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[Various Paula Jones Court  
Documents] [1]

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

PAULA CORBIN JONES,	:	
	:	
Appellee/Cross-Appellant	:	
	:	
V.	:	Cross-Appeals from the United
	:	States District Court for the
	:	Eastern District of Arkansas
WILLIAM JEFFERSON CLINTON,	:	
	:	
Appellant/Cross-Appellee	:	

PRESIDENT CLINTON'S REPLY  
TO PAULA CORBIN JONES' OPPOSITION TO  
THE PRESIDENT'S MOTION FOR STAY OF MANDATE

President Clinton, through undersigned counsel, wishes to make the following brief points in reply to the cross-appellant's Opposition to the President's Motion for Stay of Mandate:

1. The Opposition does not deny that the very interests the President seeks to protect by Supreme Court review would be irreparably injured, and his petition rendered nugatory, if the mandate is not stayed. The issue at the heart of President Clinton's petition will be whether the litigation should go forward while he is in office. Therefore, this case presents "the most compelling justification" for a stay -- to preserve the Supreme Court's power to render an opinion on the issues raised by the petition. John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers)

(case for stay is most compelling where it is needed "to protect [the Supreme] Court's power to entertain a petition for certiorari") (quoting New York v. Kleppe, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)).

2. The Opposition argues that litigation can go forward in this case without jeopardizing the President's interests because the "vast bulk of the evidence" can be obtained from persons other than the President, and that at a minimum, litigation should proceed on the claims against the President's co-defendant, State Trooper Danny Ferguson. This contention does not address the concern outlined above -- that having any part of the litigation go forward would usurp the issue from the Supreme Court -- and is contradicted by the findings of the trial court, which held on several occasions that the Ferguson claims were not severable from those against the President.

3. The District Court first found that trial could not go forward separately against the Trooper because "there is too much interdependency of events and testimony to proceed piecemeal," and that Trooper Ferguson's case "is integrally related to the allegations against the President." As the court explained:

[B]oth cases arose out of the same alleged incident; and while the suit against the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident, it would not be possible to try the Trooper adequately without testimony from the President.

Jones v. Clinton, 869 F. Supp. 690, 699 (E.D. Ark. 1994) (Add. 19-20). Further, when it stayed the litigation, including

discovery, pending President Clinton's appeal to the Eighth Circuit, the District Court could not

imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys. The claims are so inextricably intertwined that in order to protect the President to the full extent that his claim of immunity would provide, the Court finds that the motion [for stay] should be granted. . . . Trooper Ferguson is a defendant, but the case revolves around the alleged actions of then-Governor Clinton, the central figure in this action.

Jones v. Clinton, 879 F. Supp. 86, 88 (E.D. Ark. 1995) (Add. 35).

4. Indeed, at oral argument, Ms. Jones' counsel conceded to this Court, in response to a question from Judge Ross, that the two cases were inseparable, that discovery could not be had on the Ferguson claims without involving the President, and that the litigation should be treated as one.

5. The Cross-appellant's argument also ignores the fact that the President is a defendant here being sued for \$700,000 -- not just a witness -- and has a right to be an active participant in motions and discovery to protect his interests in the outcome of this litigation. His attorneys moreover have the right and the duty to consult him about all motions and discovery. Therefore, the litigation could not proceed on any aspect of the case without working the very distraction of the President from his official duties that the immunity he asserts is designed to protect.

6. The Opposition suggests that the President's petition to the Supreme Court is frivolous, is interposed only for purposes of delay, and raises no issues of import or consti-

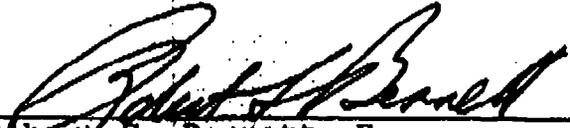
tutional magnitude. This flies in the face of the statements of both the trial judge and numerous judges of this Court, including Judge Beam's concurring opinion, which specifically stated that the President's contentions raise serious issues of constitutional dimension. Jones v. Clinton, 72 F.3d 1354, 1363 (8th Cir. 1996) (Beam, J., concurring). Rather than seeking delay, the President seeks to protect institutional freedoms of his office that have remained inviolate for over 200 years. Furthermore, contrary to Ms. Jones' assertions, the President's position throughout has been supported by the Solicitor General -- who filed briefs both in the District Court and this Court arguing that in the interests of the Presidency, the litigation should be stayed in its entirety until the President leaves office -- as well as a number of outstanding Constitutional scholars who filed an amicus brief in this Court.

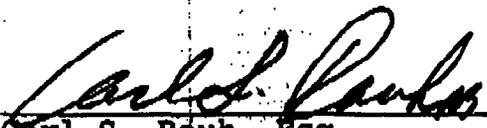
7. Finally, the Supreme Court has shown a willingness to grant certiorari to resolve disputes relating to the institutional interests of the Presidency. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); and United States v. Nixon, 418 U.S. 683 (1974). Accordingly, notwithstanding the Opposition's contentions, there is every reason to believe that the Supreme Court will take this case as well, and certainly a sufficient basis to find that there

is a significant possibility that a majority could come to a different conclusion than this Court.

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No. 96-1853

In the Supreme Court of the United States

OCTOBER TERM, 1996

PAULA CORBIN JONES

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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**QUESTION PRESENTED**

Whether a private civil action for damages against the President of the United States, based on events occurring before the President took office, should be permitted to go forward during the President's term of office.

(1)

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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**INTEREST OF THE UNITED STATES**

This is a private civil action for damages against the President of the United States based on conduct that is alleged to have occurred before the President took office. The decision below compels the President to participate in discovery and defend himself at trial while he is in office. The United States has a substantial interest in protecting the Office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be

compelled to take part in judicial proceedings in state or federal court.<sup>1</sup>

### STATEMENT

1. In May 1994, respondent Paula Corbin Jones filed a civil action against petitioner William Jefferson Clinton, President of the United States and former Governor of Arkansas, and Danny Ferguson, an Arkansas state trooper. Respondent alleged that then-Governor Clinton had sexually harassed her three years earlier, when respondent was a state employee, and that she was thereafter subjected to job-related retaliation. Compl. ¶¶ 6-34, 39. She further alleged that she was defamed in 1994 by statements, which she attributed to the President and Ferguson, relating to the alleged harassment.

Respondent filed a four-count complaint in the United States District Court for the Eastern District of Arkan-

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<sup>1</sup> The United States has participated in other cases that have presented related issues of Presidential participation in judicial proceedings. The United States participated as an *amicus curiae* in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which involved the President's immunity from civil actions for damages based on the President's conduct in office. Similarly, in *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), which involved the amenability of a sitting Vice President to a criminal indictment and trial, the United States also addressed the amenability of a sitting President to prosecution. In addition, the United States participated as an *amicus curiae* in *United States v. Poindexter*, 732 F. Supp. 142 (D.D.C. 1990), regarding the amenability of former President Reagan to a criminal subpoena relating to the Iran-Contra affair, and currently is participating in *United States v. McDougal*, Nos. 96-2606 & 96-2671 (8th Cir.) regarding testimonial subpoenas issued to President Clinton. The United States has participated as well in federal and state courts in cases involving the immunity of foreign heads of state. See, e.g., *LaFontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Anonymous v. Anonymous*, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

sas, presenting federal and state law claims against the President and Ferguson.<sup>2</sup> With respect to each of the four counts, she sought \$75,000 in compensatory damages and \$100,000 in punitive damages. Respondent did not seek injunctive relief.

In August 1994, the President filed a motion to dismiss the suit without prejudice or, in the alternative, to stay the suit until the conclusion of his service in office. In December 1994, the district court entered an order denying the President's motion to dismiss but partially granting the President's alternative motion for a stay. Pet. App. 54-77. The district court held, however, that pre-trial discovery could proceed "as to all persons including the President himself." *Id.* at 71.

2. The President and respondent filed timely cross-appeals from the district court's order. A divided panel of the Eighth Circuit affirmed the denial of the President's motion to dismiss, reversed the grant of a partial stay, and remanded with instructions to allow the suit to proceed. Pet. App. 1-31. The court held that the President "is entitled to immunity, if at all, only because the Constitution ordains it." *Id.* at 16. It then determined that the Constitution does not grant the President immunity from private suits based on his unofficial acts. *Ibid.* It reasoned that the President's absolute immunity under *Nixon v. Fitzgerald*, 457 U.S. 831 (1982), for acts within the "outer perimeter" of his official duties represents the only Presidential immunity under the Constitution. Pet. App. 8-9.

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<sup>2</sup> Count I asserts due process and equal protection claims against Clinton under 42 U.S.C. 1983. Count II asserts a claim under 42 U.S.C. 1985 against Clinton and Ferguson for conspiracy to commit the constitutional violations alleged in Count I. Count III presents a common law claim against Clinton for intentional infliction of emotional distress. Count IV presents common law claims against Clinton and Ferguson for defamation. See Pet. App. 4, 41.

The court held that it was an abuse of discretion for the district court to stay the trial in the absence of constitutionally mandated immunity. *Id.* at 13 n.9. The dissenting judge concluded that private actions for damages against a sitting President based on the President's un-official acts should be stayed until the completion of the President's term "unless exigent circumstances can be shown." *Id.* at 25.

#### SUMMARY OF ARGUMENT

1. To require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties, in violation of separation of powers principles. In both constitutional and practical terms, the demands placed upon the President under Article II are unceasing. A sitting President cannot defend himself against litigation seeking to impose personal financial liability without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to participate in the defense of a private civil suit would therefore place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions.

This Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), strongly indicates that the instant suit should be deferred. Although *Fitzgerald* involved a challenge to the President's performance of his official functions, the Court's analysis is highly relevant to the question whether litigation involving alleged pre-Presidential misconduct may go forward during the President's term of office. The Court's decision makes clear that the public interest in the President's unimpaired performance of his duties must take precedence over a private litigant's

desire to obtain redress for legal wrongs. The court of appeals erred in concluding that deferral of this lawsuit would represent an unwarranted extension of the rule announced in *Fitzgerald*. The burdens created by the litigation process pose a different threat to the Presidency than that which concerned the Court in *Fitzgerald*, but the threat is no less real. Deferral of the instant case, moreover, would be far less burdensome to the plaintiff than was the absolute immunity recognized in *Fitzgerald*, which *permanently* foreclosed the plaintiff from seeking redress in court for wrongs allegedly done by the President in his official capacity.

