

# First Lady, Last Rights? Extending Executive Immunity to the First Lady

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## Introduction

The First Lady,<sup>1</sup> as the chair of an advisory committee, reserves the sole right to revise the final set of recommendations before they reach the President's desk. In so doing, is she immune from liability resulting from a failure to add or cut a recommendation?

The First Lady has the power to hire and fire employees at will. When she does so, is she immune from a wrongful termination suit? Similarly, if the First Lady makes unwelcomed remarks on a diplomatic mission to China, is her speech protected?

The answers to these questions depend on whether a qualified executive immunity from civil damage liability is available to the First Lady. Recently, the First Lady's role has expanded beyond the traditional role of playing the White House hostess.<sup>2</sup> The First Lady is actively involved in both domestic and international politics.<sup>3</sup> Accordingly, the First Lady should also be afforded legal immunity from liability based upon official discretionary acts that her job entails.

Throughout the Clinton presidency, many have claimed that Hillary Clinton has redefined the role of the First Lady.<sup>4</sup> In fact, the ambiguity and unaccountability associated with the First Lady's actions have been the subject of controversy throughout history.<sup>5</sup> Be-

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1. Throughout this Note, the term "First Lady" will be used to refer to the spouse of the United States President.

2. See further discussion *infra* Section II.

3. See further discussion *infra* Section II.

4. See Howard Fineman and Mark Miller, *Hillary's Role*, NEWSWEEK, Feb. 15, 1993, at 20. Authors point out that the President does not run the Clinton administration alone. "Unlike most past First Ladies, Mrs. Clinton didn't—and doesn't operate by indirection. She is not a gatekeeper or silent adviser. . . . [S]he made key decisions."

5. See Carl Wasserman, Note, *Firing the First Lady: The Role and Accountability of the Presidential Spouse*, 48 VAND. L. REV. 1215, 1216 (1995).

ginning with the second First Lady, Abigail Adams, one can trace the changing role of the First Lady from silent partner to active participant in the nation's domestic and foreign affairs. The First Lady's evolution into a Presidential partner has been a gradual one.<sup>6</sup>

Hillary Clinton's active role in the Clinton administration has caused critics to question the political unaccountability of the First Lady. The First Lady plays an active role in the national government, yet she is not accountable to the voters. Therefore, there is a need by some critics for a clear definition of her role.<sup>7</sup> Indeed, in 1993, an attempt was made for the first time in United States history to define the First Lady's role in government.<sup>8</sup>

The modern tasks of the First Lady include advising the President, playing an active role in government and acting as a representative and goodwill ambassador for the United States around the world.<sup>9</sup> For these reasons, the First Lady needs qualified immunity.

This Note argues that the First Lady's actions are entitled to qualified executive immunity whenever she acts as a representative of the federal government. The First Lady, however, should not be awarded blanket immunity for all acts in her official capacity. Only if, and when, the First Lady takes on a role beyond that of playing the "White House hostess" should executive branch immunity apply.

Section I discusses the development of executive branch immunity. Section II discusses the role in politics, and otherwise, that the First Ladies have played throughout history. Section III examines the holding in *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton*,<sup>10</sup> which held that the First Lady was a de facto federal employee or official. The Note observes that as the importance of the First Lady's role in the Executive Branch continues to expand, her visibility increases. The *American Physicians* Court recognized the importance of her role, and concluded that it must grant her the same immunity as is it did to the President's cabinet members and advisors because the First Lady's role essentially parallels that of any other executive branch official.

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6. See Tiffanie Darke, *All the President's Ladies*, THE INDEPENDENT (London), Jan. 26, 1996, available in 1996 WL 4052945. "The first First Lady of influence was probably Abigail Adams, wife of the second president John Adams. Her private letters detail her strong views on women's rights . . ."

7. See Wasserman, *supra* note 5, at 1217.

8. See *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

9. Hillary Clinton has been a special envoy to China, India and Bangladesh.

10. 997 F.2d 898.

## Section I

The Executive Branch immunity has its roots in common law.<sup>11</sup> Unlike members of Congress, whose protection from civil damage suits is founded upon the United States Constitution (specifically the Speech and Debate clause),<sup>12</sup> executive branch immunity is a doctrine created by the courts.<sup>13</sup>

Generally, there are two types of immunities: absolute immunity and qualified immunity.<sup>14</sup> Absolute immunity is the strict “all or nothing” approach, which was rigorously followed by the Supreme Court until the 1970s.<sup>15</sup> As Laurier Beaupre wrote in his article, “the [Supreme] Court granted public officials either absolute immunity from civil damages suits based on official actions or no immunity at all.”<sup>16</sup> He further explained that “at its most expansive, absolute immunity shielded the discretionary official acts of judges, quasi-judges, quasi-judicial officers and executive branch officials ranging from the President and Cabinet Secretaries to mid-level bureaucrats.”<sup>17</sup>

The first grant of absolute immunity was to none other than the Judicial Branch itself.<sup>18</sup> In *Bradley v. Fisher*,<sup>19</sup> the Supreme Court held judges absolutely immune from civil damage liability for judicial acts falling within the judges’ jurisdiction.<sup>20</sup> The Court recognized that disciplining an attorney, despite a malicious intent do so, fell within the province of a judicial act.<sup>21</sup> In doing so, the Court adopted the English doctrine of judicial immunity based solely on public policy, without making reference to the common law maxim of absolute immunity descending from the sovereign.<sup>22</sup> The Court reasoned that the judicial system could not function if judges did not have the freedom to follow their conscience without fear of litigation.<sup>23</sup>

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11. *See infra* notes 15-59.

