

## AN APPRAISAL OF EXECUTIVE IMMUNITY UNDER THE NIGERIAN CONSTITUTION: NEED FOR REVIEW

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### **Abstract**

*Immunity is the legal shield that protects an officeholder from legal liabilities during their stay in office. In Nigeria, the President, Vice President, Governors, and Deputy Governors are immune from civil and criminal proceedings, including arrests during their term in office. So many officeholders have hidden under the cover of immunity to commit financial crimes and to disobey court orders; these and other abuses of the immunity privilege have necessitated calls from various quarters for the abolition of the immunity clause. This paper did an appraisal of executive immunity under the Nigerian Constitution to suggest reforms. The paper also looked at executive immunity in the United States of America to see if there are lessons that can be learned from that jurisdiction. The paper found that there is a need to reform executive immunity under the Constitution and that there are lessons to be learned from the United States. The paper employed doctrinal research methodology and made use of both primary and secondary sources of data. Primary sources of data used are the Constitution of the Federal Republic of Nigeria 1999(as amended); relevant statutes and case laws while the secondary sources of data used are textbooks, internet materials, and journal articles. The paper recommended that the Constitution should be amended to restrict immunity protection to the institution of civil actions during the period of office of the officeholders and criminal actions that do not border on financial corruption and embezzlement of public funds.*

**Keywords:** *Executive, Immunity, Exemptions, Constitution.*

### **1.0 Introduction.**

Immunity can be defined as an exemption from a legal requirement, prosecution, or penalty granted by statute or government authorities.<sup>1</sup> The term can also be defined as a legal privilege attributed to certain persons (state officials) and recognized by national and international law which enables them to exercise their functions free from outside constraints or pressures, including legal ones.<sup>2</sup> Immunity is a legal principle that shields a certain class of persons or institutions from liabilities for their actions when holding a particular office or while performing certain duties. The history of executive immunity can be traced to the old British monarchical era where the Crown that is, the King or Queen enjoyed absolute immunity from civil and criminal prosecution and liabilities. The immunity of the Crown is anchored on the belief that the “King can do no wrong”. According to H. Street, the King, at the apex of the feudal pyramid cannot be sued or subjected to the jurisdiction of any court.<sup>3</sup> One of the justifications for the immunity of the Crown in the old British era is captured in the following words:

The feudal rule that no lord of the manor could be sued in his court meant that the king being the great overlord of all and the peak of the English legal system, could not be sued in his court or the court of any of his vassals. Added to this procedural difficulty was the principle of substantive law that ‘the king can do no wrong’ which meant that no act or omission of the sovereign was open to

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<sup>1</sup>Will Kenton, “Immunity: Meaning, Types, Special Considerations” *Investopedia* 5 April 2022 <<https://www.investopedia.com/terms/i/immunity.asp>> Accessed on 17 October 2023.

<sup>2</sup>*The Practical Guide to Humanitarian Law* <<https://guide-humanitarian-law.org/content/article/3/immunity>> accessed on 17 March 2022 Accessed on 17 October 2023.

<sup>3</sup>H Street, *Government Liability: A Comparative Study* (New York: Cambridge University Press, 1953) 42.

impeachment or condemnation on the ground that it was wrongful or tortuous.<sup>4</sup>

The scope of Crown immunity in England was limited by the Crown Proceedings Act of 1947 which provided that the Crown could be sued for the torts of its servants.

The Constitution of the Federal Republic of Nigeria 1999(as amended) granted executive immunity to certain office holders from being subjected to civil or criminal proceedings in court during the period of their stay in office, the brain behind the grant of immunity to those office holders is to prevent them from being harassed, distracted and embarrassed by frivolous suits and criminal charges during their stay in office. The draftsman of the Constitution may have good intentions for enacting the immunity clause to protect these officeholders from distractions and harassment arising from frivolous litigations during their stay in office, however, the turn of events in governance and the gross abuse of the immunity clause has raised concerns from different quarters as to whether the immunity clause is still sustainable or whether it is a clog in the wheel of progress especially in the fight against official corruption. Some of these officeholders hide under the cover of immunity to commit crimes especially crimes relating to misappropriation of public funds. It has been argued that to ensure accountability in governance, the constitutional immunity should be expunged. Furthermore, the executive immunity granted to these officeholders is antithetical to the equality of all before the law as professed by the Constitution, because it places the officeholders protected by immunity above every other person, as everyone aside from these officeholders can be arrested and prosecuted for allegations of crime or sued in court for civil wrongs. This negates the constitutional provision that judicial powers ‘shall extend to all matters between persons... for the determination of any question as to the civil rights and obligations of that person’<sup>5</sup> because the office holders under the cover of immunity cannot be sued as “a person” until the expiration of his or her term in office. Consequently, the right of an aggrieved person against an office holder protected by immunity cannot be subjected to the exercise of judicial powers of the Court until the office holder leaves office.