2. The power to stay civil proceedings is a basic and long-settled judicial power. Staying a private suit until the conclusion of the President's term of office prevents the diversion of the President's time and attention while preserving the plaintiff's right ultimately to obtain redress if her claims are determined to be meritorious. A stay therefore strikes the appropriate balance between the public and private interests involved. Because the burdens imposed by pretrial discovery are frequently greater than those imposed by the trial itself, the public and constitutional interests implicated by this suit can be adequately protected only if discovery (as well as trial) is stayed until the conclusion of the President's service.

The court of appeals erred in concluding that the threat posed by ongoing civil litigation against the President could be adequately addressed by "judicial case management." In view of the unceasing nature of the President's official duties, the requirement that the President defend against a private lawsuit during his term of office necessarily and seriously impairs his authority to balance the competing demands upon his attention. The problem is exacerbated by the fact that the President may not be at liberty to articulate publicly the precise nature of those

competing demands. In addition, reliance on case management potentially subjects sitting Presidents to broad and possibly inconsistent exercises of discretion by state and federal trial judges across the country.

#### ARGUMENT

President James Monroe observed that the duties entrusted to the President "are sufficient to employ the whole mind, and the unceasing labors, of any individual." Herman Finer, *The Presidency: Crisis and Regeneration* 35-36 (1960). This case presents the question whether, notwithstanding those continuous constitutional duties, a sitting President may be compelled to defend himself against private claims for damages, based on events that are unrelated to the exercise of his official duties and are alleged to have occurred prior to his term of office.<sup>3</sup>

The court of appeals failed to recognize the fundamental incompatibility between the private demands of civil litigation and the President's constitutional responsibilities for exercising the "executive Power" of the United States.<sup>4</sup> The court also misunderstood the

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<sup>3</sup> The case also presents one claim, the defamation claim in Count IV, that concerns statements made after the President took office. Count IV thus raises an additional and distinct immunity question under *Fitzgerald, supra*. Neither the district court nor the court of appeals addressed whether Count IV comes within the scope of the President's absolute immunity under *Fitzgerald* (see Pet. App. 9 n.7), and that issue is not before this Court.

<sup>4</sup> The United States is aware of three instances prior to this one in which a private suit against a President based on events occurring before the President took office have been heard during the President's term. Those instances are noted in the opinion of the court of appeals. See Pet. App. 14 n.10. Each of those cases was commenced before the beginning of the President's service—indeed, two were already on appeal when the President took office. *Ibid.* As far as the United States has been able to determine, none of the courts was asked to

significance of this Court's decision in *Fitzgerald*, which supports rather than forecloses the President's request to postpone this litigation. Finally, the court of appeals was mistaken in believing that the danger to the Presidency posed by suits like this one can be addressed through *ad hoc* exercises in judicial "case management." A rule that subjects sitting Presidents to suits in state and federal courts across the country, subject to the exercise of discretion by trial judges over the day-to-day management of the litigation, would leave the President's discharge of his official responsibilities in serious jeopardy. It would also enmesh state courts in the affairs of the national government and federal courts in the conduct of the head of a coordinate Branch. Only a complete stay of proceedings during the President's service in office takes sufficient account of the constitutional interests of the United States at stake in this case.

**I. COMPELLING A SITTING PRESIDENT TO DEFEND HIMSELF IN PRIVATE LITIGATION CONFLICTS WITH THE REQUIREMENTS OF THE PRESIDENT'S OFFICE UNDER ARTICLE II OF THE CONSTITUTION**

A. Proper analysis of the issue before this Court begins with the "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996); see also *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977) ("the proper inquiry focuses on the extent to which [the challenged action] prevents the Executive Branch from accomplishing its constitutionally assigned func-

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dismiss or stay the litigation on the basis of any constitutionally grounded immunity after the President took office. See *ibid.*

tions"). Separation of powers principles "require[] that a branch not impair another in the performance of its constitutional duties." *Loving*, 116 S. Ct. at 1743.

Those concerns are implicated whenever a litigant seeks to invoke the processes of the courts against the President. To be sure, separation of powers principles "do[] not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*, 457 U.S. at 753-754; see *United States v. Nixon*, 418 U.S. 683 (1974). Nonetheless, "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753; see, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992) (construing APA's judicial review provisions not to apply to President "[o]ut of respect for the separation of powers and the unique constitutional position of the President"); *United States v. Nixon*, 418 U.S. at 708 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. D. Va. 1807) (No. 14,694)) ("[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual"). Accordingly, "before exercising jurisdiction, [a court] must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 753-754.

If the President is required to defend himself against private lawsuits during his term of office, "the dangers of intrusion on the authority and functions of the Executive Branch" are manifest. The "burdens, stress, and time [associated with] litigation," *Marek v. Chesney*, 473 U.S. 1, 10 (1985), are well known. See generally *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (discussing litigation burdens); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (same); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982) (same). Learned Hand observed that, "as a litigant, I

should dread a lawsuit beyond almost anything else short of sickness and of death." Jerome Frank, *Courts on Trial* 40 (1950). Where claims focus on a defendant's actions, the defendant must devote substantial time and energy to the factual disputes underlying the claims. Among other things, the defendant must prepare for and give deposition testimony; provide the information needed to pursue and answer other forms of discovery demands; and assist his counsel in developing the factual record. In addition, the defendant must consult with his counsel on an ongoing basis about choices relating to pretrial and trial strategy.

Those burdens, while real and substantial, are ordinarily a matter of purely private concern. When they are imposed on the President, however, they implicate public and governmental interests of constitutional dimension. "The President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." *Fitzgerald*, 457 U.S. at 749, 750. The President is the sole repository of the "executive Power" created by Article II of the Constitution. *Id.* at 749-750. He bears the power and responsibility to "take Care that the Laws [are] faithfully executed." See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Take Care Clause constitutes "the Chief Executive's most important constitutional duty"). The President serves as "the sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936), and his "duties as Commander in Chief \* \* \* require him to take responsible and continuing action to superintend the military," *Loving*, 116 S. Ct. at 1750. In the words of former President Truman, "every final important decision has to be made right here on the President's desk, and only the President can make it." Edward Corwin, *The President: Office and Powers, 1787-1984* (1984).

In both practical and constitutional terms, the demands placed on the President under Article II are unceasing. The President sits at the apex of an Executive Branch that includes nearly 3 million civilian employees. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1995*, at 350 (1995). As Commander in Chief he directs the activities of over 1 million active duty service members. *Id.* at 357. Our system of government presumes, moreover, that the President will exercise ultimate authority over—and will accept political accountability for—the actions of all officials within the Executive Branch and the Armed Forces. Cf. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference to unelected agency officials is justified because “[w]hile agencies are not directly accountable to the people, the Chief Executive is”); *Myers v. United States*, 272 U.S. 52, 123 (1926) (“it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide”).

As a practical matter, the countless issues of domestic and foreign policy that demand the President’s attention fully occupy, and indeed outstrip, the capacity of the President to respond. See, e.g., Clinton Rossiter, *The American Presidency* 2, 28 (1987). In the words of one scholar, “[b]eing president is a little like being a juggler who is already juggling too many balls and, at the most frustrating moments, is forever having more balls tossed at him.” Thomas E. Cronin, *The State of the Presidency* 156 (1980). Another scholar has observed that the President “is expected to do too many jobs at once; he cannot give proper attention to them all. He must simultaneously conduct the diplomacy of a superpower, put

together separate coalitions to enact every piece of legislation required by a vast and complex society, manage the economy, command the armed forces, serve as a spiritual example and inspiration, respond to every emergency." Godfrey Hodgson, *All Things to All Men: The False Promise of the Modern American Presidency* 239 (1980). As a result, the Presidency's most precious commodity is time, and one of the most vexing problems for the President and his staff is how to divide that time among the disparate issues that call for his attention. Deadlines "rule [the President's] personal agenda," and the President typically faces "deadlines enough to drain his energy and crowd his time regardless of all else." Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* 130 (1990).

Throughout the country's history, Presidents have remarked upon the overwhelming burdens of the Presidency. Our first President, George Washington, wrote that "[t]he duties of my Office \* \* \* at all times \* \* \* require an unremitting attention." Arthur B. Tourtellot, *The Presidents on the Presidency* 348 (1964). President Jefferson explained that his duties "enjoin[ed] his constant agency in the concerns of 6 millions of people," and that even during his annual vacation, "the public business \* \* \* goes on as unremittingly." 3 Philip B. Kurland & Ralph Lerner, *The Founders' Constitution* 530-531 (1987). President John Quincy Adams said that he could "scarcely conceive a more harassing, wearying, teasing condition of existence." Tourtellot, *supra*, at 349. President Polk complained that "[t]he public have no idea of the constant accumulation of business requiring the President's attention." Finer, *supra* at 36. President Benjamin Harrison observed that "it is a rare piece of good fortune during the early months of an administration if the

President gets one wholly interrupted hour at his desk each day." Tourtellot, *supra*, at 360. President Theodore Roosevelt noted that "[e]very day, almost every hour, I have to decide very big as well as very little questions." *Id.* at 361. President Taft noted that "[o]ne trouble is no sooner over in this office than another arises." *Id.* at 363. President Wilson stated that "the amount of work a President is supposed to do is preposterous" and concluded that "[m]y work can be properly done only if I devote my whole thought and attention to it and think of nothing but the immediate task at hand." *Id.* at 365.

In the modern era of United States leadership as a world power, the responsibilities noted by earlier Presidents have only increased. President Truman concluded that "the pressures and complexities of the Presidency have grown to a state where they are almost too much for one man to endure." Finer, *supra*, at 37. President Eisenhower observed that "the duties of the President are essentially endless. No daily schedule of appointments can give a full timetable—or even a faint indication—of the President's responsibilities. Entirely aside from the making of important decisions, the formulation of policy through the National Security Council, and the Cabinet, cooperation with the Congress and with the States, there is for the President a continuous burden of study, contemplation and reflection." Tourtellot, *supra*, at 372-373. President Lyndon Johnson recounted that "[o]f all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a.m., and there were few mornings when I didn't wake up by 6 or 6:30." Lyndon B. Johnson, *The Vantage Point* 425 (1971).

The unceasing nature of the President's duties is reflected in the constitutional structure of his office. In contrast to the Congress, which is required to assemble only "once in every Year" (Const. Art. I, § 4) and which

may adjourn on a regular basis (*id.* § 5), the President must attend to his duties as Chief Executive and Commander-in-Chief continuously throughout his tenure.<sup>5</sup> The Twenty-Fifth Amendment, with its elaborate machinery for carrying out the President's functions when he "is unable to discharge the powers and duties of his office," confirms that constitutional imperative. The sponsors of the Twenty-Fifth Amendment stressed the need to ensure "that there will be a President of the United States at all times \* \* \* who has complete control and will be able to perform all the powers and duties of his office." 111 Cong. Rec. 15,595 (1965) (Sen. Bayh). In the words of one of the Amendment's principal sponsors, "this Nation cannot permit the Office of the President to be vacant even for a moment." *Presidential Inability: Hearings before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965) (Rep. Celler).<sup>6</sup>

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<sup>5</sup> Responding to the argument that a sitting President enjoys no immunity from the processes of the courts, President Jefferson stated that "[t]o comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function." Kurland & Lerner, *supra*, at 530.

