</sup> The only other legal reason the justices of the Supreme Court may decide in favor of the president is due to his assertion that federalism may be violated if the state court rules on this matter. I am inclined to agree with the State Supreme Court's reasoning in *Zervos v. Trump* that holds that state courts have jurisdiction in the matter, although the justices may entertain other opinions. It is likely that some justices may be persuaded to grant the president immunity on a case-by-case basis. It is less likely that the Supreme Court will not apply the precedent in *Clinton* due to federalism issues.

The Supreme Court could also be inclined to overrule the precedent for political reasons. Although the Supreme Court is supposed to be an apolitical institution, it often acts in a political manner. The justices carry their own biases to the Court, whether they intend to or not. Brett Kavanaugh, a conservative justice recently appointed by President Trump, certainly brings his bias on executive immunity to the Court. Kavanaugh served on Independent Counsel Kenneth Starr's legal team and strongly supported the idea that the president is not above the law. He changed his opinion after working for President George W. Bush, even going so far as to say that he believed a president could not face criminal charges while in office.<sup>61</sup> In 2009, he published an article in the *Minnesota Law Review* detailing his opinion on the failure of separation of powers in the government. He stated one way to remedy the situation would be to provide the president absolute immunity for all civil and criminal charges while in office. Like the Court's decision in *Nixon*, Kavanaugh justified granting a stay of trial for the president because the president's decisions often invoke negative reactions, the responsibility for these decisions fall

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<sup>60</sup> Penzenstadler, N. & Page, S. (2017, October 23). Exclusive: Trump's 3,500 lawsuits unprecedented for a presidential nominee. *USA Today*.

<sup>61</sup> Brettschneider, C. (2018, September 4). Brett Kavanaugh's radical view of executive power. *Politico Magazine*.

primarily to the president, litigation will cause inattention to presidential duties, and there are other options to “check” a president’s actions. He also believed that civil and criminal suits would be brought to advance a partisan agenda, similar to Chief Justice Berger’s concurring opinion in *Nixon*. Kavanaugh explicitly states that Congress should spearhead an effort to enact a law protecting the president. He declined to address the constitutionality of the decision in *Clinton v. Jones*.<sup>62</sup> Although Justice Kavanaugh made sure to differentiate his personal opinion from the constitutionality of the decision in *Clinton*, it is clear he has a particular slant towards granting the president immunity from all litigation. This makes it more likely that he would rule in favor of the president in *Zervos v. Trump*.

Ultimately, I believe that a narrow majority of Supreme Court justices will hold that the precedent in *Clinton v. Jones* is applicable in state tribunals. It is a strongly held belief that no one is above the law, and a decision in favor of Trump would be detrimental to this notion. By providing the president absolute or even qualified immunity for unofficial actions, the Court decreases the opportunity for judicial review and limits the judicial branch’s power.

Additionally, the application of justifications for executive immunity in *Nixon* can be applied to the Court’s opinion in *Clinton* and *Zervos* to an extent as Kavanaugh suggests in his article.

However, there are no options other than a civil suit for a majority of these cases. Oversight by Congress or impeachment for unofficial actions are both highly improbable. Scrutiny by the press has clearly made no substantial impact on President Trump’s actions – if anything, it has only caused him to make more inappropriate statements. Finally, President Trump seems unphased by public opinion and re-election concerns, perhaps because his statements pander to his base. Other avenues do not exist for many civil litigants, so the judiciary has a responsibility

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<sup>62</sup> Kavanaugh, B.M. (2009). Separation of powers during the forty-fourth presidency and beyond. *Minnesota Law Review*, 93, 1459-1462.

to provide redress for these individuals. For these reasons, the Supreme Court will again assert their opinion that a president is not entitled to a stay of trial until his term in office has ended.

## B. President Trump's Companies and the Emoluments Clause

### 1. What is Standing?

The U.S. Constitution states that “judicial power shall extend to all cases...[and] controversies.”<sup>63</sup> The standing doctrine is a threshold issue used in civil cases. Standing only resolves the question of the litigant's ability to participate in a case. If it is not granted, the court does not debate the merits of the issue. It allows justices to reduce their caseload, control the dockets, and ensure parties have a legitimate interest in the outcome of the case. Plaintiffs must demonstrate that they have suffered or are about to suffer a clear and concrete injury that is traceable to the defendant's conduct and is likely to be resolved by a judicial decision to gain standing in civil suits. The injury does not have to be physical or financial, although these are the two most common types of injury. Plaintiffs must have a personal and direct stake in the outcome. If standing is not granted, the subject matter is not a case or controversy. Although this doctrine appears to be technical, it is often applied politically. The standards for standing can be tightened or loosened depending on the political make-up of the court. Additionally, standing is often used to avoid or reach out to resolve contentious issues of public policy.<sup>64</sup> This doctrine is paramount when discussing the emoluments clause and President Trump because it is the main barrier to gaining access to the courts. Plaintiffs must show that they personally faced injury due to President Trump's business dealings.