12. U.S. CONST. art. I, § 6, cl. 1.

13. *See infra* notes 15-59.

14. *See id.*

15. *See* Laurier W. Beaupre, *Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity From Trial*, 36 B. C. L. REV. 725, 733 (1995).

16. *Id.*

17. *Id.*

18. *See id.*

19. 80 U.S. (13 Wall.) 335, 351-52 (1872).

20. *See id.* at 351.

21. *See id.* at 354.

22. *See id.* at 349-50.

23. *See id.* at 347-48.

Similarly, in *Spalding v. Vilas*,<sup>24</sup> the Supreme Court established absolute immunity for high ranking executive officers. The Court held the Postmaster General not subject to civil damages for actions taken within the scope of his official authority.<sup>25</sup> As in *Bradley*, the Court grounded its decision on public policy reasons.<sup>26</sup> The Court explained that “just as the judicial system could not function if judges feared lawsuits, the executive branch could not function if officials could not act in the public interest without fearing liability.”<sup>27</sup>

Perhaps the broadest extension of civil damage immunity was recognized in *Barr v. Mateo*,<sup>28</sup> in which the Court held that absolute immunity extended to executive branch officials far below the cabinet rank, so long as they acted within the scope of their authority.<sup>29</sup> The *Barr* Court stated the long standing reasons for recognizing the executive privilege:

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies, which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.<sup>30</sup>

The *Barr* Court extended the executive privilege to those far below the department heads.<sup>31</sup> It did note, however, that “the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions.”<sup>32</sup> The reason, however, rested upon the scope of the duties, not the title of the office.<sup>33</sup>

In the 1970s, the Court began to modify the absolute privilege granted to executive officials.<sup>34</sup> Incrementally, the Court began to develop a qualified immunity, which left intact the immunity granted for

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24. 161 U.S. 483, 498-99 (1896).

25. *See id.*

26. *See id.* at 498.

27. *Id.*

28. 360 U.S. 564, 572 (1959).

29. *See id.* at 572.

30. *Id.* at 571.

31. *See id.* at 573.

32. *Id.* at 573-74.

33. *See id.*

34. Temporarily, the President received only qualified immunity if he lacked reasonable grounds to believe his actions were within the law. *See Halperin v. Kissinger*, 606 F.2d 1192, 1213 (D.C. Cir. 1979). However, the United States Supreme Court in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), reestablished the absolute immunity doctrine in the case of civil damages. *See id.* at 749.

acts within the scope of officials' duties but did not protect actions taken by federal and state officials that clearly violated rights guaranteed by the United States Constitution or federal statutes.<sup>35</sup>

The Court's first indication of modifying the absolute immunity doctrine was in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>36</sup> (*Bivens I*). In *Bivens I*, plaintiff accused federal agents of violating the Fourth Amendment by arresting him without probable cause or a warrant.<sup>37</sup> Although the Court did not rule on whether absolute immunity served as a defense, it did hold that the plaintiff had a cause of action and could recover money damages for injuries suffered.<sup>38</sup> The Court further remanded the case to the lower court to decide the question of whether the agents' actions were protected by absolute immunity.<sup>39</sup>

On remand, the United States Court of Appeals for the Second Circuit did not modify existing immunity doctrine, but declined to extend immunity to the agents based on the facts of the case.<sup>40</sup> The Court recognized that settled law protected "certain officers of the federal government" from lawsuits while acting in their official capacities, even when charged with malice; but the Court also noted that this immunity only extended to discretionary functions.<sup>41</sup> The Court simply concluded that making an arrest was a ministerial and not a discretionary act; therefore, the federal agents were not entitled to absolute immunity protection.<sup>42</sup>

The development of the qualified immunity doctrine first arose in the context of state officials in *Scheuer v. Rhodes*.<sup>43</sup> Representatives of the victims of the Kent State shooting charged Ohio Governor James Rhodes, Adjutant General of the Ohio National Guard, and various other Guard officers with violating their civil rights pursuant to 42 U.S.C. section 1983.<sup>44</sup> In dismissing their complaint, the United States District Court for the Northern District of Ohio held that these

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35. See *Barr*, 360 U.S. at 572.

36. 403 U.S. 388 (1971).

37. See *id.* at 389.

38. See *id.* at 397.

39. See *id.*

40. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1342-47 (1972).

41. *Id.* at 1342.

42. See *id.* at 1345-46.

43. 416 U.S. 232 (1974).