<sup>6</sup> Witnesses who testified before Congress in support of the Twenty-Fifth Amendment were equally emphatic about the dangers of any interruption in the exercise of the President's powers. Clinton Rossiter, a noted Presidential scholar, stated that "an uninterrupted \* \* \* exercise of the full authority of the Presidency" was "[p]erhaps the most pressing requirement of good Government in the United States today," and former Attorney General Herbert Brownell stated that the Nation's "very survival \* \* \* may rest upon the capacity of the Nation's Chief Executive to make swift and unquestioned decisions in an emergency." *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 134-135, 214 (1964).

A sitting President cannot adequately defend himself against litigation seeking to impose personal financial liability without diverting his time and attention from the exercise of the "executive Power" under Article II. As a result, a court that compelled the President to participate as a party in the defense of a civil suit during the President's term of office would place itself in the position of "impair[ing] another [branch] in the performance of its constitutional duties." *Loring*, 116 S. Ct. at 1743. The Constitution does not permit that result.

B. This Court's decision in *Fitzgerald*, *supra*, supports the proposition that the maintenance of private suits against a sitting President would trench impermissibly on the Presidential office under Article II. In *Fitzgerald*, this Court held that the President is entitled to absolute immunity from claims for damages "for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. The Court characterized that immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.<sup>7</sup>

The Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages based on his official conduct. 457 U.S. at 751-754. To expose the President to suits for damages based on his official actions, the court reasoned, could deprive him of

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<sup>7</sup> The Court discussed in some detail historical precedents regarding the susceptibility of sitting Presidents to judicial process. See 457 U.S. at 751-752 n.31. The Court noted, *inter alia*, that such early Americans as John Adams, Thomas Jefferson, Oliver Ellsworth and Joseph Story believed the President not to be subject to judicial process. *Id.* at 751 n.31. The Court concluded that "[t]he best historical evidence clearly supports" a rule of absolute immunity for a President's official actions. *Id.* at 752 n.31.

"the maximum ability to deal fearlessly and impartially with the duties of his office." *Id.* at 752. The Court observed that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. In his concurring opinion, Chief Justice Burger also noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763.

When the President is sued for actions wholly unrelated to his official responsibilities, *Fitzgerald's* concern for ensuring "fearless[] and impartial[]" Presidential decision making is not directly implicated. The more general concerns underlying this Court's holding, however, apply with equal force. *Fitzgerald* recognizes that "[t]he President occupies a unique position in the constitutional scheme." 457 U.S. at 749; that the President should not be diverted from attending to the national welfare by "concern with private lawsuits," *id.* at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs. *id.* at 754 n.37. As explained above, the President would be faced with a "diversion of his energies by concern with private lawsuits," *id.* at 751, if he were compelled to defend himself against a private suit for damages during his term in office. That diversion would "raise unique risks to the effective functioning of government." *Ibid.* The teaching of *Fitzgerald* is that the judicial system should not lend itself to such risks.<sup>8</sup>

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<sup>8</sup> A similar lesson can be drawn from the evident immunity of a sitting President from criminal prosecution. The available evidence strongly indicates that the Framers did not contemplate the possibility

C. The court of appeals read *Fitzgerald* to mark the outer limit of Presidential immunity. Pet. App. 8-9. In the court's view, "[t]he [Supreme] Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion \* \* \* that beyond this outer perimeter there is still more immunity waiting to be discovered." *Id.* at 9. Because the instant case involves claims that are (with one possible exception, see note 3, *supra*) beyond "the 'outer perimeter' of [the President's] official responsibility," *Fitzgerald*, 457 U.S. at 756, the court of appeals concluded that *Fitzgerald* precluded the recognition of any constitutionally grounded immunity here. Pet. App. 9. And because the court of appeals believed that the President "is entitled to immunity, if at all, only because the Constitution ordains it," *id.* at 16, the court regarded *Fitzgerald* as dispositive of the question whether a sitting President may be compelled to defend against a private lawsuit during his service in office.

The court of appeals erred in asserting that deferral of litigation until the President leaves office would "extend[] presidential immunity beyond the outer perimeter delineated in *Fitzgerald*." Pet. App. 9. The plaintiff in *Fitz-*

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that criminal prosecutions could be brought against a sitting President. See, e.g., 2 Max Farrand, *Records of the Federal Convention of 1787*, at 64-69, 500 (New Haven 1911); *The Federalist* No. 69, at 416 (Hamilton) (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction \* \* \* removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law") (emphasis added). As the Court noted in *Fitzgerald*, "there is a lesser public interest in actions for civil damages than \* \* \* in criminal prosecutions." 457 U.S. at 754 n.37. In *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

*gerald* did not name former President Nixon as a defendant until nearly four years after the conclusion of his Presidency. See 457 U.S. at 740. The case therefore did not implicate—and the Court accordingly did not discuss—the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit. Rather, the Court focused on the danger that the President's willingness to discharge his official duties "fearlessly and impartially," *id.* at 752, might be impaired by the prospect of *future* suits for damages based upon the performance of those duties, see *id.* at 751-753 & n.32. The burdens imposed by the litigation process pose a *different* threat to the Presidency than that which concerned the Court in *Fitzgerald*, but the threat is no less real. Nothing in *Fitzgerald* suggests that those burdens should be deemed insubstantial where the President is sued during his term of office.<sup>9</sup>

The temporary deferral of litigation sought by the President here, moreover, is far less burdensome to potential plaintiffs than is the absolute immunity recognized in *Fitzgerald*. Under *Fitzgerald*, even a plaintiff whose most basic legal rights have been deliberately violated by the President acting in his official capacity may be permanently foreclosed from obtaining redress in the courts.

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<sup>9</sup> In the context of suits against subordinate executive branch officials, this Court has consistently recognized that "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). That concern applies with particular force to the President of the United States. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.").

Deferring the instant suit until the conclusion of the President's service, by contrast, affects only the timing of the litigation. However the issue currently before this Court is resolved, respondent will ultimately be afforded an opportunity to prove her claims, and to obtain relief if those claims are found to be meritorious.

Thus, the deferral of litigation sought here does not, as the court of appeals believed, extend "beyond" the immunity recognized in *Fitzgerald*. It is simply a different form of relief designed to prevent a different form of encroachment on the President's ability to perform his constitutional functions. There can, moreover, be no doubt that the burden on the plaintiff imposed by *Fitzgerald*'s rule of absolute immunity for official acts is far greater than the burden that would be imposed by the stay sought here. Thus, while the permanent immunity recognized in *Fitzgerald* is limited to "acts within the 'outer perimeter' of [the President's] official responsibility," 457 U.S. at 756. *Fitzgerald* in no way forecloses the temporary deferral of litigation sought by the President in this case. To the contrary, as explained above, *Fitzgerald*'s reasoning directly supports that accommodation of the public and private interests involved.

The reasoning of the court of appeals is also flawed by the court's erroneous premise that official immunity is confined to cases in which "the Constitution ordains it." Pet. App. 16. This Court has made clear that official immunity need not be grounded directly in the Constitution. See, e.g., *Butz v. Economou*, 438 U.S. 478, 497 (1978) ("the doctrine of official immunity from § 1983 liability \* \* \* [is] not constitutionally grounded"); *Pierson v. Ray*, 386 U.S. 547 (1967); *Fitzgerald*, 457 U.S. at 747 ("Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history.")

and "[t]his Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government."). *A fortiori*, no direct constitutional mandate is required for the more limited kind of accommodation at issue in this case, which defers rather than denies a plaintiff's opportunity to pursue his or her claims in court. Thus, even if Article II and separation of powers principles did not compel the postponement of private suits against sitting Presidents *ex proprio vigore*, the overriding public interest in the President's performance of his official duties would support the deferral of private civil litigation until the conclusion of the President's service in office.

## II. PRIVATE SUITS AGAINST A SITTING PRESIDENT SHOULD BE STAYED UNTIL THE PRESIDENT LEAVES OFFICE

A. The power to stay civil proceedings is a basic and long-settled judicial power. Over a half-century ago, this Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Court recognized in *Landis* that "[o]ccasions may arise when it would be a 'scandal to the administration of justice' \* \* \* if power to coordinate the business of the court efficiently and sensibly [by staying proceedings was] lacking altogether." *Id.* at 255.

The courts and Congress have recognized a variety of contexts in which the public interest may require a stay of civil litigation. For example, a postponement or stay may be appropriate during the pendency of administrative proceedings (see, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 n.13 (1979); *Ricci v. Chicago Mercantile*

*Exch.*, 409 U.S. 289, 306-307 (1973)), criminal proceedings (see, e.g., 21 U.S.C. 881(i); *Koester v. American Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976); 2 Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* § 8:07 (1986)), arbitration proceedings (*Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983)), bankruptcy proceedings (11 U.S.C. 362; *Hill v. Harding*, 107 U.S. 631, 634 (1882); cf. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 585 (1989) (FSLIC receivership)), or state court proceedings (*Heck v. Humphrey*, 114 S. Ct. 2364, 2373 n.8 (1994); *Harris County Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964)). Similarly, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 501 *et seq.*, provides for federal and state courts to grant stays in suits involving persons in military service in specified circumstances, 50 U.S.C. App. 521. See, e.g., *Semler v. Oertwig*, 12 N.W.2d 265, 270 (Iowa 1943); *Coburn v. Coburn*, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982).<sup>10</sup> The postponement of litigation in any of these circumstances may be as long as or longer than a President's term in office. Congress and the courts have thought this result justified, however, because of the weight of the public policies supporting a stay.

Staying a private suit until the conclusion of the President's term of office forestalls the "intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 754, that would result if the President

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<sup>10</sup> Although we understand that the President does not claim relief under this statute, see Pet. Reply to Br. in Opp. 8 n.5, it demonstrates—like the other examples cited in text—that reasons of public policy may in certain circumstances require postponement of civil litigation.

were required to divert his attention to the task of defending himself against personal liability and submit his schedule to the control of a coordinate Branch. At the same time, staying the suit preserves the plaintiff's right to seek relief for a meritorious claim. It affects only when, not whether, the President must answer the allegations; it merely delays, rather than defeats, the vindication of the plaintiff's private legal interests. It is thus far less burdensome for plaintiffs than the absolute immunity from liability recognized in *Fitzgerald*.<sup>11</sup>

There is no reason to expect, at least as a general matter, that staying litigation will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims. If the circumstances of a particular case suggest an unusual risk that specific evidence will be lost—for example, if the case requires the testimony of an extremely ill witness—arrangements can be made to preserve that evidence without allowing a more general commencement or resumption of the litigation. Cf. Fed. R. Civ. P. 27(a), 27(c) (perpetuation of testimony).