### 2. *Citizens for Responsibility and Ethics in Washington v. Trump*

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<sup>63</sup> U.S. Constitution. Article III, § 2, cl. 1.

<sup>64</sup> Gruhl, J. (2017, October 30). Lecture.

Citizens for Ethics and Responsibility (“CREW”), Restaurant Opportunities Centers United, Inc. (“ROC United”), Jill Phaneuf, and Eric Goode brought a complaint against Donald Trump in his capacity as President of the United States on January 23, 2017. CREW is a non-profit government watchdog agency, ROC United is a New York organization comprised of thousands of restaurant employees and dining establishments, Jill Phaneuf books embassy functions for two Washington D.C. hotels, and Eric Goode owns hotels, restaurants, and event spaces in New York City that often host officials from foreign governments. President Trump owns the Trump Organization, and although he has turned over the management of the organization to his sons, he did not relinquish ownership of his business or establish a blind trust as previous presidents have done. President Trump owns the Trump International Hotel in Washington, D.C. and a restaurant inside the hotel. He owns several other properties, including condominiums, restaurants, and a skyscraper in New York City.<sup>65</sup>

The plaintiffs claim that the defendant has violated both the domestic and foreign Emoluments Clause of the Constitution by continuing to participate in the on-goings of the Trump Organization and collecting a profit from these holdings. They allege that there are several examples of foreign dignitaries utilizing Trump’s businesses in order to influence the President and the United States government to favor their foreign government. One violation of the foreign Emoluments Clause is the incident in which the Kuwait Embassy moved its National Day celebration from the Four Seasons Hotel to the Trump International Hotel, supposedly due to pressure from the Trump Organization. Another example the plaintiffs cite is the rejection of the trademark of the Trump name by China. The trademark protection was granted shortly after Trump pledged to continue to acknowledge Taiwan as part of China. Plaintiffs contend that the defendant violated the domestic Emoluments Clause by continuing to lease from the General

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<sup>65</sup> 17-458 F.Supp 1, 2-5 (S.D.N.Y., 2017) [Memorandum Decision and Order]

Services Administration, the head of the which is appointed by him. The lease states that “no...elected official of the Government of the United States...shall be admitted to any share or part of this Lease.” Regardless of whether or not this violates the Emoluments Clause, Trump is in clear violation of the lease. The Trump administration increased funding for the General Services Administration, and the General Services Administration later said Trump was in compliance with the lease.<sup>66</sup>

ROC United, Phaneuf, and Goode assert their injury is loss of business and consequently revenue due to increased competition, while CREW claims its injury is utilizing resources that could have been allocated elsewhere to impede Trump’s continued Emoluments Clause violations. Trump moved to dismiss the lawsuit due to lack of standing. The judge decided that ROC United, Phaneuf, and Goode lack standing because the plaintiffs could not prove a causal connection between Trump’s actions and their injury. The court ruled that foreign officials likely decide to frequent Trump’s businesses due to their individual preference, not based on Trump’s particular policies. Further, the judge found that the plaintiffs did not have standing because their injury could not be rectified by the court. The plaintiffs’ requested injunction to bring Trump and his transactions in compliance with the Emoluments Clause would not necessarily result in less competition.<sup>67</sup> Additionally, the judge found that ROC United, Phaneuf, and Goode did not have standing because the Emoluments Clause was never meant to protect businesses from competition; their injury did not fall within the “zone of interest” of the constitutional provision.<sup>68</sup> CREW was denied standing because there was no clear or concrete injury. CREW could not prove that it was unable to continue to implement its organizational goals or that it spent time, money, attention, and other resources to remedy an injury caused by the defendant’s

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<sup>66</sup> 17-458 F.Supp at 5-8 [Memorandum Decision and Order]

<sup>67</sup> 17-458 F.Supp at 10-13 [Memorandum Decision and Order]

<sup>68</sup> 17-458 F.Supp at 15-17 [Memorandum Decision and Order]

actions that would not have occurred otherwise. CREW chose to pursue this avenue and devote its resources to this particular topic; it was not required that CREW do so.<sup>69</sup>

The court also addressed the political question doctrine, which was not explicitly advanced by the defendant. Under this doctrine, the court can refuse to decide a case if it is inherently political, the court's interference would intrude on the powers of the executive or legislative branch, or because there is no available judicial redress.<sup>70</sup> The court ruled that the foreign Emoluments Clause claims are a political question because only Congress can consent to the reception of emoluments according to the Constitution. It held that Congress is also the only branch of government that can decide if someone has infringed upon the foreign Emoluments Clause and the repercussions for doing so.<sup>71</sup>

The defendant claimed that the case should be dismissed on the grounds of ripeness. Ripeness is when a case is ready to be adjudicated. The issues must be concrete, not hypothetical. A case is not ripe if it has not utilized all avenues for appeal, including through government agencies, other branches of the government, and the lower courts.<sup>72</sup> Congress had not taken action on the alleged violation of the foreign Emoluments Clause; therefore, according to the court, this case was not justiciable.<sup>73</sup>

The plaintiffs appealed the decision to deny standing on February 16, 2018.