44. See *id.* at 234.

state officials were clothed with absolute immunity for the alleged acts.<sup>45</sup> The Court of Appeals affirmed.<sup>46</sup>

The Supreme Court, however, reversed the lower court's ruling by relying on case law that held government officials answerable for section 1983 violations.<sup>47</sup> It established that only a "qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."<sup>48</sup> In *Scheuer v. Rhodes*, the Court remanded to determine whether the Governor's order of the shooting was within the discretion of his authority.<sup>49</sup>

The Court, relying on the reasoning in *Scheuer*, extended the qualified immunity doctrine to federal officials in *Butz v. Economou*.<sup>50</sup> The Court dismissed the claim that the Secretary of Agriculture and other high executive officials were immune from civil liability arising out of an alleged constitutional violation.<sup>51</sup> Instead, the Court reasoned that once officials violated the Constitution, they exceeded the scope of their authority and no longer qualified for absolute immunity protection.<sup>52</sup> Therefore, it granted federal officials only qualified immunity from damages arising from suits based on constitutional grounds.<sup>53</sup> However, the Court did leave intact absolute immunity protection for federal officials performing special functions, specifically those that perform adjudicative functions.<sup>54</sup>

The Court's final retraction of the doctrine was in *Harlow v. Fitzgerald*,<sup>55</sup> where the Court held that the President's private aides were not protected by the absolute immunity doctrine. The Court reasoned that "it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House."<sup>56</sup> It did note, however, that for "aides entrusted with discretionary authority in such sensitive areas as national security or foreign

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45. *See id.*

46. *See id.*

47. *See id.* at 238.

48. *Id.* at 247.

49. *Id.* at 250.

50. 438 U.S. 478 (1978).

51. *See id.* at 485.

52. *See id.* at 495.

53. *See id.* at 507.

54. *See id.* at 508-17.

55. 457 U.S. 800 (1982).

56. *Id.* at 809.

policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest."<sup>57</sup> The Court essentially reaffirmed *Butz*, which had established "that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of the his office, not mere fact of high station."<sup>58</sup>

It is clear from its development that the qualified immunity doctrine is grounded in public policy. The Supreme Court has established immunity from civil liability to assure federal officials that they can exercise discretion in performing their duties. The grant of immunity enables officials to follow their conscience and act for the public interest without fear of liability. Further, as the *Barr* Court stated, the basis for the immunity doctrine is not the title of the office, but rather the scope of the official's duties.<sup>59</sup>

## Section II

To understand the need for a First Lady privilege, it is important to examine the role assumed by First Ladies throughout history. The lives of these First Ladies are well-documented. Indeed, historians have noted that "the absence of any clearly defined role for presidential wives, the possibility that they exercised some private influence on their husbands, and their place as symbols of how women ought to behave, made them the object of the same kind of media attention that surrounded actresses, sports figures, and society women."<sup>60</sup>

The First Lady's duty has always been to act as hostess or organizer of White House social events.<sup>61</sup> Nonetheless, rarely has a First Lady adhered solely to this traditional role. As early as our second "First Lady," Abigail Adams, one can observe presidential wives acting as the President's and the government's representatives, and providing advice about important political decisions.<sup>62</sup>

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57. *Id.* at 812.

58. *Id.*

59. *See Barr*, 360 U.S. at 572.

60. DILLER AND ROBERTSON, *THE PRESIDENTS, FIRST LADIES, AND VICE PRESIDENTS, WHITE HOUSE BIOGRAPHIES 1789-1989*, 9 (1989) (quoting Betty Boyd Caroli).

61. *See Wasserman, supra* note 5, at 1226 n.37 ("Custom demands that the president's wife organize and preside at social events. The first lady is supposed to arrange any teas, receptions, banquets, coffees, and state dinners that the president may have. And although she has both a personal and the White House domestic staff to assist her, the basic responsibility is still hers, even on those occasions when she does not have to act as a hostess.") (quoting DILLER, *supra* note 60).

62. *See generally* CARL ANTHONY, *FIRST LADIES: THE SAGA OF THE PRESIDENTS' WIVES AND THEIR POWER 1789-1961*, at 60-72 (1990) [hereinafter ANTHONY I] (outlining

Probably the most famous example of a First Lady who became the President's sole advisor was Edith Wilson. After a stroke disabled President Woodrow Wilson, Mrs. Wilson "made an immediate decision to become a sole conduit to the president."<sup>63</sup> Recounting her unprecedented role, First Lady Wilson explained that the President could not resign as a result of the stroke so she became her husband's personal representative and made important governmental decisions:

Dr. D. leaned toward me & said, "Madame it is a grave situation but I think you can save it[.] Have everything come to you—weigh the importance of them & see if it is possible by consultations with the respective Heads of each Dept. to solve them without the guidance of your husband. If not they of course must go to him . . . . Then—I said—["]Had he better not to resign—let the V.P. act . . .?" The answer again was—"No—Not if you feel equal to what I suggest—for to resign would have a bad affect on the country & as serious affect on the Pres. He has staked his life & his promise to the World to do all in his power to ratify the Treaty to make the League of Nations complete[.] If he resigns—all incentive to recover is gone . . . . He has utmost confidence in you & Dr. Grayson tells me he has always discussed public affairs with you—so you will not come to them uninformed."

—So—I began my stewardship—I studied every paper & sent for the different Secretaries or Senators— . . . the only decision that was mine was what was important & what [was] not.<sup>64</sup>

From the time of President Wilson's incapacitation, Mrs. Wilson controlled the flow of information to the President, and determined which decisions he was going to make.<sup>65</sup> Indeed, her apparent control over the government was so great that famed League of Nations opponent Republican Senator Albert Fall pounded his fist at a meeting of the Senate Foreign Relations Committee and shouted, "We have petticoat Government! Mrs. Wilson is President!"<sup>66</sup>

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Abigail Adam's political influence during the time of her husband's presidency). Indeed, "[t]he most startling recognition of the President's Lady was on her initiative when she served as the president's representative at an official government event. Heading north, Abigail stopped at a New Jersey federal army site, toured the camp thoroughly, and even *reviewed the troops* like the president. 'I acted,' she boldly wrote him, 'as your proxy.'" *Id.* at 62. Even in the political arena, The President's foes dubbed Abigail Adams as "Mrs. President, not of the United States, but of a faction. One senator noted that 'the President would not dare to make a nomination without her approbation.'" *Id.* at 63.

