AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Immunity from Judicial Processes

**Zervos v. Trump, No. 150522/17** (NY Co. Sup. Ct. 2018)

*Summer Zervos was a contestant on* The Apprentice*, a reality tv show hosted by Donald Trump. She alleges that Trump forcibly kissed her when she later sought a job in his organization. During Trump’s 2016 presidential campaign, Zervos told her story publicly. Trump publicly denied that he had ever engaged in any inappropriate sexual conduct and called his accusers (including Zervos) liars. After Trump’s election as president, Zervos filed a defamation suit in a New York court against Trump. After his inauguration, Trump moved to have the suit dismissed or delayed until after he leaves office. The judge denied that motion, holding that the president was subject to civil suits for his private conduct.*

JUDGE SCHECTER.

. . . .

No one is above the law. It is settled that the President of the United States has no immunity and is "subject to the laws" for purely private acts. In *Clinton v Jones* (1997)*,* the United States Supreme Court made clear that "immunities are grounded in `the nature of the function performed, not the identity of the actor who performed it.'" There, the Court required then-President William Jefferson Clinton to defend against a civil-rights action that included a state-law defamation claim in federal court. The Court concluded that the President was subject to suit because regardless of the outcome there was no "possibility that the decision [would] curtail the scope of the official powers of the Executive Branch.” It explained that the "litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.” In holding that the doctrine of separation of powers did not mandate a stay of all private actions against the President, the Court flatly rejected that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."

The rule is no different for suits commenced in state court related to the President's unofficial conduct. Nothing in the Supremacy Clause of the United States Constitution even suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal executive responsibility. Significantly, when unofficial conduct is at issue, there is no risk that a state will improperly encroach on powers given to the federal government by interfering with the manner in which the President performs federal functions. There is no possibility that a state court will compel the President to take any official action or that it will compel the President to refrain from taking any official action.

. . . .

Nor is there any legitimate fear of local prejudice in state court when the actions under review bear no relationship to federal duties. . . .

There is no reason, moreover, that state courts like their federal counterparts will be "either unable to accommodate the President's needs or unfaithful to the tradition . . . of giving `the utmost deference to Presidential responsibilities.'" State courts can manage lawsuits against the President based on private unofficial conduct just as well as federal courts and can be just as mindful of the "`unique position in the constitutional scheme' that the office occupies."

Additionally, and for the very same reasons articulated in *Clinton v Jones,* a stay for the duration of the Trump presidency must be denied. A lengthy and categorical stay is not justified based on the possibility that, at a moment's notice, the President may have to attend to a governmental or international crisis. If and when he does, of course, important federal responsibilities will take precedence.

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Dismissal of the complaint for failure to state a cause of action is also denied as the "pleading meets the minimal standard necessary" to proceed. Plaintiff's complaint is based on assertions made by defendant, that if proven false, form the predicate for a maintainable defamation action.

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. . . . That defendant's statements about plaintiff's veracity were made while he was campaigning to become President of the United States, does not make them any less actionable.

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