### 3. *Blumenthal et al. v. Trump*

On June 14, 2017, Senator Richard Blumenthal and 194 members of the Senate and the House of Representatives filed a complaint against Donald Trump in his official capacity as President of the United States.<sup>74</sup> The complaint was amended on August 15, 2017 and included

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<sup>69</sup> 17-458 F.Supp at 15-24 [Memorandum Decision and Order]

<sup>70</sup> Gruhl, J. (2017, October 30). Lecture.

<sup>71</sup> 17-458 F.Supp at 25-26 [Memorandum Decision and Order]

<sup>72</sup> Gruhl, J. (2017, October 30). Lecture.

<sup>73</sup> 17-458 F.Supp at 26-29 [Memorandum Decision and Order]

<sup>74</sup> Constitutional Accountability Center (2019, January 30). Rule of Law: *Blumenthal et. al v. Trump*.

five more members of Congress as plaintiffs. It is important to note that the plaintiffs still do not make up a majority of Congress. The plaintiffs allege that Trump has repeatedly violated the foreign Emoluments Clause and request that the Court release a statement that the President has violated the clause and prevent the President from further accepting emoluments unless explicitly permitted by Congress.<sup>75</sup>

Trump has received multiple benefits from foreign governments due to his business ties without obtaining the consent of Congress. Trump owns over 500 corporations, companies, and partnerships located across the globe and in United States, but he has not divested his assets since taking the office of the President. He continues to profit from these entities.<sup>76</sup> The defendant has admitted that he receives monetary compensation from foreign governments due to his vast business interests.<sup>77</sup> Based on Article I, § 9, cl. 8, the members of Congress have a right to decide if Trump is allowed to accept any foreign emolument, including money or other benefits he may receive from his business. Plaintiffs mention several instances of the defendant's actions that allegedly encroach upon their congressional power, including the "One China" and General Services Administration lease examples given in *Citizens for Ethics and Responsibility in Washington v. Trump*. Plaintiffs also point to the additional 157 pending trademarks in 36 foreign countries as an infringement on the rights granted to them in the Emoluments Clause, if accepted.

Another main problem that gives rise to this suit is Trump's acceptance of payment for hotels and event rooms from foreign diplomats that plaintiffs allege only use these spaces in order to make a connection with the administration. For example, the Saudi government paid \$270,000 for the room and board of Saudi lobbyists who stayed at the Trump hotel who hoped to convince Congress to repeal a law allowing the families of 9/11 victims to sue Saudi Arabia. Moreover,

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<sup>75</sup> 17-1154 F.Supp. 1, 18-20 (D.D.C., 2017) [Amended Complaint]

<sup>76</sup> 17-1154 F.Supp. at 35-36 [Amended Complaint]

<sup>77</sup> 17-1154 F.Supp. 1,5 (D.D.C., 2018) [Opinion]

several foreign governments lease office space from the defendant. Plaintiffs also take issue with the payment Trump receives from the licensing of his show *The Apprentice*. A spin-off of the show is broadcast in the United Kingdom and the government directly pays for the licensing fees. The final issue of contention is the defendant's alleged acceptance of expedited projects he is associated without first asking for congressional approval.<sup>78</sup> This raises question as to if these governments would come to expect favorable policy in return for their advancement of Trump's projects. As a result of his business ventures, it is unclear if Trump will be motivated to make decisions based on his personal interest or on what he believes is best for the country.

Defendant does not believe that financial gain from his businesses qualify as emoluments and has not requested the consent of Congress as a result. Plaintiffs assert their injury is the inability to authorize or reject emoluments, which is constitutionally mandated.<sup>79</sup> The judge ruled that plaintiffs have standing in this case. Plaintiffs have a vested interest in the outcome of the case and the injury is tangible and can easily be traced to the defendant's actions. Vote nullification is defined as an institutional injury. Standing has previously been granted to legislators who experienced this type of injury.<sup>80</sup> The judge further states that the ability of Congress to introduce and vote on legislation about emoluments does not factor into granting or denying standing to the plaintiffs because their injury is the unwillingness of the President to share information about his acceptance of emoluments, cutting out their ability to actually give him consent.<sup>81</sup>

The judge stated this case is justiciable because there is "no adequate legislative remedy" for depriving the members of Congress of their ability to vote on this matter.<sup>82</sup> Defendant suggests that plaintiffs could vote on if the alleged incidents violate the Emoluments Clause (although

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<sup>78</sup> 17-1154 F.Supp. at 45-46 [Amended Complaint]

<sup>79</sup> 17-1154 F.Supp. at 5 [Opinion]

<sup>80</sup> 17-1154 F.Supp. at 13-21 [Opinion]

<sup>81</sup> 17-1154 F.Supp. at 34-35 [Opinion]