Special concerns regarding the impact of a stay might be raised by private claims that seek immediate equitable relief, such as suits to enjoin ongoing unlawful conduct that is wholly unrelated to the President's official duties. In that context, there may be less assurance that a plaintiff's interests would be adequately protected if resolution of the suit were deferred until the President left office. But even if it could be shown that staying a

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<sup>11</sup> A stay is preferable to dismissal without prejudice because a dismissal, unlike a stay, creates a risk that the limitations period will run before the suit is refiled. See, e.g., *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir. 1988); cf. *Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 2143 n.2 (1995); *Deakins v. Monaghan*, 484 U.S. 193, 202-203 & n.7 (1988).

particular lawsuit would seriously prejudice the plaintiff's interests, it would not necessarily follow that the litigation should be allowed to proceed while the President is in office. Where the public and constitutional interest in the President's unimpaired attention to his duties conflicts with the purely private interest of a plaintiff in obtaining immediate relief, the private interest must yield. See *Fitzgerald*, 457 U.S. at 754 n.37.

This Court need not decide, however, whether a plaintiff's interest in immediate relief could ever justify denying the President a stay during his term of office. It may be assumed, *arguendo*, that in truly extraordinary circumstances a stay would not be required. Whatever the scope of such an exception might be, it plainly would not extend to suits like this one, in which the plaintiff seeks only monetary relief. When a plaintiff seeks damages for alleged past misconduct, mere delay is highly unlikely to vitiate the relief.

The court of appeals appears to have believed that granting the President a stay would impermissibly place him "above the law." See Pet. App. 6 ("the President \* \* \* is subject to the same laws that apply to all other members of our society"; "Article II \* \* \* did not create a monarchy"). That objection disregards the temporary nature of the relief sought by the President. As noted above, a stay does not insulate the President from legal responsibility for his private actions; it merely affects the timing of the proceedings in which his liability is determined. A stay leaves the President as an individual subject to the same laws as other citizens, while protecting the vital public interest in his effective exercise of the "executive Power" of the United States.

The court of appeals also believed that a stay would infringe the constitutional right of plaintiffs to have access to the courts. Pet. App. 10, 17, 20-21. The statutory

and common law causes of action asserted here, however, may be subjected to procedural requirements and limitations designed to protect countervailing public interests. Moreover, because a stay affects only the timing of the litigation, the plaintiff's asserted constitutional interest is protected.<sup>12</sup> In this regard, we note that while the Bill of Rights guarantees the right to a speedy trial in criminal cases, see U.S. Const. Amend. VI, it lacks a similar guarantee for civil litigation.<sup>13</sup>

B. In contrast to the court of appeals, the district court held that the President is entitled to "temporary or limited immunity from trial." Pet. App. 70.<sup>14</sup> The district court declined to stay pretrial proceedings, however, allowing discovery to go forward "as to all persons including the President himself." *Id.* at 71. That disposition is incorrect.

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<sup>12</sup> As *Fitzgerald* demonstrates, in appropriate circumstances, the constitutional demands of the President's office may require a plaintiff to forfeit his or her right to legal redress altogether. If permanent immunity from liability does not offend the constitutional right of access to the courts, then, *a fortiori*, neither does the temporary deferral of litigation at issue in this case.

<sup>13</sup> The concurring opinion below is similarly mistaken in suggesting (Pet. App. 17) that a stay of the litigation would infringe the plaintiff's Seventh Amendment right to trial by jury. The Seventh Amendment addresses the question of who will decide contested issues of fact, not when such issues will be decided. See *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899) (Seventh Amendment "does not prescribe at what stage of an action a trial by jury must \* \* \* be had").

<sup>14</sup> The district court's stay of trial proceedings covered the claims against Ferguson (see pages 2-3, *supra*) as well as those against the President. See Pet. App. 71. The court concluded that the stay should extend to Ferguson because the claims against him are "integrally related to the allegations against the President." *Ibid.* The United States agrees with that conclusion.

The touchstone of constitutional analysis in this case is the conflict between the demands of the litigation process and the President's attention to the duties of his office. Pretrial discovery is a primary source of that conflict. The discovery process often lasts far longer, and consumes far more of the parties' time and attention, than the eventual trial. For a sitting President, the discovery burden would be most prominent with respect to his own deposition, and whatever other discovery requests might be presented to him. The President would also be required to work closely with his attorneys on other discovery matters, such as identifying potential sources of discovery on the President's own behalf. The President's interests as defendant could not be adequately served during the discovery process without a substantial commitment of time and effort on his part, a commitment that could only come at the expense of his official duties.

The district court's failure to take account of those burdens is directly at odds with this Court's precedents regarding official immunity. Immunity is intended not only to insulate officials from the chilling effect of potential liability for government decisions, but also "to spare a defendant \* \* \* unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," including the demands of the discovery process. *Siegert*, 500 U.S. at 232; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (same); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982) (same). Concern over the disruptive effects of pretrial discovery is a principal reason that courts resolve disputed questions of immunity at the earliest possible point, before discovery is allowed to take place. See *Siegert*, 500 U.S. at 232; *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818 (until the "threshold immunity question is resolved, discovery should not be allowed."). It is also one of the reasons why orders denying motions to dismiss on

immunity grounds are immediately appealable. See, e.g., *Mitchell*, 472 U.S. at 524-530. The law of official immunity thus reflects the recognition that pretrial discovery subjects public officials to serious and intrusive burdens. The significance of those burdens, and the need to avoid them, are at a constitutional zenith when the official in question is the President of the United States.

To be sure, on several occasions, sitting Presidents have given evidence as witnesses in federal criminal cases by means of depositions and interrogatories, while declining to attend (or being excused from attending) court to testify in person.<sup>15</sup> We know of no instance, however, in

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<sup>15</sup> We are not aware of any instance in which a sitting President has been compelled to testify at a trial, civil or criminal. President Jefferson was subpoenaed in *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), but the subpoena was directed only to documents. The President insisted that he was supplying the documents voluntarily, and he redacted portions of a subpoenaed letter that he determined should be kept confidential. See 11 *The Writings of Thomas Jefferson* 228, 363-366 (A. Lipscomb ed. 1904); *United States v. Burr*, 25 F. Cas. at 193. President Monroe was served with a subpoena to testify at a court martial. Based on the Attorney General's advice, however, he advised the court that he could not appear because his official duties were paramount. Although he stated that he would consent to a deposition, the court instead submitted interrogatories, which he answered. See Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote*, 1975 U. Ill. L.F. 1, 5-6. President Grant initially volunteered to testify at a criminal trial of a former aide, but, after consulting with his staff, he chose to give a deposition instead. *Id.* at 3. President Nixon was ordered to produce tapes from his office in response to subpoenas *duces tecum* upon the government's showing of a "demonstrated, specific need for evidence in a pending criminal trial." *United States v. Nixon*, 418 U.S. 683, 713 (1974). President Ford was ordered to and did give a deposition for the criminal trial of Lynette (Squeaky) Fromme. See *United States v. Fromme*, 405 F. Supp. 578, 580-583 (E.D. Cal. 1975). Most recently, President Clinton has given videotaped testimony in

which a sitting President has been compelled to furnish evidence in connection with a civil proceeding.<sup>16</sup> In any event, the burden of full-scale pretrial discovery for the President as defendant would be greater than the burden imposed on him as a non-party witness. As a result, the historical examples of sitting Presidents giving evidence as witnesses in criminal cases do not support the district court's decision to subject the President to full pretrial discovery in a civil case where the President himself is the defendant.<sup>17</sup> The district court's insistence on allowing pretrial discovery "as to all persons including the President himself" is therefore an unduly intrusive solution that subjects the President and his office to constitutionally inappropriate burdens.

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connection with ongoing criminal prosecutions relating to the Whitewater affair. See *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (order providing for President's videotaped testimony); *United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996).

<sup>16</sup> Testimony of former Presidents has been sought in several criminal and civil proceedings. Former President Nixon was deposed in *Fitzgerald* and in *Halpern v. Kissinger*, 401 F. Supp. 272 (D.D.C. 1975). Former President Reagan gave a videotaped deposition in *United States v. Poindexter*, 732 F. Supp. 142 (D.D.C. 1990). Former President Bush moved to quash a subpoena for testimony in a criminal proceeding in 1993, but the motion became moot when the defendant entered a guilty plea. See *United States v. Drogoul*, No. 1:91-CR-75-1-GET (N.D. Ga. order filed Sept. 21, 1993).

<sup>17</sup> The production of evidence at a criminal trial has constitutional dimensions, since the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." See *United States v. Nixon*, 418 U.S. 683, 711 (1974). A plaintiff in a civil action can assert no comparable constitutional entitlement. Cf. *Fitzgerald*, 457 U.S. at 754 n.37 ("there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions").

C. Rather than permitting this litigation to be stayed, the court of appeals endorsed the alternative of "judicial case management." Pet. App. 13. The court of appeals called on the district court to exercise its discretion to avoid scheduling conflicts that would "thwart the President's performance of his official duties," and professed "every confidence" that the district court would do so. *Id.* at 13-14. At the same time, the court of appeals indicated that only "specific, particularized, clearly articulated presidential duties" would suffice to invoke the district court's scheduling discretion. *Id.* at 16. And the court stated its expectation that the district court would "move forward with \* \* \* reasonable dispatch," "without impeding [petitioner's] right to have her claims heard without undue delay." *Id.* at 13-14, 16.

The court's reliance on "case management" to protect the office of the President is wholly misconceived. The court of appeals assumed that the President is free to turn his attention to private litigation whenever he is not occupied by "specific, particularized, clearly articulated presidential duties," Pet. App. 16, and hence that a court need only schedule litigation events to coincide with the President's free time. As explained above, however, the demands placed on the President are unceasing. See pages 10-13, *supra*. The President's superintendence of the Executive Branch requires that decisions regarding the relative priority to be given to diverse matters, and the amount of Presidential time and attention to be devoted to each of them, will be made by the President and by persons acting under his direction and control. Even during periods of time when no specific task occupies the President's agenda, moreover, "there is for the President a continuous burden of study, contemplation and reflection." Tourtellot, *supra*, at 372-373 (quoting President Eisenhower). The continuing distraction created by a

lawsuit seeking to impose substantial financial liability poses a significant threat to the President's unhindered performance of his official responsibilities.