The legislators enjoy some form of qualified immunity, but legislative immunity is not as broad in scope as that enjoyed by the elected executive officeholders. A criminal or civil proceeding shall not be instituted against a member of the Legislative House in respect of words spoken or written at the plenary session or Committee proceedings of the Legislative House.<sup>6</sup> A member of the legislature shall not be served with a court process or court order, or be arrested in the chamber or within the premises of the legislative house.<sup>7</sup>

This article will therefore examine the executive immunity under the Nigerian Constitution and make a case for a review of the constitutional provision in other to ensure that these officeholders do not abuse this immunity to the detriment of the state and the citizens. The article will also look at executive immunity in the United States of America to find out if there are lessons Nigeria can learn from that jurisdiction.

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<sup>4</sup>DIO, Ewelukwa, ‘Proceedings by and against the State in Nigeria’ (1973)11 *Nigeria Bar Journal*.10 at 11. Cited in Akinwumi Ogunranti, *Immunity Clause under the Nigerian 1999 Constitution; A Curse or A Blessing?*<[https://www.academia.edu/7941706/immunity\\_clause\\_under\\_theNigerian\\_1999\\_constitution\\_as\\_a\\_mended\\_a\\_curse\\_or\\_a\\_blessing](https://www.academia.edu/7941706/immunity_clause_under_theNigerian_1999_constitution_as_a_mended_a_curse_or_a_blessing)> Accessed on 17 October 2023.

<sup>5</sup>See Constitution of the Federal Republic of Nigeria 1999(as amended), section 6(6)(b).

<sup>6</sup>Legislative House (Powers and Privileges) Act 2017, section 1.

<sup>7</sup>*Ibid*, section 23.

## 2.0 Executive Immunity under the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Executive immunity is provided for in section 308 of the Constitution of the Federal Republic of Nigeria. The section made the following provisions:

(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section –

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

Flowing from the constitutional provisions reproduced above; the President, the Vice President, Governors, and Deputy Governors have immunity from any civil and criminal actions being instituted against them during the period of their stay in office. Furthermore, any pending civil or criminal action against any of the listed office holders will be put at abeyance once he or she takes an oath of office until the expiration of the term of office; this constitutional provision received judicial approval in the case of *Bola Tinubu v IMB Securities PLC*,<sup>8</sup> in that case, the respondent instituted an action against the appellant to enforce an overdraft facility granted to the appellant by the respondent. The appellant applied to set aside the service of the writ of summons and for an order to dismiss or strike out the suit, the trial court however, granted an order for the renewal of the writ of summons. The appellant appealed that decision to the Court of Appeal and while the

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<sup>8</sup>(2001) 16 NWLR (Pt. 740) 670.

appeal was pending, the appellant was sworn in as Governor of Lagos State. The respondent applied for an adjournment *since* relying on section 308 of the Constitution, the Court of Appeal granted the adjournment. Dissatisfied by the grant of adjournment *sine die* instead of striking out of the suit, the appellant further appealed to the Supreme Court. The Supreme Court, per Belgore, JSC stated that the reason for the protection of the executive office holders stated in section 308 of the Constitution is to avoid harassment on personal matters and to afford the person complete devotion to carry out the duties of the office. The Supreme Court also held that action against the appellant cannot be continued against him in line with section 308 of the Constitution. Therefore the proper order to make is an order striking out the suit and not an adjournment *sine die*.

The question is whether the holder of the executive office protected by the immunity clause can bring an action against another person; put differently, does the immunity granted to these officeholders also bar them from instituting personal action against another person during their term in office, has been canvassed in court. This question was answered by the Supreme Court in the case of *Global Excellence Communications Ltd. & Ors. v Donald Duke*.<sup>9</sup> The respondent who at that time was the Executive Governor of Cross Rivers State instituted an action seeking damages against the appellant for alleged defamatory publications made by the appellant against the respondent. The Supreme Court made the following pronouncement:

I am unable to construe a provision of the Constitution that granted an immunity such as section 308(1) as also constituting a disability on the person granted immunity when there is no provision to that effect, either expressly or by necessary implication in the enactment. If the makers of the Constitution had wanted to prohibit a person holding the offices stated in section 308 from instituting or continuing action instituted against any other person during his period of office, nothing would have been easier than to provide expressly that: 'no civil or criminal proceedings shall be instituted or continued by a person to whom this section applies during his period of office and no civil or criminal proceedings shall be instituted or continued against such person during his period of office' or in like terms. The makers of the Constitution in their wisdom did not so provide.