<sup>82</sup> 17-1154 F.Supp. at 13 [Opinion]

defendant has failed to give them the necessary information to accurately assess the situation) or pass a bill in which emoluments are defined and regulated. To achieve redress in the legislative branch, Congress would need to convince a majority of the members to enact legislation. However, the Emoluments Clause clearly states that the President is responsible for asking for permission to accept emoluments. Further, legislation would not provide a remedy for emoluments already accepted by the President and may not stop him from accepting other emoluments.<sup>83</sup> This case does not present a political question and does not violate the principle of separation of powers. The judicial branch is responsible for interpreting and applying the Constitution and the Emoluments Clause is part of the Constitution.<sup>84</sup>

The defendant appealed the decision to grant standing on October 22, 2018.<sup>85</sup>

#### 4. *District of Columbia and the State of Maryland v. Trump*

On June 12, 2017 a complaint was brought against Donald Trump in his official capacity as the President of the United States and in his individual capacity by the District of Columbia and the State of Maryland. The complaint was amended on March 12, 2018. The plaintiffs allege that President Trump has violated both the domestic and foreign Emoluments Clauses. As owner of the Trump Organization and the various entities within it, they allege that Trump has received payment and a competitive advantage from domestic and foreign governments and government officials. Of particular interest is the Trump International Hotel in Washington D.C. and the bars, restaurant, and event spaces located inside of the hotel. Trump stated he would turn over management of the Trump Organization to his sons, but as alleged in the other emoluments' cases, he regularly receives updates on the ongoing of his businesses. He also vowed to gift the profit he earned from foreign governments patronizing his business to the U.S. Treasury Department but

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<sup>83</sup> 17-1154 F.Supp. at 44-46 [Opinion]

<sup>84</sup> 17-1154 F.Supp. at 52-54 [Opinion]

<sup>85</sup> Constitutional Accountability Center (2019, January 30). Rule of Law: *Blumenthal et. al v. Trump*.

has not followed through on this promise. Like other cases, they allege that the Saudi Arabian government and Kuwait government have begun utilizing Trump's hotel in order to please the President. State governments have followed suit. For example, the governor of Maine chose to stay at the Trump International Hotel while in D.C. to meet with federal officials. Trump has pandered to these audiences. His hotel directly marketed to over 100 diplomats in order to increase sales. Plaintiffs seek a declaratory and an injunctive relief.<sup>86</sup>

a. Standing opinion

On March 28, 2018, the District Court granted standing in part and denied standing in part. Standing for states is justified based on three types of interest: sovereign interests, non-sovereign or proprietary interests, and quasi-sovereign interests. Sovereign interests involve "the power to create and enforce legal code," and non-sovereign interests encompass ownership of businesses. The right to "not being discriminatorily denied its rightful status within the federal system" is a quasi-sovereign interest. *Parens patriae* interests, which are interests in the well-being of constituents, are also included under the quasi-sovereign interest. Maryland asserts it faces injury due to sovereign interests. Both Maryland and Washington D.C. state they have standing due to injury from quasi-sovereign interests, proprietary interests, and *parens patriae* interests.<sup>87</sup> The Court denied standing for Maryland's sovereign interests and for any claims relating to the Trump Organization and its entities outside of Washington D.C.<sup>88</sup>

Maryland claimed its injury based on sovereign interests derived from the state's early investment in the domestic and foreign Emoluments Clause. They allege that the state only ratified the Constitution because of the inclusion of these corruption-preventing clauses.<sup>89</sup> The District

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<sup>86</sup> 17-1596 F.Supp. 1, 1-5 (D. Md., 2018) [Standing Opinion]

<sup>87</sup> 17-1596 F.Supp. at 6-10 [Standing Opinion]

<sup>88</sup> 17-1596 F.Supp. at 2, 12 [Standing Opinion]

<sup>89</sup> 17-1596 F.Supp. at 6 [Standing Opinion]

Court judge ruled that there is no precedent to support a claim of this type by the state and there is no factual basis to suggest it is accurate.<sup>90</sup> Maryland also maintained they had an injury-in-fact because the state lost revenue from taxes for Maryland hotels, restaurants, and event spaces that were in direct competition with the Trump Organization.<sup>91</sup> The judge denied this injury because Maryland did not offer specific data on loss of this particular tax revenue to back its assertion.<sup>92</sup>

The judge then turns to the plaintiffs' quasi-sovereign interests, which he distinguishes from their *parens patriae* interests. States have a vested interest in taxation, zoning, and land use in their state. Trump has repeatedly received exemption and concessions from states in these areas, which has continued even after he ascended to the presidency. This puts Washington D.C. and Maryland between a rock and a hard place. If they do not grant Trump these concessions, he will decide to move his business elsewhere, putting their state at a disadvantage. If they grant him these concessions, they will lose tax revenue. This is a clear abuse of the domestic Emoluments Clause.<sup>93</sup> The defendant argues that the state is not forced to grant concessions or punished for not doing so. The judge granted the plaintiffs standing in this matter because Trump's entities have been given concessions by both Washington D.C. and Mississippi. It is very likely these states felt coerced into providing tax concessions in order to curry favor with the president, and it is likely that Washington D.C. and Maryland will continue to face this pressure. Additionally, government officials, like the governor of Maine, may feel it necessary to use Trump's businesses over others, further suggesting that states face pressure to allow Trump to expand his businesses into their states. However, he denied standing for the entities of the Trump Organization outside of Washington D.C. because the plaintiffs do not face conflict from entities in other states.<sup>94</sup>