63. *Id.* at 371.

64. *Id.* at 372.

65. *See id.*

66. *Id.* at 375.



As the presidents in the White House changed, the responsibilities taken by successive First Ladies increased. The First Ladies did not just wield power over their husbands, rather they took to defining their own role and power. Many historians note that during the twentieth century the First Lady's position became "The Office of the First Lady."<sup>67</sup> Undoubtedly, the first "First Lady" to form and shape this "office" was Eleanor Roosevelt. Indeed, commentators have noted that "Eleanor hadn't consciously invented a 'modern' first ladyship; it had been evolving. What she did was mobilize traditional components of a volunteer role into a 'job.'"<sup>68</sup>

The era of the New Deal, and the threat of World War II, found the First Lady employed in a government position for the first time.<sup>69</sup> Eleanor Roosevelt became the unsalaried deputy director of the Office of Civilian Defense ("OCD").<sup>70</sup> Selected by New York Mayor Fiorello LaGuardia, whom President Roosevelt had appointed as director, First Lady Roosevelt alluded in a press conference that her appointment was similar to any appointment by the President.<sup>71</sup> When a reporter asked Mrs. Roosevelt how she decided to take a public job. The following dialogue ensued:

Mrs. Roosevelt: "Well, the mayor had asked the President and seemed to feel that the time had come when everybody who could do any work as a volunteer should do it. Therefore, I decided that as I could do it as a volunteer, I had better do it. The mayor asked the President and me, both. The President has to approve anyone who is going to be in a position."

Question: "He asked the President not for permission to ask you but for permission?"

Mrs. Roosevelt: "Just as he would ask about anyone he was bringing in as assistant director. Whether I would be useful, I suppose. He may have asked him also from the point of view of having any personal objections. I don't know about that."<sup>72</sup>

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67. See generally CARL SFERRAZA ANTHONY, *FIRST LADIES VOLUME II: THE SAGA OF THE PRESIDENTS' WIVES AND THEIR POWER, 1961-1990*, at 283-294 (1991) [hereinafter ANTHONY II] (titling the chapter The Office of the First Lady); BETTY BOYD CAROLI, *FIRST LADIES*, at 117-52 (1987) (noting the office of the First Lady as a twentieth century development).

68. ANTHONY I, *supra* note 62, at 455.

69. See *id.* at 490.

70. See *id.*

71. See Wasserman, *supra* note 5, at 1242 (citing *THE WHITE HOUSE PRESS CONFERENCES OF ELEANOR ROOSEVELT* 224 (Maurine Beasley ed., Garland 1983) [hereinafter *PRESS CONFERENCES*]; *ELEANOR ROOSEVELT'S MY DAY: HER ACCLAIMED COLUMNS, 1936-1945*, at 241 (Rochelle Chadakoff, ed., Pharos Books 1989).

72. Wasserman, *supra* note 5, at 1242 (citing *PRESS CONFERENCES*, *supra* note 71).

First Lady Roosevelt's duties involved organizing a "national volunteer network of women who persisted in emphasizing welfare, educational, and health issues."<sup>73</sup> She had the authority to hire people on her own.<sup>74</sup> Despite her position, it did not take long for the pressure of politics to force her resignation.<sup>75</sup> She resigned on February 21, 1942, fifteen days after Congress voted to ban funding for a dance educator Mrs. Roosevelt hired; an appointment for which First Lady Roosevelt had been widely criticized.<sup>76</sup>

Eleanor Roosevelt was certainly not the last First Lady to be criticized for taking an active role in government. Rosalynn Carter generated much controversy by her attendance at Cabinet meetings.<sup>77</sup> She writes in her autobiography that "[she] was there to be informed so that when [she] traveled around the country, which [she] did a great deal, and was questioned by the press and other individuals about all areas of government, [she'd] know what was going on."<sup>78</sup>

First Lady Carter continued Eleanor Roosevelt's tradition by heading the President's Commission on Mental Health.<sup>79</sup> Mrs. Carter had to settle for being "honorary" chairperson, instead of the formal chairperson, because of the federal anti-nepotism act.<sup>80</sup> Despite her title, Mrs. Carter's role was far from trivial. With an operating budget of only \$100,000 and a time limit of one year, First Lady Carter held public hearings across the country, and managed 450 volunteers on thirty task panels who developed comprehensive statements in special areas of concern such as research, prevention, and the needs of special populations.<sup>81</sup> The Commission prepared a final set of 117 recommendations.<sup>82</sup>

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73. *Id.*

74. *See id.*

75. *See id.* at 1241 ("As Mrs. Roosevelt writes, however, 'I soon discovered that the very thing I had feared was true: that I could not take a government position, even without salary or paid expenses, without giving ample opportunity for fault finding to some members of the opposition in Congress and even to some of our own party people who disagreed with certain politics.'" (quoting ELEANOR ROOSEVELT, *THIS I REMEMBER* 231-32 (1949))).

76. *See id.* at 1242.

77. *See generally* ROSALYNN CARTER, *FIRST LADY FROM PLAINS* 175 (1984).

78. *Id.* at 176.