Since the rationale behind the grant of immunity is to avoid distractions of litigations against the holders of the elected executive offices stated in the Constitution, one wonders why they can sue but cannot be sued, this is because arguably, an office holder clothed with immunity can also be distracted when he or she decides to institute or continue a personal action against another person. Another issue is, what happens in a situation whereby an elected executive officeholder brings an action against another person and that person files a counterclaim, will the court be clothed with jurisdiction to hear and determine the counterclaim or will it amount to a contravention of the constitutional immunity of the office holder? The writer submits that although a counterclaim is regarded as an independent suit that can be heard even when the main claim is discontinued and struck out; it will amount to grave injustice for the courts to turn their backs on a counterclaim that arose out of a suit filed by an office holder shielded by immunity.

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<sup>9</sup>(2007) 16 NWLR (Pt. 1059) 22.

The other aspect of the immunity clause is the protection from arrest and imprisonment. The office holders to which the immunity is applicable cannot be arrested nor imprisoned during their period of stay in office. However, the police and other law enforcement agencies can carry out investigations into an allegation of crime against the elected executive officers protected by immunity. This was in the decision of the Supreme Court in the case of *Fawehinmi v Inspector General of Police & 2 Ors*,<sup>10</sup> in that case, the appellant brought an action against the respondent for the court to issue an order of mandamus against the respondent to carry out criminal investigations against the then Governor of Lagos State, the trial court dismissed the case because section 308 of the Constitution shielded the governor from being investigated. The appeal went up to the Supreme Court which held that the immunity clause does not prevent the police from an investigating crime against the office holder. The Court per Uwaifo, JSC made the following pronouncement:

The provisions of section 308 are unambiguous and should be given their ordinary interpretation. The court endorsed the court a quo's interpretation that a police investigation could be carried out upon a criminal investigation against a governor so long as the police do not encounter him in the course of the investigation. Thus, a person protected under section 308 of the 1999 Constitution can be investigated by the police for an alleged crime or offense.

The question is, after the investigation and a prima facie case are established against the office holder, what happens next? If the officeholder's presence or appearance at the police station is needed for the investigation and he declines to cooperate with the police by making himself available for interrogations what becomes of the ongoing investigation because his presence or attendance cannot be compelled by an order of court.

### 3.0 Exceptions to the Application of Executive Immunity

The immunity granted to the elected executives at the federal and state levels of government by the Constitution does not extend to civil and criminal proceedings in which the office holder is a nominal party or in civil proceedings brought against him in an official capacity. A nominal party can be defined as a plaintiff or defendant who has no real interest in the result of the suit, or no actual interest or control over the subject matter of the litigation but is solely joined because a technical rule of practice requires their presence in the record.<sup>11</sup> A nominal party also refers to the party to the lawsuit who is connected to the case, without any interest or prejudice, so that the court can resolve certain issues or have all the evidence proved with his/her help to give a proper judgment. This nominal party will not be affected by the result of the case and is not at fault or considered for any benefits out of it.<sup>12</sup>

On the issue of an elected executive officeholder being sued in an official capacity, it has been held that it is the substance of an action that will determine whether a president or a governor was sued in his personal or official capacity and not the mere use of the name.<sup>13</sup> In *Shugaba v Minister of*

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<sup>10</sup>(2000) 7 NWLR (Pt. 665) 511.

<sup>11</sup>Cornell Law School, *Nominal Party*. <[https://www.law.cornell.edu/wex/nominal\\_party](https://www.law.cornell.edu/wex/nominal_party)> Accessed on 21 October 2023.

<sup>12</sup>Legal Explanations, *Nominal Party, Definition and Legal Meaning*. <<https://legal-explanations.com/definition/nominal-party/>> Accessed on 21 October 2023.

<sup>13</sup>*President of Nigeria v Governor of Kano State* (1982) 3 NCLR 189.

*Internal Affairs & Ors.*,<sup>14</sup> the question of the immunity of the President as stipulated in section 267 of the 1979 Constitution (a replica of section 308 of the extant constitution) was in issue, the Court held that the President can be sued in his official capacity. The Court went ahead to state that the immunity granted under our constitution is different from the immunity enjoyed by the Crown in the United Kingdom.