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<sup>90</sup> 17-1596 F.Supp. at 13-15 [Standing Opinion]

<sup>91</sup> 17-1596 F.Supp. at 6 [Standing Opinion]

<sup>92</sup> 17-1596 F.Supp. at 13-15 [Standing Opinion]

<sup>93</sup> 17-1596 F.Supp. at 6 [Standing Opinion]

<sup>94</sup> 17-1596 F.Supp. at 15-20 [Standing Opinion]

Both plaintiffs claimed injury-in-fact resulting from proprietary interests. Washington D.C. owns the Walter E. Washington Convention Center, the Washington Convention Center and Sports Authority, and the Carnegie Library, and Maryland has a financial interest in the Montgomery County Conference Center, the MGM Casino, and the Bethesda Marriot Conference Center, which are all located within 15 miles of the Trump International Hotel.<sup>95</sup> These businesses are adversely affected when Trump violates the foreign and domestic Emoluments Clause, causing foreign and state government officials choose to stay at his hotel in the hopes of fostering a good relationship with the administration. This is seen in the Kuwait National Day and Saudi Arabia situations. The judge granted standing because Supreme Court precedent allows plaintiffs to sue competitors that receive financial benefits resulting in a market advantage. As the plaintiffs' organizations are closely located, offer similar services, and cater to the same class of individuals, they are clearly in direct competition with Trump's hotel.<sup>96</sup>

The final injury addressed and ultimately granted standing is *parens patriae* injury. Plaintiffs allege that their residents are harmed when Trump violates the Emoluments Clauses because it results in the loss of wages and tips for employees in the hospitality industry. The hospitality industries make up a significant population in Maryland and Washington D.C., which allows them to establish *parens patriae* injury. The defendant asserts that the states are unable to pursue litigation against the president in his official capacity because this amounts to a suit against the United States according to precedent, but the judge ruled this case does not fall under this categorization because Trump's actions are outside the scope of his official duties as president.<sup>97</sup>

The judge finally addresses the three other requirements for granting standing: traceability of injury to the defendant's actions, redressability by the court, and prudential standing. Foreign

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<sup>95</sup> 17-1596 F.Supp. at 7 [Standing Opinion]

<sup>96</sup> 17-1596 F.Supp. at 20-25 [Standing Opinion]

<sup>97</sup> 17-1596 F.Supp. at 25-29 [Standing Opinion]

governments have publicly stated they have chosen to stay at the president’s hotel in order to receive more beneficial policy outcomes, which showcases the link between the president, the actions of foreign and domestic governments and their officials, and the increase in competition detrimental to the states of Maryland and Washington D.C.<sup>98</sup> This case is likely to be resolved by a judicially enforced injunction and declaratory relief because it will reduce the competitive disadvantage faced by these businesses.<sup>99</sup> To have prudential standing, a plaintiff’s claim must fall within the zone of interest and not be considered a political question. This suit accomplished both objectives. Maryland and Washington D.C. are within the zone of interest for the domestic Emoluments Clause because they are states (“He shall not receive within that Period any other Emolument from the United States or any of them.”). The foreign Emoluments Clause, which was established as an anti-corruption measure, was created in part to protect from competitive disadvantage.<sup>100</sup> Therefore, the plaintiffs are squarely within the zone of interest for both Clauses. Additionally, this issue is able to be resolved by the court because the domestic Emoluments Clause does not say which branch of government is responsible for enforcement and the foreign Emoluments Clause does not state that only Congress can be involved in the determination of its violations.<sup>101</sup> Plaintiffs are granted standing.<sup>102</sup>

#### b. Opinion on the meaning and applicability of the Clauses

On July 25, 2018, the District Court decided in favor of the plaintiff that the Emoluments Clauses were applicable to the president and that the term “emolument” means “any profit, gain, or advantage.”<sup>102</sup> The defendant argued that “emolument” meant “profit arising from an office or employ” not payment for independent services.<sup>103</sup> To determine this, the judge addressed the

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<sup>98</sup> 17-1596 F.Supp. at 31-32 [Standing Opinion]

<sup>99</sup> 17-1596 F.Supp. at 33, 37 [Standing Opinion]

<sup>100</sup> 17-1596 F.Supp. at 39-41 [Standing Opinion]

<sup>101</sup> 17-1596 F.Supp. at 45 [Standing Opinion]

<sup>102</sup> 17-1596 F.Supp. 1, 2 (D. Md., 2018) [Meaning Opinion]

<sup>103</sup> 17-1596 F.Supp. at 6-7 [Meaning Opinion]

plain text of the Constitution, the meaning at the time of its drafting, its purpose, and executive branch precedent and practice.