79. *See id.* at 272. President Carter signed the Executive Order creating the President's Commission on Mental Health.

80. *Id.*

81. *See id.* at 273.

82. *See id.* at 274.

The Commission's report and the First Lady's role did not end at the desk of the President.<sup>83</sup> In May, 1979, President Carter submitted the Mental Health Systems Act to Congress.<sup>84</sup> Despite little precedent, Congress called First Lady Carter to Capitol Hill to testify before the Senate committee.<sup>85</sup> Only one other First Lady, Eleanor Roosevelt, had testified before Congress prior to Rosalynn Carter.<sup>86</sup> Finally, in September, 1980, Congress passed the Mental Health Systems Act, the first major reform of federally funded public health programs since the Community Mental Health Centers Act of 1963.<sup>87</sup>

Not only did First Lady Carter assist in implementing a Congressionally created program, but she became one of President Carter's most senior advisers.<sup>88</sup> In accounts of First Lady Carter's role, historians explain "the day before Carter delivered his 1978 State of the Union Address, [the First Lady] went over the draft, suggesting changes and additions, some of which he incorporated."<sup>89</sup> Her influence did not go unnoticed:

[Rosalynn Carter's] son Jack said [she] was "almost like another Cabinet member," and senior adviser to the president Hedley Donovan characterized the First Lady's power as that of a "true senior adviser," and "intimate political counselor" equating it with the vice president's as an "ultimate example of the 'organic adviser . . .'" Like all other advisers, she brought to him those of which she believed he should be made aware, armed with answers or evidence of personal accounts, statistics, projected results, and views of experts she might have consulted in the process.<sup>90</sup>

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83. See CARTER, *supra* note 77, at 278.

84. See *id.*

85. See *id.*

86. See *id.* Not only did First Lady Carter speak before Congress but traveled throughout the world advocating mental health reform, including the World Federation for Mental Health in Vancouver, British Columbia, the World Health Organization in Geneva, Switzerland, and in Manitoba, Canada.

87. See *id.* at 279. Despite her success, Mrs. Carter confesses that:

Our celebration was brief. Within a month Ronald Reagan was elected President, and with the change of administration, many of our dreams and the bulk of the funding for our program were gone. I felt betrayed. After four years of hard work and efforts by thousands of people, carefully studying an existing system of care and making changes so it would be responsive and cost-efficient, community-controlled, and accessible to those who desperately needed it, and after having had the benefit of eighteen months of public scrutiny and careful adjustment-after all this, the funding for our legislation was killed by the philosophy of a new President. It was a bitter loss.

88. See ANTHONY II, *supra* note 67, at 295.

89. *Id.* at 294.

90. CARTER, *supra* note 77, at 295.

Undoubtedly, Rosalynn Carter performed roles far beyond the traditional duties of hosting state dinners. "She consciously studied the minutiae of details on even complex issues, immersing herself in the thick of policy."<sup>91</sup> Moreover, "[w]hen the president had questions relating to health and welfare, he consulted Rosalynn first . . . she easily delivered speeches on strategic arms limitations and civil rights."<sup>92</sup> Besides playing a First Lady, Rosalynn Carter acted as a Cabinet member and a senior adviser.

After examining the expansive roles played by former First Ladies, Hillary Clinton's involvement in U.S. politics should not surprise anyone. She is not the first politically active First Lady, nor the first to face criticism for having undertaken such a role.<sup>93</sup> Hillary Clinton has continued in the tradition of former First Ladies by engaging in diplomatic relations and helping set the domestic agenda.<sup>94</sup>

Indeed, the public perception of the Clinton Administration when President Clinton took office reflected what many advisers and commentators had already a "Team Presidency."<sup>95</sup> It was not a secret that Hillary Clinton played a role in evaluating the President's Cabinet nominees. Before Judge Kimba Wood withdrew from consideration for Attorney General,<sup>96</sup> it was almost certain that she would have received the nomination.<sup>97</sup> One of the most important reasons for Judge Wood's consideration was Hillary Clinton's backing of her nomination.<sup>98</sup> Hillary was seen as "the person whose political network and personal views had helped her [Judge Wood] get in the door."<sup>99</sup> Furthermore, "[Hillary] is one of only five people in the room (along

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91. *Id.*

92. *Id.*

93. *See* Wasserman, *supra* note 5, at 1229. Hillary is also not the first First Lady to be accused of financial impropriety. (Attorney General Janet Reno appointed an independent counsel in the wake of the Whitewater scandal to investigate if any individuals violated either federal criminal or civil laws relating to their relationship with both President and Hillary Clinton). "Julia Grant, wife of Ulysses S. Grant, had prominent associations with the 'robber barons' of the day, most significantly Jay Gould and Jim Fisk. When the scandal was uncovered that Fisk and Gould had tried to corner the gold market with the help of important Government officials, the two directly implicated Mrs. Grant and accused her of making enormous profit from activities. Her role in the crisis was never fully determined." ANTHONY I, *supra* note 62, at 211.

94. *See infra* notes 95 and 96.

95. Howard Fineman & Mark Miller, *Hillary's Role*, NEWSWEEK, Feb. 15, 1993, at 18. President Clinton's campaign slogan was "Buy one get one free."

96. *See id.* Judge Kimba Wood withdrew from consideration "when it became known that, in 1986, she had hired an illegal alien from Trinidad to care for her child."

97. *See id.* "Wood was very likely to get the job."