Executive immunity does not apply to election petition matters; this is because of the *sui generis* nature of election petition which is neither considered a civil proceeding nor a criminal proceeding. In *Obi v Chief Samuel Mbakwe*,<sup>15</sup> the Court held that “election petitions are special proceedings completely divorced and separated from civil proceedings within the context of section 267 of the 1979 Constitution. Consequently, a Governor of a state is not immune by any reason of section 267 of the Constitution from legal proceedings against him in respect of an election petition.” In *Alliance for Democracy v Peter Ayodele Fayose & Ors.*,<sup>16</sup> the petitioner issued a *subpoena duces tecum* on the 1<sup>st</sup> respondent who is as at that time the Governor of Ekiti State, to appear before the Tribunal with notice to produce his credentials and passport. The 1<sup>st</sup> respondent filed a notice of preliminary objection on the grounds of section 308 of the 1999 Constitution which granted him immunity from being compelled by a court process. The Court of Appeal, per Mikailu JCA, stated that “in an election petition where the status of the governor is being challenged as in this, then said immunity is also questioned. He has no immunity against being sued and consequently, he cannot be immune from being subpoenaed.”

#### **4.0 Problems with the Executive Immunity Clause under the Constitution.**

There have been several calls for a review of the immunity clause contained in the Constitution which shields elected executives at the federal and state levels from being subjected to civil or criminal prosecution, and arrest. The immunity clause is against the principles of the rule of law which entails the subjection of all persons to the ordinary law of the land. Although the immunity does not perpetually shield the elected executive office holder from personal actions, it only puts at abeyance civil and criminal proceedings against him or her until the expiration of his or her term, such delay can lead to a miscarriage of justice on the part of the aggrieved party. Evidence that would have been used in prosecution civil suits or criminal charges against the office holder may be destroyed by effluxion of time. The possibility of reelection of the office holder and also the possibility of the office holder getting elected and being sworn into another executive office that is also clothed with immunity after serving out the maximum two terms of his or her current office even makes the matter worse. For instance, if one is elected as a deputy governor and a civil or criminal proceeding pending against him is put on hold, and he serves two terms in office and during his second term as deputy governor he gets elected as governor and serves another two terms, it means that an aggrieved person who initiated or about to initiate a court action against him will have to wait for a total of 16 years for him to come out of immunity before the case can be litigated on. Imagine a scenario where the same person, while serving as governor of a state, or gets elected as vice president or president, will keep on enjoying immunity protection for about two decades before personal actions can be instituted against him.

The cover of immunity has been grossly abused in the area of financial corruption, some elected executive officeholders engage in all sorts of corrupt practices, embezzlement of public funds,

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<sup>14</sup>(1981) 1 NCLR 25.

<sup>15</sup>(1984) 15 NSCC 127.

<sup>16</sup>(2002) All. FWLR (Pt. 218) 74.

some of them sponsor electoral violence and orchestrate the commission of several electoral offenses and they get away with it as a result of the protection of immunity.

Another problem with the immunity clause is that it encourages elected executive officeholders to brazenly disobey court orders knowing that contempt proceedings cannot be initiated against them and no process of court can be used to compel their attendance in court. Executive lawlessness and disobedience of court orders have been a menace in Nigeria and part of the reason why the presidents and governors who disobey court orders get away with flagrant disobedience to court orders is that they are immune from contempt proceedings being taken against them in their capacity and as such they cannot be personally committed to correctional centers until purged of contempt.

As stated earlier, many prominent personalities and authors have canvassed for the removal of the executive immunity as provided for in the Constitution. Former President Olusegun Obasanjo led the call for abolition of executive immunity, at a national political reform conference held during his tenure as president; he called on the delegates to delete the immunity clause from the Constitution. He stated that as soon as one is caught committing an offense while in office, he or she should be charged for that offense at once.<sup>17</sup>

Late President Umaru Musa Yar'Adua supported the call for the removal of the immunity when he was the President of the Federal Republic of Nigeria. He stated that the immunity of the President, Vice President, Governors, and Deputy Governors which shields them from being prosecuted for any act of corruption while in office has become a cover for non-performance, ineptitude, and corrupt practices.<sup>18</sup> A writer, O Ndibe canvassed for the removal of what he termed 'two fertilizers of corruption' which are; the immunity clause and the security vote for elected officeholders.<sup>19</sup> Former Secretary General of the Commonwealth, Chief Emeka Anyaoku advocated for a qualified immunity that will shield elected executive office holders only concerning criminal proceedings, he stated that;

When the immunity clause is removed, all forms of corruption will drastically reduce in Nigeria. Since the immunity comes from the top, the other people will follow suit. The President and the governors should not have immunity from criminal offenses. They should only have immunity for civil offenses because constant lawsuits will distort the day-to-day running of the country.