An amicus curiae brief filed by Professor Seth Tillman of the Maynooth University Department of Law asserts that the president is not subject to the foreign Emoluments Clause because the presidency is not “an Office of Profit or Trust under the United States.” He alleges that the Framers were referring to appointed, not elected positions in the Clause due to the English term “Office under the Crown” which denoted appointed positions within the government. The judge ruled the president is subject to the foreign Emoluments Clause because the text of Constitution, the Federalist Papers, and the Department of Justice’s Office of Legal Counsel have all stated the president holds an office. The Framers specifically discussed the office of the presidency when considering the foreign Emoluments Clause. Moreover, the term “United States, or any of them” was used to reference federalism. “United States” is the federal government and the presidency is a federally-elected office, therefore the foreign Emoluments Clause is applicable to President Trump.<sup>104</sup>

Plaintiffs assert that their definition is consistent with the surrounding text of the Clauses. The foreign Emoluments Clause provides that “no Person...shall...accept of *any* present, Emolument, Office, or Title, *of any kind whatever*,”<sup>105</sup> while the domestic Emoluments clause states that “he shall not receive...*any other Emolument* from the United States, or any of them”<sup>106</sup> (emphasis added). By utilizing the words “any,” “any kind whatever,” and “any other,” the Framers indicate they wanted the term emolument to be interpreted broadly. The defendant, however, affirms that the words “any” and “any kind whatever” only ensure types of compensation and do not extend the meaning of emoluments to include compensation outside of

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<sup>104</sup> 17-1596 F.Supp. at 10-15 [Meaning Opinion]

<sup>105</sup> U.S. Constitution. Article I, § 9, cl. 8.

<sup>106</sup> U.S. Constitution. Article II, § 1, cl. 7.

official services.<sup>107</sup> According to the judge, the text of the Clauses is more consistent with the plaintiffs' meaning. The Framers intended both Clauses to be broad, and therefore they are applicable to private commercial transactions.<sup>108</sup>

Not only did the Framers intend emoluments to include any profit, gain, or advantage, but there is evidence to suggest that the public also agreed with this interpretation. The plaintiffs point to research by a professor at Georgetown University Law Center that found that 92% of dictionaries at the time of the Constitution's drafting defined emoluments consistent with the plaintiffs' definition. William Blackstone, the Framers, and Supreme Court justices all used the term emoluments in this manner. The defendant states that the term emoluments as profit arising from an office is used in contemporary dictionaries and that etymology relates emolument to "profit from labor." He also suggests this definition was used because a constitutional amendment was proposed to extend the foreign Emoluments Clause to all citizens and although it did not pass, it could not have encompassed their business with foreign governments.<sup>109</sup> The judge again sided with the plaintiffs, stating that in addition to their assertions, emolument was commonly used to include commercial transactions for individuals by treatises, prominent scholars the Framers were knowledgeable about, delegates to the Constitutional Convention, and George Washington.<sup>110</sup>

The plaintiffs and the defendant disagree about the constitutional purpose of the clauses, with the plaintiffs alleging they are broad anti-corruption measures meant to protect the United States from foreign and state influence and the defendant stating they were created to prevent the acceptance of certain types of compensation from foreign governments and to ensure the

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<sup>107</sup> 17-1596 F.Supp. at 16-18 [Meaning Opinion]

<sup>108</sup> 17-1596 F.Supp. at 19-21 [Meaning Opinion]

<sup>109</sup> 17-1596 F.Supp. at 22-25 [Meaning Opinion]

<sup>110</sup> 17-1596 F.Supp. at 26-29 [Meaning Opinion]

president's salary was stable throughout his time in office. Plaintiffs state the foreign Emoluments Clause would be meaningless if the defendant's definition prevailed because it could only be used to prevent bribery, which is addressed elsewhere in the Constitution. Furthermore, the Federalist Papers specifically address the Framers' concern that the president could easily be swayed by state governments without the domestic Emoluments Clause. The defendant believes that the domestic Emoluments Clause does not prevent him from owning a business because the Framers would not have included this provision as federal officials owned businesses at this time that could have interacted with foreign governments.<sup>111</sup> The judge determined that both clauses arose out of corruption concerns, as is shown in constitutional ratification debates and the Federalist Papers. Early state constitutions prohibited government officials from engaging in private business and unlike what Trump suggests, there is no proof that federal officials' private businesses in the late 1700s were providing goods and services for state or foreign governments in exchange for compensation.<sup>112</sup>