The court of appeals' directive that this lawsuit should go forward necessarily impairs the President's authority to fashion an appropriate balance among the various demands of the office. Reliance on judicial case management, moreover, would necessarily enmesh the courts in an ongoing oversight of the President's schedule over a potentially extended period of time.<sup>18</sup> The process of case management envisioned by the court of appeals would disserve the interests of the judiciary as well as those of the President, by requiring the district court to undertake a politically charged inquiry into the relative importance of diverse Presidential activities—an inquiry for which no judicially manageable standards exist. The problem is compounded by the fact that the President may not be at liberty to provide the kind of "specific, particularized, clearly articulated" showing contemplated by the court of appeals. Particularly where sensitive matters of foreign affairs and national security are involved, the President may not be free to identify the issues that demand his attention. Indeed, precisely at moments of greatest crisis, it may be imperative for the President to convey the impression that nothing is amiss. A scheme that requires the President to identify and justify the official demands on his time to another Branch of government cannot accommodate those concerns.

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<sup>18</sup> President Jefferson long ago noted the threat to separation of powers posed by subjecting the President to civil process during his term of office: "But would the executive be independent of the judiciary \* \* \* if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?" Kurland & Lerner, at 530-531; see *Fitzgerald*, 457 U.S. at 751 n.31.

Finally, reliance on case management potentially subjects sitting Presidents to broad and possibly inconsistent exercises of discretion by state and federal trial judges across the country. Even within the confines of the federal system, it is questionable how readily such exercises of discretion can be overseen by appellate courts.<sup>19</sup> Moreover, federal courts have no readily available means of correcting erroneous exercises of discretion by state courts. Yet the exercise of jurisdiction by state courts over a sitting President would pose risks to the integrity of the President's office at least as great as, if not greater than, the risks arising from comparable exercises of jurisdiction by the federal courts. If state courts were free to proceed with private suits against sitting Presidents, cases might arise in which local antipathy to the President could adversely influence the exercise of judicial discretion.<sup>20</sup>

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<sup>19</sup> The court of appeals suggested that "[i]f either party believes the [district] court is failing to discharge [its] responsibility, the proper course is to petition this Court for a writ of mandamus or prohibition." Pet. App. 16. As a general matter, however, extraordinary writs have severely limited scope in cases involving the exercise of discretion by district courts. See, e.g., *Allied Chemical Corp. v. Daihlon, Inc.*, 449 U.S. 33, 36 (1980); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-666 & n.7 (1978) (plurality opinion).

<sup>20</sup> If this Court holds that the instant suit can go forward during the President's term of office, it is not clear whether a sitting President would have any remaining defense against being required to participate in suits in state court for acts unrelated to his official duties. On the one hand, Supremacy Clause principles might plausibly be thought to impose an independent barrier to the adjudication of such a suit. Cf. *Hancock v. Train*, 426 U.S. 167, 178-179 (1976) (Supremacy Clause requires that federal functions "'be left free' of [state] regulation," particularly "where \* \* \* the rights and privileges of the Federal Government at stake \* \* \* find their origin in the Constitution"); *Feldman v. United States*, 322 U.S. 487, 491 (1944) ("[T]he

Even the court of appeals recognized that the instant lawsuit should be adjudicated in a manner "sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. Thus, the question is not whether respondent's interest in prompt resolution of her claims must be balanced against countervailing public and governmental concerns. The question is how the competing interests can best be reconciled. The court of appeals' approach would enmesh the district court in a politically charged, and potentially extended, oversight of the President's schedule, to the likely detriment of both the President and the court. A stay would avoid that intrusion on the President's conduct of his official duties, while preserving respondent's ability to obtain redress if her claims are ultimately found to have merit.

The Founders understood "Energy in the executive" to be an essential feature of "good government," and they intended the "structure and powers of the executive department" to assure to the President "all the requisites to energy." *The Federalist* No. 70, at 423 and No. 77, at 463 (Hamilton) (C. Rossiter ed. 1961). Subjecting the President to the indefinite and unpredictable demands of civil litigation during his term in office, and submitting the management of his schedule to the superintendence of another Branch of government, would contradict the Founders' design and frustrate their purpose.

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sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."). On the other hand, there is no readily apparent statutory basis for removal of such a suit to federal court in the absence of some ground of federal jurisdiction independent of the President's official status. Cf. *Mesa v. California*, 489 U.S. 121 (1989) (construing federal officer removal statute, 28 U.S.C. 1442(a), to authorize removal only where officer asserts a colorable federal defense).

**CONCLUSION**

The judgment of the court of appeals should be reversed.  
Respectfully submitted.

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AUGUST 1996

No. 95-1853

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IN THE  
Supreme Court of the United States  
October Term, 1996

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WILLIAM JEFFERSON CLINTON  
Petitioner,

v.

PAULA CORBIN JONES,  
Respondent.

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

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BRIEF OF THE COALITION OF AMERICAN  
VETERANS AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT

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---

BRIEF OF THE COALITION OF AMERICAN  
VETERANS AS AMICUS CURIAE IN SUPPORT OF  
RESPONDENT

Coalition of American Veterans, ("Amicus") respectfully submits this brief as amicus curiae in support of the the Respondent. Pursuant to Supreme Court Rule 37(a), the parties have consented to the filing of this

brief and the written consent has been filed with the Clerk of this Honorable Court.

#### INTEREST OF AMICUS CURIAE

The Coalition of American Veterans (CAV) is a corporation which represents over 100,000 United States Armed Forces veterans, both active-duty and retired, nationwide. The CAV is opposed to extending special privileges afforded by an Act of Congress to a specified class of people, such as the Soldiers' and Sailors' Civil Relief Act, to individuals not included in that class.

#### SUMMARY OF ARGUMENT

There is no legal basis for the relief the Petitioner seeks. First, the Petitioner no longer claims that he is entitled to a stay of litigation under the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Act") because he is on active duty military status, but now seeks that same relief by analogy. Such relief remains an extraordinary remedy, despite Petitioner's protestation to the contrary. The argument by analogy instead of by specific intent still seeks an unwarranted extension of a protection afforded by Congress, and which Congress only can extend, to someone Congress did not intend to protect. The power to analogize laws is the power to create laws. Second, no court has ever held that the President is entitled to official immunity for unofficial acts. To grant the relief Petitioner seeks would be

to violate the Respondent's civil rights and place the Petitioner above the law.

## ARGUMENT

### I. THE RELIEF SOUGHT REMAINS AN EXTRA-ORDINARY REMEDY AND AN UNWARRANTED EXTENSION OF A PROTECTION AFFORDED BY CONGRESS TO SOMEONE IT DID NOT INTEND TO PROTECT

In his brief, the Petitioner no longer claims that he is on active duty military status and, hence, entitled to relief under the Soldiers' and Sailors' Civil Relief Act of 1940. Instead, the Petitioner now contends that the relief he seeks is "analogous" to relief granted under the Act. Yet, despite the fact that he no longer has a statute upon which he seeks to rely, the Petitioner asserts, "But these examples dispel any suggestion that the President ... is somehow seeking extraordinary relief ... ." (Pet. Brief, p. 37). Such is not the case. Thus, the Petitioner takes the position that he is entitled, by analogy, to the relief before the court which he now admits

In his Brief, the Petitioner states that the Soldiers' and Sailors' Civil Relief Act "provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act." At footnote 32, he states, "President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation ..."

that Congress did not grant him. The logic underlying the Petitioner's analogy is flawed. Further, the analogy itself does not bear scrutiny.

While Petitioner would have the courts create a rule of law by analogy, ostensibly because of the importance of his office to the country, he fails to acknowledge that to do so would be the creation of law by a manner which the Constitution does not allow. In our constitutional republic laws are enacted by the Congress, not by analogy. Continuing the tradition of the common law, rules are enunciated by judges to interpret and advance the law, but laws, including interpretative rules pronounced by the judiciary necessary to the proper application of those laws, are not created by analogy. Intendment, either in a proscription of the legislative branch or as necessary to the carrying out of such intendment, must be found. There is no such intendment here and none is even argued. It is conceded, in fact, that with regard to the Act in question, it does not apply, yet still a result is sought as if it did apply.

Petitioner seeks to advance his analogy argument by listing five laws and judicial rules, including the Act. Four of these constitute a "smoke screen" intended to disguise the weakness of his analogy argument now that he has admitted the inapplicability of the Act. It is clear that analogizing from the Act alone does not have convincing force because it is to argue that Congress gave leave to expand the Act beyond what was intended by its clear language. The argument does not gain strength by bringing in four more  
Petitioner's Brief, p. 36. <sub>4</sub>

examples that are a disparate congeries and which certainly were not embraced in any way in the Congressional intent expressed in the Act.

Each of the other four examples cited by the Petitioner (the Bankruptcy Code, the practice of taking criminal matters first while civil matters involving the same parties are pending, the doctrine of exhaustion of administrative remedies, and the doctrine by which claims of qualified immunity are allowed to be appealed on an interlocutory basis) are either direct proscriptions of Congress, as is the case with the Act at issue and the Bankruptcy Code, are the result of necessarily carrying out such a proscription (as when Congress proscribes an administrative agency and procedure which must be followed before relief can be sought in the courts) or they are necessary to determine the extent of such a proscription as with the threshold determination of whether a qualified immunity obtains for an act committed in an official capacity, or finally, as with the priority to given to criminal over civil matters, they have been deemed necessary for the orderly administration of courts since the early days of common law. None of these things approximate the President's present situation.

What Petitioner seeks is not an extension of what Congress intended by analogizing from what Congress stated in a law or even in a set of similar laws, nor is it an extension by analogizing of what the courts have stated. It is an extension of what neither the Congress nor the courts

have stated. It is a principle enunciated out of, and impelled by, a claim of administrative inconvenience and which only then has been analogized to a list of disparate enactments and rules which have no common thread nor authorship but which have been searched out in an effort to justify the otherwise unsupportable argument.

What Petitioner is doing is asking this Court to create, rather than interpret, the law. He seeks to create by "analogy" that which he could have sought from the legislature. The Petitioner is the President of the United States of America. If he felt that he, as President, should have been entitled to a stay under the Act or other relief by special legislative act, he could have asked the Congress to pass such a law. This lawsuit was filed on May 6, 1994. Congress has been in session several times since then. The President has had ample opportunity to ask Congress to act, but, for whatever reason, has failed to do so. To suggest that courts create such a law by "analogy" is to usurp the authority of Congress. The power to analogize law is the power to create law.