National Judicial Council in a memorandum to the sub-committee on supplementary and general provisions of the Joint Assembly Committee on the Review of the 1999 Constitution<sup>20</sup> recommended that the immunity be limited to civil suits against the public officers in their private capacity. The Memorandum further reads:

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<sup>17</sup>OVC Ikpeze, "The Imperative of Removing Immunity Clause in the Constitution of the Federal Republic of Nigeria 1999" *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 2013. PP. 136-146 @142.

<sup>18</sup>G Omo Arishe & A Aniyie, "Reconsidering Executive Immunity under the Nigerian Constitution" *Nigerian Current Law Review* 2007-2010. PP. 274-311, @ 297.

<sup>19</sup>O Ndibe, "Nigeria's Twin Scandal" cited in Arishe & Aniyie, n. 18.

<sup>20</sup>Ikpeze, n. 17. P. 143.

The committee notes that the immunity from criminal prosecution granted to the specific officers of state under section 308 of the constitution is being abused in a manner that could endanger the nation and its democratic system of government. This will put the administration of justice into disrepute and make the country a laughing stock in the comity of nations. In this day and age in the world, this will have disastrous consequences for society and its economy....<sup>21</sup>

Mabillee, while advocating for qualified immunity, posits thus<sup>22</sup>:

Section 308 is a provision too broad for the purpose for which it is meant. It is in effect an excessive protection of the president and governors as what is sought to be achieved through the section can better be achieved if the immunity is limited to the official transactions of the persons named in the section to the exclusion of every other transaction. Such qualified immunity offers a double-barrel advantage. The first is that it would reduce the arbitrariness of such officials, the second is that it would roll away the stone from the iniquitous tomb to which section 308 has confined people's fundamental right to sue when their rights have been trampled upon by any of the persons named in the section...it is time for the legislature to amend the immunity provision of the constitution to make it applicable only when the officials act of the persons named in the section come into question.

President Goodluck Jonathan, the then President of the Federal Republic of Nigeria, instituted a National Conference in 2014, one of the recommendations made by that conference, which was headed by learned jurist, Justice Idris Kutigi, retired Justice of the Supreme Court is the complete removal of the immunity clause to ensure accountability in governance.<sup>23</sup>

In 2021 at a public hearing on the review of the 1999 Constitution, the Christian Association of Nigeria (CAN) also joined the call for the removal of the immunity clause stating that the immunity clause had given room for criminals to perpetuate evil agenda against the country. The Association stated that "CAN stands for equality of all persons before the law. So, we want the immunity clause (section 308) to be expunged. Some governors hide under the cover of immunity to perpetrate heinous acts, but they cannot be challenged in court. If you err either as a President or Governor, and it is so fundamental, you should have nowhere to hide."<sup>24</sup>

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<sup>21</sup>OVC Ikpeze *Op cit*

<sup>22</sup>AO Enabulele, "From Immunity to Impunity: A Scandalisation of the Rule of Law" in Chianu E. (eds.): *Legal Principles and Policies*, note 68. 245 at 256-257.

<sup>23</sup>PM News, "Confab Kicks against Immunity Clause for President, Governors", *PM News* 13 June 2014. <<https://pmnewsnigeria.com/2014/06/13/confab-kicks-against-immunity-clause-for-president-govs/>> Accessed on 4 October 2023.

<sup>24</sup>Luminous Jannamike, "Constitution Amendment: CAN seeks Removal of Immunity Clause" *Vanguard Newspaper* 3 June 2021. <<https://vanguardngr.com/2021/06/constitution-amendment-can-seeks-removal-of-immunity-clause/>> Accessed on 20 October 2023.



### 5.0 Executive Immunity in the United States of America

The Constitution of the United States of America did not make any provision for executive immunity. The only express immunity stipulated in the Constitution is the legislative immunity of members of Congress which is not absolute. Article 1, section 6 of the Constitution of the United States of America provides that members of the Congress are immune from arrest during the attendance at the session of their respective houses (that is, the Senate or the House of Representatives), or while going to or coming from such session, the exceptions are cases that allege treason, felony and breach of peace. Furthermore, the members of Congress shall not be questioned for any speech or debate in either house of Congress.