98. *See id.*

99. *Id.*

with Vice President Gore, transition chief Warren Christopher and two closemouthed aides) when Clinton goes over names for top jobs Hillary's stellar resume makes her advice more than pillow talk."<sup>100</sup> Indeed, one administration official noted, "Of course she's in the loop; she is the loop."<sup>101</sup>

In addition to advising the President, Hillary continued Rosalynn Carter's tradition of attending Cabinet meetings<sup>102</sup> and "traveling the globe as an envoy."<sup>103</sup> This time, however, the First Lady had the full backing of the President.<sup>104</sup> President Clinton openly voiced his opinion on Hillary's attendance of Cabinet meetings by claiming, "[s]he knows more about this stuff than most of us do."<sup>105</sup>

Hillary's diplomatic missions to East Asia include the countries of India, Pakistan and Bangladesh.<sup>106</sup> Her most famous mission was in September, 1995, when she attended the United Nations Conference on Women in China.<sup>107</sup> In preparation of the visit, officials claimed that this would be a "trial run" for a trip by President Clinton."<sup>108</sup> They further noted that "the discussions over a China visit by . . . Hillary Clinton were part of a continued effort by the White House and China's leaders to improve bilateral ties."<sup>109</sup>

Commentators recognized that Hillary Clinton's speech at the conference was highly important, not just for the conference itself but for Chinese-U.S. relations.<sup>110</sup> A reporter explained that "[h]er dilemma was this: Failure to mention China's human-rights record would leave her vulnerable to domestic critics, while bashing China in China could damage Beijing-Washington relations at a sensitive mo-

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100. Eleanor Clift & Mark Miller, *Hillary Behind the Scenes*, NEWSWEEK, Dec. 28, 1992, at 23.

101. Matthew Cooper, *Co-President Clinton?*, U.S. NEWS & WORLD REPORT, Feb. 8, 1993, at 32.

102. See Clift & Miller, *supra* note 100, at 25.

103. Christian Chaise, *Hillary Clinton Regains Political Limelight With Trip to China*, AGENCE FRANCE PRESSE, Sept. 1, 1995, available in LEXIS.

104. See *id.*

105. *Id.*

106. See Chaise, *supra* note 103.

107. See *Hillary Clinton Attacks China on Civil Rights*, KYODO NEWS INTERNATIONAL, Sept. 11, 1995, available in LEXIS. The UN conference on women was touted as the largest ever UN gathering, as well as the largest gathering of women.

108. Gore, *Hillary Clinton May Visit China in New Year*, AGENCE FRANCE PRESSE, Dec. 20, 1994, available in LEXIS.

109. *Id.*

110. See E. Thomas McClanahan, *As Much As I Hate to Admit It, Hillary Did Okay*, KANSAS CITY STAR, Sept. 12, 1995, at C7 (the author opined, "The Speech was a Winner.").

ment.”<sup>111</sup> Although she did not mention China by name in her speech, Hillary cataloged the ills facing women and alluded to China’s lack of human rights policy toward women.<sup>112</sup> Chinese officials responded with an icy reception.<sup>113</sup>

After examining the responsibilities undertaken by the First Ladies, and understanding the nature and importance of those roles to the U.S. Government, it is clear why the First Lady should be afforded executive immunity. It is unequivocal that the First Lady is an important player in Washington. The legal question, however, is how to carve out such protection.

### Section III

Unlike the President and his appointees, the First Lady traditionally maintains no constitutional power. She is accountable to no one. Critics complain that even when she assists the President she cannot be fired.<sup>114</sup> This lack of accountability has troubled critics of the *American Physicians* court,<sup>115</sup> which held the First Lady was a de facto federal employee or official.<sup>116</sup>

In *American Physicians*, the court addressed the issue of whether the Federal Advisory Communications Act<sup>117</sup> (hereinafter FACA) applied to the Health Care task force chaired by Hillary Clinton.<sup>118</sup> The task force would be exempt from the provisions of the FACA only if it was “wholly composed of full-time officers or employees of the federal government.”<sup>119</sup> The Government argued that for purposes of

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111. *Id.*

112. *See id.*

113. *See id.*

114. *See* Fineman & Miller, *supra* note 95, at 22. When asked about the problem of Hillary being appointed to the task force, Democratic polltaker Geoffrey Garin said, “If it’s just some politician heading a task force, you get rid of him and repudiate his report. But if you don’t like your wife’s work, it’s kind of hard to distance yourself from it.”

115. 997 F.2d 898.

116. *See id.* at 905.

117. Passed in 1972, the FACA was enacted to control the growth and operations of the “numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government.” 5 U.S.C. App. 2 § 2(a). “As Congress put it, FACA’s purpose was: to eliminate unnecessary advisory committees; to limit the formation of new committees to the minimum number necessary; to keep the function of the committees advisory in nature; to hold the committees to uniform standards and procedures; and to keep Congress and the public informed of their activities.” 997 F.2d at 903.

118. Hillary was appointed to the Chair of the Task Force to compile information and suggestions in revamping the Health Care system. *See id.* at 900-01.