What the Petitioner really seeks here is an unwarranted extension of a protection afforded by Congress in the Act to someone Congress did not intend to protect. In the face of public outcry and for the sake of political expedience<sup>2</sup>, the President dropped his original claim that he was on active duty status and, therefore, exempt. Yet

<sup>2</sup> See "An Open Letter to the President of the United States from Medal of Honor Recipients," Chicago Tribune, May 27, 1996, and the news

now he seeks by "analogy" that same relief. Petitioner may be arguing by analogy, but the end result he seeks is the same: an unwarranted extension of a protection afforded by Congress to someone it did not intend to protect.

The use of analogy is not appropriate where Congress has expressed its intent specifically and, as the Petitioner has now conceded, the fact pattern at issue is not embraced within that intent. On the topic of analogy it is well stated, and it applies here, that "In working out the legal rights and liabilities arising from novel legal relationships, courts wisely strive to assimilate such to other long established and defined relationships to which the one in question is most similar. But analogy does not mean identity. It implies difference. Also the attendant use of established terminology only adds to the danger of carrying an analogy too far." (emphasis added). *Sturm v Ulrich* (8th Circuit 1925) 10 F2d 9, 11. Congress, in enacting a law such as the Act, considers what could be covered and defines what is covered in the final version of the bill. That which is different from that which is covered, even though it may be analogous in certain respects, is, by the intent of Congress, not covered. To argue, as petitioner does, that though he is not covered by the law, and not entitled to come within its scope, he is, nonetheless, entitled to its benefits by analogy, is not only to misconstrue the constitutional scheme for originating laws, it is to ask that that scheme be bypassed, and that laws originate with the executive branch, provided paper article, "Honored Vets Flay Clinton in Ad," Washington Times, May 26, 1996.

that it can persuade the judicial branch that it would be inconvenient not to analogize them into being.

That Congress did not intend to protect someone in the Petitioner's position with the Act is readily apparent in the case of *Boone v. Lightner*, 319 U.S. 561 (1943). In that case, Boone, a Captain, sought a stay of proceedings against him in a North Carolina civil action on the grounds that he was in the military, stationed in Washington, D.C. In holding that the petitioner was not entitled to a stay simply because he was in the military, the Court undertook an exhaustive review of the legislative history of the Act. In footnote 2, Congress discusses who is to be protected:

"Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that 'a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs. There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves, and the court would say to them, "no; your affair is a going concern; go ahead with the lawsuit. You have a lawyer ... .'"

"The House Report on this bill, No. 181, 65th Cong., 1st Sess., stated: 'Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the

defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against soldiers will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. Though not in military service, he may have property from which the income continues to come in irrespective of his presence; perhaps he may be some ne'er-do-well who only seeks to hide under the brown of his khaki ..." (p.2)." *Id.* at 566-567.

In the present case it is clear that, even if he were in the active duty military, the Petitioner is not someone Congress intended to protect. If, as the Petitioner suggests, this Court were to grant a stay "analogous" to relief under the Soldiers' and Sailors' Civil Relief Act, a number of perplexing issues arise. Would this Court feel bound to impose "analogous" restrictions found in the Act? Despite the fact that the District Court also stayed the proceedings against co-defendant Ferguson, under Section 524 of the Act, the Respondent may be able to proceed against Ferguson. *Trujillo v. Wilson*, 189 P2d 147 (Colorado, 1948). Under section 521 of the Act, the trial court would have to make a determination as to whether the Petitioner's ability to conduct his defense was materially affected by his military service. *Jamaica Savings Bank v. Bryan*, 25 NYS 2d 17 (New York, 1941). Further, could it be that, under

section 573 of the Act, the President would defer paying his income taxes? Such a thing should not be. Clearly, the relief the Petitioner seeks here is an extraordinary remedy and one not intended by Congress.

Finally, the issue of whether the President, as Commander-in-Chief of the military is entitled to a stay of civil litigation against him under the Soldiers' and Sailors' Civil Relief Act has already been raised in court. In 1962, President Kennedy sought a stay from the California Superior Court in two lawsuits which were filed against him prior to his taking office. In footnote 10, Judge Bowman points out, "the Court denied Mr. Kennedy's motion for a stay, apparently without a written opinion, and the case eventually settled." *Bailey v. Kennedy*, No. 757, 200 (Cal. Super. Ct. 1962); *Hills v. Kennedy*, No 757, 201 (Cal. Super. Ct. 1962)." (CCA p. 15, reported at 72 F.3d 1354). Just as the California Court found the President's argument to be without merit, we would urge this Court to do the same.

## II. GRANTING THE RELIEF SOUGHT WOULD PLACE THE PETITIONER "ABOVE THE LAW."

No one is above the law. It is a basic principle of our system of justice that every citizen be afforded access to the courts. "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Courts, however, have recognized in certain situations that public officials, because of the nature of their duties, have immunity for their official acts. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Petitioner, however, asserts that he should be entitled to immunity for his unofficial acts. There is absolutely no legal precedent for the Petitioner's position, and to grant the relief the Petitioner seeks would violate the Respondent's civil rights and place the Petitioner above the law.

There can be no doubt that the President is subject to the legal process. We start with the proposition that "our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal laws ..." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Furthermore, the President can be sued in a civil lawsuit. *United States v. Nixon*, 418 U.S. 683 (1974), (where the Court ordered the President to release official presidential communications despite the claim of executive privilege), *National Treasury Employees Union v. Nixon*, 492 F2d 587, 615 (D.C. Circuit 1974) (where the court held that the President was subject to judicial process in a civil case). The question, then, is whether there is any law to keep the Petitioner, in his unique position, from being sued.

There is absolutely no legal precedent for the Petitioner's contention that he is entitled to official immunity for unofficial acts. As the American Civil Liberties Union pointed out to the 8th Circuit Court of

Appeals in its Amicus Curiae brief in support of Appellee Jones, "(u)p to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official governmental responsibilities, even temporarily." *Jones v. Clinton*, Nos. 95-1050, 95-1167 (Amicus Brief, p. 17). According to Judge Bowman, both sides agree that the case of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) is controlling. (CCA Opinion at p. 8. reported in 72 F.3d 1354). In *Fitzgerald*, this Court held that the farthest immunity extends is "to acts within the 'outer perimeter' of {the President's} official responsibility." Id. at 756. Further, as Chief Justice Burger points out in his concurrence, the President's immunity "does not extend beyond such actions." and "a President {is} not immune for acts outside official duties." Id. at 761 n.4, 759. Again, the Petitioner asks this Court to place him above the law. His request should be denied.

The delay the Petitioner seeks would also jeopardize the Respondent's case and place him above the law. The Petitioner downplays the potential effect of a delay, but justice delayed is justice denied. Witnesses die. Evidence is lost. Memories fade. In his concurrence, Judge Beam recognizes this fact:

"Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chase in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to

the workings of the federal tribunal." CCA opinion, p. 19, reported at 72 F.3d 1354

Again, Petitioner has cited no legal precedent for placing himself above the legal rights of the Respondent and, hence, above the law.

The Petitioner's assertions also raise another perplexing issue. Let's assume for a moment that the Petitioner had been charged with a crime arising from the alleged encounter. If Petitioner had been charged with indecent exposure or solicitation as a result of the incident complained of, this Court would have no legal precedent for staying any criminal action or impeachment proceedings. Yet according to the logic the Petitioner proposes, if such criminal charges were filed, the state would be able to go forward on behalf of the victim but the victim herself would have no such right in a civil court. In fact, should this civil action be allowed to go forward, depending upon the evidence adduced at trial, it is not beyond the realm of possibility that criminal charges - and even resulting impeachment proceedings - could be instituted against President Clinton.

#### CONCLUSION

There is no legal basis for this Court to grant the relief Petitioner seeks. What the Petitioner seeks by "analogy" is an unwarranted extension of a protection afforded by Congress under the Soldiers' and Sailors' Civil Relief Act to someone Congress did not intend to protect.

The power to analogize laws is the power to create laws. Moreover, because the power to analogize laws would then be the power to enact laws that would be different than the laws intended by the legislative branch, the person analogizing the law would then be invested with the authority to make laws which the legislature had not intended, and possibly had rejected or did not want. He would then be above the legislature, and, therefore, above the law. This would be antithetical to everything which our Constitution stands for. No argument of expediency justifies such a result. To grant such relief would violate the Respondent's civil rights and place the Petitioner above the law.

This 9th day of September, 1996.

Respectfully submitted,

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IN THE  
*Supreme Court of the United States*

OCTOBER TERM, 1996

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WILLIAM JEFFERSON CLINTON,

*Petitioner,*

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PAULA CORBIN JONES,

*Respondent.*

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ON WRIT OF *CERTIORARI*  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL  
LIBERTIES UNION IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICUS*<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Since its founding in 1920, the ACLU has sought to ensure that people whose constitutional or statutory rights have been denied have an effective means of redress. The ACLU has participated directly or as *amicus curiae* in many of this Court's cases concerning immunity of public officials, including the President. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The ACLU takes no position on the truth or falsity of the allegations of the Complaint. *Amicus* does assert that a President, sued for civil damages for actions taken outside the scope of his official responsibilities, is not entitled to an automatic (or nearly automatic) stay of the entire case until he leaves the presidency.<sup>2</sup>

## STATEMENT OF THE CASE

Respondent alleges that while President Clinton was Governor of Arkansas he made unwanted sexual advances toward her and that, when she rejected these advances, she

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<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

<sup>2</sup> This case arises in the context of allegations of actions, most of which occurred prior to Mr. Clinton being elected President. However, the arguments made by the President would apply equally to actions taken by a sitting President if those actions were outside the official responsibilities of the presidency. Thus, the critical factor is not when the actions occurred, but whether they were within the President's official responsibilities.

suffered in her employment with the Arkansas state government. Respondent also asserts that her initial intention was not to sue. However, when an article appeared in the press, which she believed implied that she had had a consensual sexual relationship with the President while he was Governor, she "saw herself as held up falsely to public scorn," *Prime Time Live* (ABC television broadcast, June 16, 1994) (transcript attached to Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity), and, given the discrepancy between this account of the incident and the account she had given to her friends, believed her friends might believe she had been untruthful. In addition, she alleges that the President denied her account of the incident, further casting doubt on her truthfulness.

The President asserts numerous defenses to these allegations, not the least of which is to deny respondent's account of the facts. However, prior to raising those defenses (and with the court's permission), the President filed a motion to "dismiss on the basis of Presidential immunity." *Jones v. Clinton*, 869 F.Supp. 690, 692 (E.D.Ark. 1994).