The effect of the above constitutional provisions is that a senator or a member of the House of Representatives in the United States cannot be arrested in the building of the Congress during a session of the legislative house to which he or she belongs, or while on his or her way to the Congress building or on his or her way exiting the Congress building after attending a session; the exceptions are when the alleged offenses for which his or her arrest is sought, borders on treason, felony or breach of peace. Furthermore, a member of Congress cannot be questioned for any speech or debate made during the session of the legislative house to which he or she belongs. There is no equivalent provision for the executive especially the President who is the chief executive officer.

The question of whether the President of the United States of America enjoys any form of immunity from civil and criminal liabilities while in office has been referred to the courts for answers in several cases.

In *Mississippi v. Johnson*,<sup>25</sup> President Andrew Johnson refused to give his assent to the Reconstruction Bill passed by Congress; the Congress eventually overrode the presidential assent and passed the bill into law. The State of Mississippi approached the Supreme Court asking for an injunction preventing the President from enforcing the Reconstruction Act on the ground that it was unconstitutional. The Supreme Court held that it had no jurisdiction to interfere with the President's performance of his official duties. The Court went further to state that the duties of the President as required by the Reconstruction Act were "in no sense ministerial", and that a judicial attempt to interfere with the performance of such duties would be "an absurd and excessive extravagance".

From the above decision, it can be said that the President enjoys absolute immunity from liabilities arising from the performance of his official duties. This decision is also anchored on the principles of separation of powers which bars the courts from interfering with the exercise of executive powers by the President.

In the case of *United States v. Nixon*,<sup>26</sup> the prosecutor in the Watergate scandal sought an order of subpoena to compel President Nixon to produce tapes of recorded conversations made in the Oval Office, the President argued that he could not be compelled by subpoena by his office, that he enjoys immunity. The Court held that the doctrine of separation of powers cannot sustain an absolute presidential privilege and stated that the President must obey the subpoena and produce

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<sup>25</sup>71 U.S. (4 Wall) 475 (1867). Cited in "Mississippi v. Johnson" Oyez, <[www.oyez.org/cases/1850-1900/71us475](http://www.oyez.org/cases/1850-1900/71us475)> Accessed on 5 November 2023.

<sup>26</sup>418 U.S. 683 (1974).

the tapes required from him. The same decision was given in the case of *Trump v Vance*,<sup>27</sup> the brief facts of the case were that in 2019, New York County District Attorney Cy Vance served a subpoena on Mazars, USA, the then President Trump's accounting firm, seeking various financial records.<sup>28</sup> The U.S. Court of Appeals for the Second Circuit held that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material,"<sup>29</sup> the U.S. Supreme Court upheld the judgment as regards the issue of the president not having absolute immunity from the issuance of a state criminal subpoena.<sup>30</sup>

The Court in the United States has also held that the president is not covered by immunity from civil litigation brought against him bordering on acts that occurred before he became the President of the United States. This issue was canvassed in the case of *Clinton v Jones*,<sup>31</sup> in that case, an employee of the State of Arkansas sued President Bill Clinton, then President of the United States for sexual advances which occurred when Clinton was the Governor of the State of Arkansas. Clinton argued that the suit should be suspended because he enjoyed presidential immunity. The US Supreme Court held that the Constitution does not grant incumbent president immunity from civil litigation except under highly unusual circumstances. The Court went further to state that while the independence of government branches must be protected under the doctrine of separation of powers, the Constitution does not prohibit these branches from exercising any control over one another.<sup>32</sup>

Where the acts complained of arose from the performance of the official duties of a president, the President has absolute immunity from liabilities in the form of damages. This was decided in the case of *Nixon v Fitzgerald*,<sup>33</sup> a civilian analyst with the United States Air Force who was sacked, brought an action against President Nixon praying for damages for wrongful dismissal. The Court held that the President "is entitled to absolute immunity from damages liability predicated on his official acts."<sup>34</sup>

States in the United States of America have their respective state's constitution which governs the affairs of each state. It appears also that there is no express provision for executive immunity in the constitutions of the various states that make up the United States of America. There are instances wherein incumbent governors have been investigated, and compelled by courts to appear before an investigating panel; there are also instances where incumbent governors were indicted by the courts. This paper will highlight two instances.