119. *Id.* at 903.

the FACA, "Mrs. Clinton is the functional equivalent of a government officer or employee."<sup>120</sup>

In a case of first impression, the *American Physicians* court had to determine what the First Lady's legal title meant. Finding no definition of employee or officer within the FACA, the court turned to Title I of the United States Code,<sup>121</sup> which provided that a federal officer "includes any person authorized by law to perform the duties of the office."<sup>122</sup> The Court construed this language to govern a situation where "Congress authorizes someone who is not formally an officer (such as the President's spouse) to perform federal duties. Even if . . . Mrs. Clinton does not occupy an 'office' specifically created by Congress, she could still be regarded as an 'employee.'"<sup>123</sup> Despite this rationalization, the district court held that Mrs. Clinton did not meet the statutory definition of a federal officer or employee.<sup>124</sup>

The appellate court took a different approach to defining Hillary Clinton's title. The district court had relied on Title V of the United States Code to hold that Mrs. Clinton did not meet the definition of a federal officer or employee.<sup>125</sup> The appellate court, however, relied on legislative history to point out that Congress "did not adopt explicitly all of Title [V]'s definitions in FACA."<sup>126</sup> Instead, "Congress actually deleted from the Senate version of FACA definitions of 'officer' and 'employee' that paralleled those of sections 2104 and 2105."<sup>127</sup>

The appellate court then turned to the Government's two arguments. It did not find persuasive the argument that the "traditional, if informal status and 'duties' of the President's wife as 'First Lady' gives her de facto officer or employee status."<sup>128</sup> Instead, the court found

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120. *Id.* at 902.

121. 1 U.S.C. § 1 (1998).

122. *Id.*

123. *American Physicians*, 997 F.2d at 904.

124. *See id.* at 902.

125. *See id.* at 903; *see also* 5 U.S.C §§ 2104 & 2105 (1998) (according to these sections, an officer or employee must be: (i) appointed to the civil service; (ii) engaged in the performance of a federal function; and (iii) subject to supervision by a higher elected or appointed official. Although Mrs. Clinton met the latter two requirements, undoubtedly she failed to meet the first one because she was not appointed to civil service, which would require a Senate confirmation.).

126. *American Physicians*, 997 F.2d at 904.

127. *Id.*

128. *Id.* The court was reluctant to be persuaded by this argument because it was not "confident that this traditional perception of the President's wife, as a virtual extension of her husband, is widely held today. . . . [I]t may not even be a fair portrayal of Mrs. Clinton, who certainly is performing more openly than is typical of a First Lady." *Id.* Additionally, the government did not decide which term to choose between officer or employee in claiming status for the First Lady. "The government is uncomfortable at having to choose

more persuasive the argument that “Congress itself has recognized that the President’s spouse acts as the functional equivalent of an assistant to the President.”<sup>129</sup> Indeed, the authorization to the President to pay the White House aides includes the following provision:

Assistance and services authorized pursuant to this section to the President are authorized to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President’s duties and responsibilities. If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President’s family whom the President designates.<sup>130</sup>

The government argued that, through this authorization provision, Congress understood that the First Lady assists the President in his duties and thus serves as an “officer” of the Federal government.<sup>131</sup> Persuaded by this argument, the *American Physicians* court read section 105(e) as creating a de facto official position for the Presidential spouse.<sup>132</sup>

The *American Physicians* court’s reasoning (that Hillary Clinton, for the purposes of the FACA, became a de facto employee or official) has been criticized. In his concurring opinion, Judge Buckley argued that the efforts by the court to characterize the First Lady as an employee “lack an argument in support of the proposition.”<sup>133</sup> Additionally, Carl Wasserman, gave a well-developed account of section 105(e)’s legislative history that the statute does not create an office for the First Lady.<sup>134</sup> However, this analysis was limited to whether the statute created an office of the First Lady, and noted that “Mrs. Clinton’s appointment as head of the Health Care Task Force may be a federal appointment.”<sup>135</sup> Indeed, he indicated that “[o]ne could argue that the First Lady is a private citizen in general, but that Mrs. Clinton became a federal officer when the President appointed her to head the task force.”<sup>136</sup>

Although Wasserman admitted that Mrs. Clinton could become an officer when appointed to a federal position, he pointed out that

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whether Mrs. Clinton should be thought of as an officer or employee. The government’s discomfort is understandable.” *Id.* at 905.

129. *Id.*

130. 3 U.S.C. § 105(e) (1998).

131. *American Physicians*, 997 F.2d at 904-05.

132. *See id.*

133. *Id.* at 920.

134. *See* Wasserman, *supra* note 5, at 1246 n.130.

135. *Id.*

136. *Id.* at 1238.



the *American Physicians* court wanted to avoid this reasoning. Wasserman rested his conclusion on an opinion letter written by acting Assistant Attorney General John Harmon.<sup>137</sup> Although the letter is dated and does not address specifically the First Lady's position as an adviser, it generally explained the employment status of informal presidential advisers for conflict-of-interest purposes.<sup>138</sup>

After analyzing Title 5 of United States Code sections 2104 and 2105's provisions, Harmon defined an informal adviser as one who "advises the President almost daily, principally on an informal basis."<sup>139</sup> He did not think it essential that an appointment be identifiable for an individual to be considered an employee or officer if the omission was necessary to avoid conflict of interest laws, or if there was a firm mutual understanding that a relatively formal relationship existed.<sup>140</sup> Hence, according to Harmon, "there must be official retention, designation, appointment or employment of the informal adviser or there must be a basis to infer a formal relationship."<sup>141</sup>