The district court denied the motion. *Id.* at 698. After reviewing the historical record and relevant case law, the court found that the Constitution itself was "silent on all of this" and that there was no dispositive case law. The court then summarized its holding with the following observation:

[T]his Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writing of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that

even the sovereign is subject to God and the law.

*Id.*

After rejecting the broad assertion of immunity, the court next considered a "limited or temporary immunity from trial." *Id.* The court first acknowledged "the necessity to avoid litigation, which might also blossom through other unrelated civil actions and which could conceivably hamper the President in conducting the duties of this office . . . [and] could have harmful effects in connection not only with the President but also with the nation in general." *Id.* The court then discussed the specific facts of this case, finding that respondent's claims did not seem to be "of an urgent nature." *Id.* at 699. Relying on the "equity powers of the Court" and Fed.R.Civ.P. 40, the court ruled that it would "put the case on hold, as far as trial is concerned." 869 F. Supp. at 699. Finally, the court held that there was "no reason why the discovery and deposition process could not proceed as to all persons including the President himself." *Id.*

The President appealed and the court of appeals generally affirmed, one judge dissenting. *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996). Judge Bowman, on behalf of the majority, held that the burden was on the President to establish the necessity for delay, either in the form of a rule of law, or in the specific circumstances of the individual case. Finding no dispositive decision of this Court, the court of appeals proceeded to balance the interests involved. It did so "'guided by the Constitution, federal statutes, and history' and . . . informed by public policy." *Id.* at 1358, citing *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982). More specifically, the decision below closely followed the analytic structure used by this Court in *Fitzgerald*, another case involving presidential immunity. Based on this informed balancing of interests, the court then concluded that "the Constitution does not confer upon an incumbent President any

immunity from civil actions that arise from his unofficial acts." 72 F.3d at 1363.

This Court granted the President's petition for a writ of *certiorari* and the President, joined by the United States and an *amicus* group of distinguished law professors argues that the district court and the court of appeals were in error. Each proposes a rule of law that would make it completely or virtually impossible for any person to pursue a civil suit for damages for actions taken by a President outside the scope of his official duties while the President holds office.

### SUMMARY OF ARGUMENT

Under *Nixon v. Fitzgerald*, 457 U.S. at 756, a President's entitlement to absolute immunity does not apply to actions taken beyond "the outer perimeter" of his official responsibility." The question presented here is whether a claim for damages that would otherwise be permissible under *Fitzgerald* should automatically, and in every case, be "deferred" until the expiration of the President's term in office.<sup>3</sup>

We respectfully suggest that the answer to that question is no for two fundamental reasons. First, the notion of deferring any litigation activity involving the President for up to eight years in all damage cases is inconsistent with our nation's deeply held view that no person is above the law.

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<sup>3</sup> Although the motion in the trial court was a motion to dismiss on the basis of "Presidential immunity," the President now uses the term "deferral" rather than "immunity" to describe the relief sought. Because the President seeks a *per se* rule of law to mandate deferral, and relies upon "immunity" cases such as *Nixon v. Fitzgerald*, this semantic shift is of no significance. The President's request is for a form of immunity, albeit temporal rather than absolute. This brief uses the terms "delay," "deferral," and "immunity" interchangeably to reflect the relief sought by the President.

Second, the argument in favor of an automatic stay in all cases, regardless of circumstances, undervalues the very real prejudice that such a delay may create to aggrieved litigants. Among other things, memories fade and evidence becomes stale. The odds of prevailing on even nonfrivolous claims thus inevitably decline.

In some cases, that price may be inescapable. In others, it surely is not. Trial judges can and should be trusted to balance these competing interests with due deference to the special burdens faced by the President in fulfilling his duties. In particular, a trial court may fully utilize its authority over the pace and procedures of litigation to minimize the demands on the President. An automatic deferral of all litigation would, on the other hand, strip trial judges of their traditional case management responsibilities and effectively expand a President's absolute immunity from damages well beyond the carefully defined limits set forth in *Fitzgerald*.

The law disfavors immunities. Accordingly, the burden is upon the party seeking an immunity to establish its need. Neither the President nor his *amici* acknowledge this well-established rule,<sup>4</sup> nor do they seek to satisfy it except in the most general way -- by emphasizing the importance of allowing the President to conduct the nation's business with-

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<sup>4</sup> The President does not explicitly address the burdens in cases such as this. He argues that the entire case should be delayed until he leaves office. Brief for the Petitioner (Pet.Br.) at 10. The United States argues that the entire case should be stayed unless respondent can establish "truly extraordinary circumstances [under which] a stay would not be required." Brief for United States as *Amicus Curiae* in Support of Petitioner (United States Br.) at 22. The law professors argue that the entire case should be delayed unless respondent establishes an "unusual circumstance [of] compelling need." Brief *Amicus Curiae* of Law Professors in Support of Petitioner (Law Professors' Br.) at 16. All three briefs argue that, to the extent the rule is less than absolute, this case does not fit the grounds for any exception.

out undue distraction. We agree with the importance of that interest, as did both courts below. The duties of the President of the United States, particularly with respect to foreign policy, are uniquely demanding. Presidents are called upon, often at all hours, to respond to national crises. But, as both courts below also held, it simply does not follow that no litigation can ever take place against a sitting President.

One of the major fears seems to be a threatened avalanche of frivolous lawsuits motivated by partisan political considerations. In our view, that fear is overstated. Nothing in the historical record supports it. Trial judges already have an arsenal of weapons at their disposal to deal with frivolous lawsuits if they occur. Finally, if not deterred by the prospect of sanctions, such lawsuits will be routinely dismissed with little or no demands on the President's time.

The difficult issue arises in nonfrivolous cases where the stakes are undeniably higher, both for the President and the opposing litigant. Even in this context, however, the demands on a President's time necessarily vary at different stages of the litigation, and from case to case. The absolute rule proposed by the President in this case does not take account of these differences. Instead, it effectively obliterates the line between official and unofficial conduct that this Court carefully established in *Fitzgerald* as the basis for a President's absolute immunity.

The President is not like any other litigant. But, like any other litigant, the President should still be required to justify a requested delay in the proceedings by showing that, given the particular phase of the case (*e.g.*, motion to dismiss, deposition, interrogatory), the suit will significantly interfere with his ability to carry out the specific duties of his office then commanding his attention, and that his ability to carry out those duties cannot be preserved by a less drastic alternative than a potential eight-year stay. The decision below is consistent with that approach and should be affirmed.

## ARGUMENT

### I. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT THAT THE PRESIDENT HAS THE BURDEN OF ESTABLISHING THAT, AFTER THE RESPECTIVE INTERESTS ARE BALANCED, IMMUNITY IS WARRANTED

The lower courts found that neither the Constitution nor any decision of this Court provides an authoritative answer to the question presented by this case. Those courts also found that, in determining the scope of any claim for immunity, the court must balance the respective interests with the burden of establishing the need for immunity on the party seeking immunity. *Jones*, 869 F.Supp. at 697-98. Those conclusions are correct and should be affirmed.

In *United States v. Nixon*, 418 U.S. 683 (1974), this Court unanimously held that the President could be compelled to provide evidence in a pending federal criminal case under appropriate circumstances. The Court first held that it was the province of the courts to determine the scope of any privilege, including one asserted by the President. *Id.* at 703-05. In determining the scope of any privilege, the court must balance the competing interests. *Id.* at 711-12. Furthermore, a generalized interest asserted by the President (in that case, confidentiality) cannot outweigh the specific interest in providing relevant evidence in a criminal case. *Id.* at 712-13. The Court also acknowledged the special care that must be taken in light of the unique position of the presidency and was careful to limit its holding to criminal cases. *Id.* at 712-16.<sup>5</sup>

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<sup>5</sup> In a number of subsequent cases, these principles have been applied and Presidents have been required to give evidence and even testimony in criminal cases. See *United States Br.* at 25, n.15.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court rejected the argument that federal officials were absolutely immune from damages for actions taken within the scope of their official duties. The Court held that any person seeking an immunity has the burden of establishing "that public policy requires an exemption of that scope." *Id.* at 506. The Court acknowledged that some officials could meet that burden and would be allowed absolute immunity. 438 U.S. at 503-17.

In *Nixon v. Fitzgerald*, 457 U.S. 731, the Court held that the President was one of the officials entitled to absolute immunity in some instances. Specifically, the Court held that the President was absolutely immune from damages for actions taken "within the 'outer perimeter' of his official responsibility." *Id.* at 756.

Noting that "[t]he President occupies a unique position in the constitutional scheme," *id.* at 749, the Court in *Fitzgerald* concluded that absolute immunity was warranted for actions taken within the scope of the President's official responsibilities for two reasons.<sup>6</sup> First, "damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 & n.32. Second, a suit could "distract a President from his public duties to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753.

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<sup>6</sup> In explaining its holding, the Court reviewed the Constitution, history and the common law. The Court held that it must weigh "concerns of public policy, especially as illuminated by our history and structure of our government." 457 U.S. at 747-48. With respect to the President, the Court found that common law provided little guidance and that "the inquiries into history and policy . . . tend to converge." *Id.* at 748. No fair conclusion concerning the outcome of this case can be drawn from the limited and fragmentary historical evidence.

As the President acknowledges, the first rationale does not apply here because the complaint is based on actions that allegedly took place before he assumed office. The concern about distraction is a real one. However, *Fitzgerald* certainly does not hold that an automatic stay is appropriate in all cases during a President's incumbency. In many cases, perhaps most, the issue will not even arise because absolute immunity will attach. Moreover, *United States v. Nixon* suggests that all of the concerns about distraction are insufficient if balanced against sufficiently weighty concerns. See also Section II.A.1.

In short, none of these authorities provides a definitive answer to the question raised by this case. In fact, only three clear rules emerge. First, in measuring the need for, and scope of, a claim of immunity, the burden of proof is on the party seeking immunity. *Butz*, 438 U.S. at 506.<sup>7</sup> Second, as all parties recognize, in determining whether to acknowledge a claim of immunity, the Court must balance the interests of the respective parties and the public interest. Third, the problems created by judicial acts that affect the President's schedule are insufficient, if balanced against other, sufficiently weighty concerns, to cause the courts to grant an absolute immunity from participation in court proceedings. Thus, the structure of analysis utilized by the lower courts was correct.

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<sup>7</sup> To the extent the President and his *amici* argue to the contrary, they are simply wrong. See Law Professors' Br. at 16, United States Br. at 22.