In 2004, Mr. John G. Rowland, as an incumbent governor of the State of Connecticut had an allegation of corruption leveled against which necessitated the investigation of the Federal Bureau of Investigation (FBI). The law was set in motion for his impeachment; the Supreme Court of Connecticut compelled Mr. Rowland to appear before an investigating panel. He later resigned

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<sup>27</sup>140 S. Ct. 2412 (2020).

<sup>28</sup>Julia Solomon-Strauss, "Summary: The Supreme Court Rules in Trump v. Vance" *Lawfare* 10 July 2020. <<https://www.lawfareblog.com/summary-supreme-court-rules-trump-v-vance>> Accessed on 6 November 2023.

<sup>29</sup>*Trump v Vance* 941 F.3d 631 (2d Cir. 2019).

<sup>30</sup>*ibid.*

<sup>31</sup>520 U.S. 681 (1997).

<sup>32</sup>"Clinton v Jones" Oyez <[www.oyez.org/cases/1996/95-1853](http://www.oyez.org/cases/1996/95-1853)> Accessed on 6 November 2023.

<sup>33</sup>457 U.S. 731 (1982).

<sup>34</sup>"Nixon v. Fitzgerald" Oyez <<https://www.oyez.org/cases/1981/79-1738>> Accessed on 6 November 2023.

from his position as governor to avoid impeachment.<sup>35</sup> He later pleaded guilty in a federal court to a one-count indictment for conspiracy to commit honest services fraud, mail fraud, and tax fraud.<sup>36</sup>

In 2018, Eric Greitens, then Governor of the State of Missouri was indicted by a St Louis grand jury on one count of invasion of privacy for allegedly taking a photo of a woman without her consent at his home in 2015 before he was elected governor; this led to his resignation from office as governor.<sup>37</sup>

Executive immunity in the United States of America is more restricted in scope than that of Nigeria which is wider in scope. The immunity in the United States does not cover acts that happened before the ascendancy to the highest office in the land by the holder of the office while in Nigeria acts that happened before the ascendancy to the office by the elected executive office holders cannot be instituted against them during the period of their stay in office.

Also unlike the position in Nigeria where no order of the court can compel the appearance of the Chief Executives and their deputies at both the federal and state levels of government, in the United States, the President can be compelled to appear before the court by way of subpoena. It seems that the only areas the President of the United States of America enjoys absolute immunity are acts done in the exercise of his official duties. It has been argued that the President of the United States cannot be prosecuted for an offense during his term in office; the United States Constitution did not expressly state, however in Nigeria where that Constitution expressly made it impracticable to prosecute elected executive office holders during their stay in office.

As earlier stated in this paper, the executive immunity in the United States of America is not expressly provided for in its constitution, it is therefore unclear whether the Vice President enjoys some forms of immunity. This controversy has arisen but there was no judicial pronouncement. In 1973, the then Vice President of the United States, Spiro Agnew was faced with an allegation of bribery which allegedly occurred during his term as Governor of Maryland. It was argued on his behalf that he was protected from criminal indictment and prosecution by his office as Vice President, the Justice Department argued that the immunity enjoyed by the President is not available for the Vice President.<sup>38</sup> Vice President Angew resigned from office before the court could make a pronouncement on the issue of whether the Vice President enjoys immunity.<sup>39</sup> In 2000, Randolph Moss of the Justice Department opined that Agnew's precedent serves as a pointer

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<sup>35</sup>Jonathan Finer, 'Former Connecticut Governor pleads Guilty, Rowland accepted Thousands of Dollars in trips and home Improvements while in Office' *Washington Post* 23 December 2004 <<https://washingtonpost.com/wp-dyn/articles/A21937-2004Dec23.html>> Accessed on 20 November 2023.

<sup>36</sup>Kristin Hussey & Marc Santora, 'Judge sends Rowland, Ex-Connecticut Governor, back to Prison' *The New York Times* 18 March 2015 <<https://nytimes.com/2015/03/19/nyregion/john-rowland-of-connecticut-sentenced-to-prison.html>> Accessed on 20 November 2023.

<sup>37</sup>"Missouri Gov. Eric Greitens, 'Facing Possible Impeachment, says He will Resign' *CNBC News* 29 May 2018. <[www.cnbc.com/amp/2018/05/29/missouri-gov-eric-greitens-facing-possible-impeachment-says-he-will-resign.html](http://www.cnbc.com/amp/2018/05/29/missouri-gov-eric-greitens-facing-possible-impeachment-says-he-will-resign.html)> Accessed on 20 November 2023.