Executive branch precedent also advances the plaintiffs' argument. The Office of Legal Counsel ("OLC") has repeatedly cited any profit as an emolument.<sup>113</sup> The defendant states these precedents cannot be applied to this case because they address personal services rather than private transactions. He argues that emolument cannot mean "anything of value" because the OLC granted President Reagan the ability to receive his retirement benefits from California despite the domestic Emoluments Clause and that private transactions are not covered by the Clause because George Washington once bought public land without scrutiny.<sup>114</sup> Emolument is any profit, gain, or advantage, as shown by executive precedent.<sup>115</sup> The Emoluments Clauses are

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<sup>111</sup> 17-1596 F.Supp. at 21-32 [Meaning Opinion]

<sup>112</sup> 17-1596 F.Supp. at 33-37 [Meaning Opinion]

<sup>113</sup> 17-1596 F.Supp. at 39, 42 [Meaning Opinion]

<sup>114</sup> 17-1596 F.Supp. at 40-41 [Meaning Opinion]

<sup>115</sup> 17-1596 F.Supp. at 46 [Meaning Opinion]

only applicable to cases where the government official could likely be tempted by foreign and state governments to take a course of action in line with their wishes. The Office of Congressional Ethics has held that unofficial actions can constitute violations of the Emoluments Clauses. Precedent is neither in contrast to nor in support of the defendant's definition.<sup>116</sup>

The defendant is denied the motion to dismiss in his official capacity as president for failure to state a claim because the plaintiffs' injuries under the foreign and domestic Emoluments Clauses are sufficiently persuasive.<sup>117</sup> Trump filed a motion for interlocutory appeal and a stay for discovery in the District Court case while appeal was pending. The District Court denied both motions on November 2, 2018.<sup>118</sup>

#### 5. How is the Supreme Court Likely to Decide?

I am going to address how the Supreme Court is likely to decide these cases based on their merits, assuming their affirmance or denial of standing is accurate. It is significantly harder to parse out how the Supreme Court is likely to decide due to a lack of legal precedent. If the Supreme Court were to decide based purely on the legality of Trump's actions, I believe it would rule against him in *Blumenthal et al. v. Trump* and *District of Columbia and Maryland v. Trump*. However, if the Supreme Court justices were to decide based on politics, they would rule in favor of Trump in both cases.

I believe that if the Supreme Court only considered legal issues in its rulings of the Emoluments Clause cases, it would decide against Trump. The decision about the applicability and meaning of the Emoluments Clauses in *District of Columbia and Maryland v. Trump* provides substantial evidence that the president is subject to this law and that the term "emolument" should be construed broadly. The Framers were obviously concerned with the undue influence of foreign

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<sup>116</sup> 17-1596 F.Supp. at 43-44 [Meaning Opinion]

<sup>117</sup> 17-1596 F.Supp. at 47 [Meaning Opinion]

<sup>118</sup> 17-1596 F.Supp. 1, 3 (D. Md., 2018) [Memorandum Opinion]

and state governments on government officials when they created the Clauses. They undoubtedly wanted to prevent executive officials from receiving private transactions through their personal businesses from foreign and state governments in order to limit the ability of others to influence the newly created American government. The surrounding text of the Constitution and the public understanding at the time of the drafting of the Constitution support a wide interpretation of the term “emolument.” Furthermore, contemporary practice by the Office of Legal Counsel has followed an expansive definition. Congress is constitutionally entitled to authorize or reject emoluments given to the president and must be afforded that opportunity, which the President has denied them. The Supreme Court would undoubtedly follow the opinions held in *Blumenthal et al. v. Trump* and *District of Columbia and Maryland v. Trump* if it only considered the constitutionality of the matter.

The Court often makes decisions that are not entirely based on legal or constitutional matters, but instead intersects with politics. The Court is not isolated from politics; it is entrenched in it. Judges’ experiences and their ideology shape how they decide cases. Decisions on the Supreme Court often fall along party lines. As liberal justices vote on one side and conservative justices on another, more decisions reflect a 5-4 split. For instance, in the Supreme Court case *Bush v. Gore*, the conservative Court essentially decided the presidency by prohibiting a recount of the votes in Florida, which gave the necessary electoral votes to President Bush. The Court did not consider the political question doctrine in this case, nor did it allow Congress to exercise its power to decide the presidency if neither candidate received the necessary electoral votes. This decision was unquestionably motivated by partisan interests. The Supreme Court’s decision in *Citizens United v. Federal Election Commission* also reflect a politically-motivated court. In this case, conservatives voted to allow a free market in which campaign contributions made by individuals and corporations could not be limited, while liberals favored government regulation of

campaign finance to limit the overwhelming influence of the wealthy.<sup>119</sup> These are just two examples of partisanship on the Court, but they are enough to show that at least some justices are willing to overlook precedent and the Constitution in order to pursue their political objectives.

It is not unlikely that these justices will decide along partisan lines in the Emoluments Clause cases. The current Supreme Court has a conservative majority. Justice Kavanaugh and Justice Gorsuch were both appointed to the Court by President Trump. I believe that conservatives are more likely to rule in favor of President Trump, who is a Republican. Additionally, it is common knowledge that conservatives do not favor government interference in the regulation of businesses. They may see these cases as an unnecessary restriction on the ability of President Trump to conduct his businesses in a way that pleases him. It seems possible that the Supreme Court would decide in favor of Trump based on these facts.