Harmon concluded, however, that informal advice is not a federal function and that an informal adviser was not an officer or employee.<sup>142</sup> He reasoned the official did not formally supervise the adviser like a federal employee or officer since "the largely personal relationship between the President and [the informal adviser]<sup>143</sup> is based on mutual respect rather than assignment of duties."<sup>144</sup>

Harmon further noted that "[the informal adviser] discusses policy issues daily with the President, but we do not believe the mere fact that [he] speaks with the President on a daily basis in itself alters the fundamentally personal nature of the relationship that is apparently involved here, just as Mrs. [Rosalynn] Carter would not be regarded as a . . . Government employee solely on the ground that she may discuss governmental matters with the President on a daily basis!"<sup>145</sup>

Harmon's letter conflicted with the D.C. Circuit's holding.<sup>146</sup> What damaged the *American Physicians* holding the most was Har-

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137. *See id.* at n.101; *See* 1 Op. Off. Legal Counsel 20 (1977).

138. *See* Wasserman, *supra* note 5, at 1238 n.101.

139. *Id.*

140. *See id.*

141. *Id.*

142. *See id.*

143. In his letter, Harmon refers to the informal adviser as Mr. A.

144. Wasserman, *supra* note 5, at 1238 n.101.

145. *Id.*

146. *See id.*

mon's description of a situation very similar to the First Lady's chairing the task force and giving informal advice.<sup>147</sup>

Mr. A [the informal adviser], however, seems to have departed from his usual role of an informal advisor to the President in connection with his recent work on a current social issue. Mr. A has called and chaired a number of meetings that were attended by employees of various agencies, in relation to his work, and he has assumed considerable responsibility for coordinating the Administration's activities in that particular area. Mr. A is quite clearly engaging in a governmental function when he performs these duties, and he presumably is working under the direction or supervision of the President. For this reason, Mr. A should be designated as a special Government employee for purposes of this work—assuming that a good faith estimate can be made that he will perform official duties relating to that work for no more than 130 out of the next 365 consecutive days. If he is expected to perform these services for more than 130 days, he should be regarded as a regular employee. In either case, he should be formally appointed and take an oath of office. This formal designation would not necessarily affect the conclusion that Mr. A's other consultations with the President are of a personal rather than official nature. Should Mr. A assume governmental responsibilities in other areas, as he has done with his work on the above project, he should be regarded as a Government employee for these other purposes as well.<sup>148</sup>

Wasserman argued that the Office of Legal Counsel's opinion suggested that: "(a) the First Lady as First Lady is simply an informal adviser and not an employee; [and] (b) if the First Lady is selected by the President to take on unique responsibilities, she may become a Federal employee, subject to the strictures placed upon such employees."<sup>149</sup> Some of the strictures Wasserman later discussed included the anti-nepotism act,<sup>150</sup> the limit of outside employment,<sup>151</sup> revolving door restrictions<sup>152</sup> and federal bribery laws.<sup>153</sup> Wasserman concluded that the *American Physicians* holding that the First Lady was a de facto federal employee or official was a countervailing attempt to avoid deciding the really tough question posed in the case: whether the FACA encroached on the President's constitutional power.<sup>154</sup> He claimed that "rather than take the hard road and rule directly on the

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147. *See id.*

148. *Id.*

149. *Id.*

150. *See generally* Wasserman, *supra* note 5, at 1239-44.

151. *See generally* 1250-54.

152. *See generally* 1254-56.

153. *See generally* 1256-59.

154. *See id.* at 1258.

FACA's constitutionality, the D.C. Circuit sought to avoid the issue . . . . Instead, it chose to create a legal role for the First Lady that does not exist."<sup>155</sup>

Wasserman's reliance on the Office of Legal Counsel's letter was misplaced. The letter discussed the consequences of an informal adviser assuming governmental responsibilities. The difference between the informal adviser and the First Lady was that no provision authorizing a legal "office" for the informal adviser already existed. Section 105(e), as construed by the *American Physicians* court, created an assistant position for the First Lady.<sup>156</sup> Furthermore, the court left the term 'assistance' undefined by stating "section 105(e) neither limits the particular kind of "assistance" rendered to the President, nor circumscribes the types of presidential duties and responsibilities that are to be aided. . . . It is reasonable, therefore, to construe section 105(e) as treating the presidential spouse as a de facto officer or employee."<sup>157</sup>

Most importantly, the court went further and admitted the consequence of not holding the First Lady as a de facto federal employee by stating "[o]therwise, if the president's spouse routinely attended, and participated in, cabinet meetings, he or she would convert an all-government group, established or used by the President, into a FACA advisory committee."<sup>158</sup> The court implicitly acknowledged that that First Lady participates and involves herself in situations that need to remain confidential from the public.

### Conclusion

The purpose of the immunity doctrine is to allow officials to follow their conscience in fulfilling their discretionary duties. More importantly, as the Court in *Barr v. Mateo* emphasized, the doctrine rests not on the title of the office, but rather the scope of the duties.

By examining the roles that First Ladies have historically played, it is evident that the First Lady's duties involve important matters, such as attending Cabinet meetings, advising the President on Cabinet nominees and helping plan the domestic agenda. All of these duties necessarily require that the First Lady have the ability to exercise discretion in fulfilling her duties. Therefore, in situations where the First Lady is acting in a capacity that requires her to exercise her discretion she should receive qualified immunity from civil damage liability.

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155. *Id.*

156. 997 F.2d at 904.

157. *Id.*

158. *Id.* at 905.