<sup>38</sup>Mark E Coon, "Vice Presidential Immunity in the Age of Impeachment: A Fresh Look at the Agnew Precedent" *ConLawNow* (2018) vol. 9, PP.209-225 <<https://ideaexchange.uakron.edu/conlawnow/vol9/iss1/11/>> Accessed on 23 October 2023.

<sup>39</sup>*Ibid.*

that the Vice President does not enjoy the same immunity as the President.<sup>40</sup> Recently, a federal court in the United States held that a US Vice President can enjoy legislative immunity from being questioned on speeches he made in Congress while presiding as the President of the Senate.<sup>41</sup>

Governors in the United States of America do not enjoy absolute immunity, unlike their Nigerian counterparts. As can be seen in the instances given above, a state governor in the United States can be investigated; compelled by court to appear before an investigating panel, and can be indicted for crimes. This has led to the resignations of some governors in the United States thereby enhancing accountability in governance.

There is a need for Nigeria to borrow a leaf from the United States of America and restrict the scope of immunity protection to only deserving circumstances to enhance accountability in governance.

## 6.0 Conclusion

The immunity clause enshrined in the Constitution of the Federal Republic of Nigeria 1999(as amended) is intended to protect the President, Vice President, Governors, and Deputy Governors from being harassed and distracted from the performance of their official responsibilities by incessant litigations most of which are frivolous and unnecessary. Although the makers of the Constitution might have had good intentions while incorporating the immunity clause into the Constitution, some of these executive officeholders have hidden under the cover of immunity to commit crimes bordering mostly on financial corruption and embezzlement of public funds; sponsoring election violence and other electoral offense, and some of them do not get prosecuted even after leaving office. Furthermore, these office holders most times disobey court orders and cannot be cited for contempt of court because no order of the court compelling their attendance to court can be issued against them. The immunity clause also causes a delay in the administration of justice as an aggrieved person who has personal claims against these office holders, especially claims that are already in court, will have to wait till the office holder's term in office elapses before the case can be instituted or continued and such delay may frustrate the case of the aggrieved person who might suffer hardship as a result of the delay in waiting for the term of the office holder to elapse.

There have been several calls for either outright abolition of the immunity clause or it to be restricted to cover specific areas. There are lessons to be learnt from the executive immunity in the United States of America which is not broad in scope like that of Nigeria.

## 7.0 Recommendation

This paper recommends that section 308 of the Constitution of the Federal Republic of Nigeria 1999(as amended) should be amended to cover the institution of civil actions against the President, Vice President, Governors, and Deputy Governors for acts done while in office; that is to say, acts performed by these office holders in personal capacity while occupying the office can be put in abeyance till the expiration of the term of office; civil actions that are already in court and the subject of litigation before their being sworn into office should be allowed to continue instead of

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<sup>40</sup>Scott Bomboy, "Can a Vice President be charged with a Crime while in Office" *Constitution Daily*, 12 July 2018. <[www.constitutioncenter.org/amp/blog/can-a-vice-president-be-charged-with-a-crime-while-in-office](http://www.constitutioncenter.org/amp/blog/can-a-vice-president-be-charged-with-a-crime-while-in-office)> Accessed on 23 October 2023.

<sup>41</sup>Kyle Cheney, "Secret Pence Ruling breaks New Ground for Vice Presidency" *Politico* 30 March 2023. <https://politico.com/news/2023/03/30/mike-pence-immunity-ruling-00089629> Accessed on 23 October 2023.

being struck out when the office holder takes the oath of office; also civil actions bordering on acts done by these office holders before getting into office should not be covered by immunity.

The mentioned officeholders should enjoy immunity in criminal prosecution except in cases of financial corruption and embezzlement of public funds, and sponsoring election violence and other electoral offenses, this will aid ensure accountability in governance. Contempt of court proceedings should not be covered by immunity; this will let these officeholders know that there will be immediate consequences for disobedience of court orders. The powers of the Attorney General of the Federation and the Attorney of States to prosecute; continue and discontinue criminal prosecution<sup>42</sup> should be amended so that it will not be applicable in the prosecution of these office holders, this is because the Attorney General of the Federation and a state are appointed by the President and Governor respectively, and they may out of loyalty to their principal discontinue prosecution against him or her. Prosecution of these officeholders should be done by an independent prosecutor. Compelling the attendance of these office holders to court by subpoena either to testify or tender documents should be made possible by removing the prohibition from the immunity clause.

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<sup>42</sup> Constitution of the Federal Republic of Nigeria 1999(as amended), sections 174 & 211.