### **Conclusion**

President Trump is facing civil damages litigations for his alleged defamation of Summer Zervos' character and refusal to divest his businesses to prevent conflicts of interest. He has claimed that he is entitled to a stay of litigation until the end of his presidency under state court jurisdiction. He has also asserted that the foreign and domestic Emoluments Clauses were not intended to regulate private commercial transactions and therefore do not apply to him. Civil liability encompasses his immunity case and the Emoluments Clauses controversies.

The history of executive immunity shows that the Framers had conflicting opinions as to its use. However, early precedent shows the president is subject to the judicial process. In *Nixon v. Fitzgerald*, the Court found that the president has absolute immunity from civil litigation for actions within the outer perimeter of his official duties. In *Clinton v. Jones*, the Court held that executive immunity does not extend to unofficial duties. The justices expressed the opinion that

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<sup>119</sup> Gruhl, J. (2017, November 20). Lecture.

the civil litigation would not overwhelm the presidency. After the case was decided, the president was unable to balance his presidential responsibilities with participation in his defense. The litigation morphed into a politically-motivated lawsuit and entirely encompassed Clinton's presidency and his legacy.

An evaluation of the foreign and domestic Emoluments Clauses reveals that the Framers wanted to curtail the ability of the foreign and state governments to influence executive officials with gifts and other types of compensation. There are no early historical examples or Supreme Court precedents on this matter because former presidents and other government officials have always respected the Constitution and the clauses within it. In order to bring cases before the court, a litigant must articulate a case or controversy. This is the main barrier to reigning in President Trump's continued business practices that are allegedly in violation of the Emoluments Clauses.

It was decided in *Zervos v. Trump* that the precedent in *Clinton v. Jones* was applicable to the state court. The president is not afforded a temporary stay of trial merely because he holds the office of the presidency. The judge ruled that this assertion does not violate the principle of federalism. If this case were to be appealed to the Supreme Court, it is my opinion that the outcome of *Clinton v. Jones* would persist. However, the decision will be closer because the justices will seriously consider the schedule of the president and the likelihood of politically motivated lawsuits. It is also probable that Justice Kavanaugh will decide in favor of executive immunity due to his opinion on the decline of separation of powers and the consequences that have resulted. The Supreme Court's opinion on this matter could impose a necessary restraint on the power of the president. A decision in favor of Summer Zervos would truly prove that no one is above the law. By deciding in favor of the president, the Court would limit the judicial branch's ability to decide on the constitutionality of a sitting president's actions. This would also

cause detrimental effects to litigants who are unable to advance their suit throughout the court until the end of the president's term.

The plaintiffs in *Citizens for Ethics and Responsibility in Washington v. Trump* were not granted standing because they either did not face an injury or they couldn't prove a causal link between their injury and the president's alleged actions. In *Blumenthal et. al v. Trump*, the plaintiffs were granted standing because the inability to vote on a constitutionally granted power is an injury. The plaintiffs in *District of Columbia and Maryland v. Trump* were also granted standing because the states, their entities, and their residents were competitively harmed in the hospitality market because President Trump was able to tilt the playing field to his advantage due to his position in office. Additionally, the plaintiffs faced injury because of the "intolerable dilemma" of having to decide between granting Trump concessions and the resulting loss of tax revenue or not granting him concessions and facing possible retribution. As this case has progressed further than the other cases, the judge has decided on the applicability of the foreign Emoluments Clause to the president and the meaning of the term "emolument." The text and historical meaning of the clause suggest that it is applicable to the president. The definition of emolument as any profit, gain, or advantage is supported by the text of the Constitution, the historical meaning, the intended purpose of the clauses, and the Office of Legal Counsel's contemporary precedent. If either *Blumenthal et al v. Trump* or *District of Columbia and Maryland v. Trump* came before the Supreme Court, the justices would decide based on the constitutionality of the issue or based on their political interests. It is my opinion that the decision in *District of Columbia and Maryland* was legally correct. However, the Court often makes decisions based on its partisan biases. The justices may choose to interpret the term "emolument" narrowly in order to prevent interference in business or merely to support a conservative president. The conservative justices may rule that a decision against the president in

this case would lead to a narrower selection of candidates in the future because businessmen and businesswomen are not likely to run if they are forced to divest their business. If the Supreme Court ruled this way, the president could continue to abuse his power unchecked. It would be impossible to discern if Trump was pushing certain policies or making decisions that affect the entire nation based on his business interests or based on what is beneficial for the United States. It is probable that foreign and state governments would be able to influence the president. Throughout his presidency, Trump has continued to violate the Constitution, make defaming statements, and take actions that suggest he believes he is above the law. In order to resolve these flagrant violations, a Supreme Court decision is required.