## II. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT THAT THE INTERESTS OF THE PRESIDENT, ALTHOUGH SUBSTANTIAL, WHEN BALANCED WITH THE INTERESTS OF RESPONDENT, DO NOT JUSTIFY AN AUTOMATIC DISMISSAL OR STAY OF THE ENTIRE CASE

### A. The Interests Of The President

The President and his *amici* suggest two major policy interests to support a broad immunity in this case: to prevent the President from being distracted from the duties of his office and to preserve the separation between the executive and judicial branches. As noted, this Court has already held that neither of these considerations, either separately or in conjunction, prevents the courts from requiring the occupant of the presidency from providing evidence in court under appropriate circumstances. Balancing the relevant factors in this case, neither factor, either alone or in conjunction with the other, should require the courts to establish a rule granting an automatic delay of a civil suit for damages for actions taken outside the scope of presidential responsibilities.

#### 1. Distraction

There can be no question that the President, as any defendant, may be called upon to expend time in his defense. It also cannot be seriously denied that there may be occasions when the time required will be substantial and when the time being spent will divert him from his attention to his duties as President. Finally, this diversion may occur at the discovery phase as well as at trial.

There is a strong national interest in ensuring that the President not be unduly distracted from his responsibilities as President. The President and his *amici* are correct when

they suggest that the presidency is a unique office with uniquely broad responsibility. Particularly in the area of foreign policy, the President often speaks for the nation in a way that no other public official can. Moreover, foreign policy problems, in particular, are apt to occur at all hours and Presidents are awakened in the middle of the night to attend to vital matters affecting the entire nation and even the world. Foreign policy crises can be of singular importance, involving matters of war and peace, life and death. Thus, the first concern raised by the President -- distracting him from his duties -- is an important one.

However, this concern can be overstated. First, the President emphasizes that the executive branch, unlike the legislative or judicial, is headed by a single official. This means, he argues, that he alone must be available to make decisions 24 hours a day. Of course, many "presidential" decisions are made by lower level officials and never even presented to the President. Moreover, the same singularity applies to state governors who, within their sphere of responsibilities, are the lone, final decisionmakers.

The President must be available 24 hours a day, but that does not mean that Presidents actually work 24 hours a day. Of course they do not. All Presidents do, in fact, sleep, vacation, and engage in nonpresidential social and political activity.<sup>8</sup> Depending on their personal management styles, Presidents have worked more or less demanding schedules. Thus, President Carter was famous for working long hours,

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<sup>8</sup> The President suggests that no standards exist or could be developed to guide the courts in distinguishing "political" from "official" activities. Pet.Br. at 32. That is, of course, incorrect. For example, the President himself makes that judgment every time he travels and decides whether to bill the national committee or the taxpayers for the trip.

President Reagan for working at a more relaxed pace.<sup>9</sup>

Moreover, like the concern for confidentiality in *United States v. Nixon*, the concern for the President's time is generalized, not specific. Although there will be occasions during litigation when the President is called upon to expend significant time on his defense, there will also be occasions and even entire cases when he is not required to spend any substantial time on defense.

Many suits against an incumbent President are likely to be frivolous.<sup>10</sup> Courts have ample tools at their disposal for quickly dispensing with frivolous litigation, and it is fair to presume that those tools will be quickly employed when the President is a defendant. See Fed.R.Civ.P. 12, 12(f), 56. Furthermore, courts have broad authority to impose sanctions on parties and lawyers who file lawsuits "for any improper purpose, such as to harass"; lawsuits that lack eviden-

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<sup>9</sup> See e.g. Lou Cannon, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* (Simon and Schuster, 1991) at 125 ("Reagan wasn't kidding in the slightest when he told television interviewer Charlie Rose during the 1980 campaign, 'Show me an executive who works long, overtime hours and I'll show you a bad executive'"); Hedrick Smith, *et al.*, *REAGAN THE MAN, THE PRESIDENT* (MacMillan Publishing, 1980) at 152.

<sup>10</sup> "Nixon Ready to Testify," *The National Law Journal*, Sept. 29, 1980, at 27:

According to presidential counsel Lloyd Cutler's office, Mr. Carter hasn't been named in any suits for personal damages except those in which the president is cited along with a number of other defendants and quickly dismissed from the case. Mr. Ford's lawyer, Dean Burch, of Pierson, Ball & Dowd, of Washington, D.C., said the former president has been slapped with a number of suits relating to his pardon of Mr. Nixon, but "[t]o be candid I just refer them to Justice and don't worry about them." None of the suits has survived summary judgment.

tiary support"; and lawsuits that are lacking in legal basis. Fed.R.Civ.P. 11. Courts also have the power to award attorneys' fees, cite parties for contempt, and impose sanctions under their inherent powers. *Id.* (committee comments); *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

The President suggests that these devices will be ineffective in preventing frivolous litigation against a President because those bringing the suit are often more interested in the publicity than in the result of the action. However, the attention paid to those bringing allegations against a President comes not from the court proceedings, but from the factual allegations themselves and the media attention surrounding them.<sup>11</sup> Even if the President is given the kind of immunity he seeks -- a stay of proceedings until the end of his presidency -- a complainant is free to do what has already been done in this case: make public charges and file a complaint. The complainant is free to outline the evidence he will put forth at trial. And he will have the added advantage that he can rightly say that the President has chosen to hide behind presidential immunity rather than honestly confront the charges.<sup>12</sup> The only practical method for dealing with frivolous allegations is swift action under the Federal Rules to dismiss such cases.

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<sup>11</sup> The President was asked questions about respondent's claims in this suit during a meeting with a prominent world leader. Hentoff, "A Day in Court for Paula Jones," *Washington Post*, Nov. 12, 1994, at A25. This encounter would likely still have occurred even if there were a rule that suits of this kind be stayed until the end of a President's term of office.

<sup>12</sup> If this Court really wanted to guard against the danger of frivolous allegations distracting a President, it would have to prohibit citizens from making public allegations against the President, whether or not they actually file a complaint or proceed to trial. But such a rule would clearly violate the First Amendment.

It is in nonfrivolous cases that the plaintiff's interest in redress and the drain on the President's time are both likely to be maximized. The President's solution to that dilemma is to favor a rule in every case granting the President an automatic stay during the duration of his presidency. That solution entirely discounts the plaintiff's interest, however; and although it might be the right answer in some cases, it should not be the automatic answer in all cases.

The concern about the President's time applies equally in the case of injunctive relief sought against the President, whether that injunctive relief is based on actions taken outside or within the scope of his official responsibilities. Even with regard to actions taken within the President's responsibilities, where damages may not be obtained, this Court has implicitly held that injunctive actions may go forward. In the immunity cases, the Court repeatedly cites *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for the proposition that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President . . . ." *Nixon v. Fitzgerald*, 457 U.S. at 753-54; *United States v. Nixon*, 418 U.S. at 707. *But see Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992)(Scalia, J., concurring).

The continued viability of *Youngstown* cannot be explained by the notion that a civil case seeking injunctive relief will invariably require less of the President's time than a civil case seeking damages. There will be cases in which that is so and cases in which it is not. Thus, the danger of diversion of the President's attention from matters of state is insufficient, standing alone, to justify an automatic stay or dismissal of litigation.

Similarly, *United States v. Nixon* stands for the proposition that despite the distraction that will inevitably flow, the President can be compelled to provide evidence, including

testimony, in a criminal case. In this case, the President and his *amici* argue that the case against defendant Ferguson should also be dismissed or stayed because the demands on the President's time as a potential witness would be so great. In other words, they argue that in a civil case, the rule of law should be the opposite from that in *Nixon*. Were this distinction to have value, it could not be as a result of any suggestion that being a witness in a civil case will inevitably involve more of a demand on the President's time than being a witness in a criminal case.

Thus, both *Youngstown* and *Nixon* must stand for the proposition that distraction to the President, while relevant, is insufficient, standing alone, to justify any immunity or stay. Where the distraction to the President is the principal factor supporting immunity, the critical issues are how great the distraction is likely to be, whether that distraction can be mitigated through less drastic alternatives than a stay, and what impact a stay will have on plaintiff's competing interests. By definition, those judgments can only be made on a case-by-case basis. Indeed, those judgments should be made at each phase of each case. See Section III.

Finally, the President suggests that if this Court were to affirm, it would signal a change in law and would invite a torrent of litigation, some abusive, against sitting Presidents. All parties agree that there have so far been few such suits filed. Significantly, however, the fact that there have been some suits in the past suggests that, contrary to the President's assertion, the common understanding of history has been that such suits were possible. Moreover, the small number of prior cases suggests that the President's fears of an explosion of nonfrivolous litigation are misplaced. *Jones v. Clinton*, 72 F.3d at 1362.<sup>13</sup>

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<sup>13</sup> As previously noted, substantial sanctions already exist against the  
(continued...)

There is an additional reason suggested by the court of appeals for rejecting the President's speculative fear of an avalanche of litigation. A President only interacts with a limited number of people in his unofficial capacity. "Thus, the universe of potential plaintiffs who might seek to hold the President accountable for his alleged private wrongs via a civil lawsuit is considerably smaller than the universe of potential plaintiffs who might seek to hold the President accountable for his official conduct." *Id.*

## 2. Separation of Powers

The President and his *amici* also argue that presidential immunity is necessary to preserve the separation of powers. In particular, the President argues that if a President moved for a continuance on the ground that he had to attend to an urgent matter of national interest, and the Court denied the motion, "the Court would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them." Pet.Br. at 30.

We agree that the President should not be treated as an ordinary litigant. Substantial deference should be given to his assertion, in a particular context, that his official duties require additional time or rescheduling of a particular matter. The history discussed by the President, however, convincingly demonstrates that the courts have already been, and presumably will continue to be, sensitive to the President's unique status as a litigant. *Id.* at 18, n.17, at 28, n.25. *See also* United States Br. at 25, n.15.

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<sup>13</sup> (...continued)

filing of frivolous lawsuits and such lawsuits will rarely, in any event, command much of the President's time. *See* p.12-13, *supra*. The fear that sitting Presidents will frequently be subject to nonfrivolous litigation for their private behavior rests on a supposition about the behavior and character of our Presidents that this Court should not indulge, and that history does not support.

Despite this history, the President suggests that it is improper or at least unseemly for the courts to be involved in executive matters. Thus, both he and his *amici* challenge the suggestion of the court of appeals that the trial courts would utilize sound principles of case management to prevent abuse of the President's time. More fundamentally, the President argues, any judicial inquiry into the value of the President's time only highlights the separation of powers issue.

It is well-settled, however, that the judiciary has not only the power but the duty to review the actions of the other coordinate branches. This principle was established by the Court almost two centuries ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). More recently, in *United States v. Nixon*, 418 U.S. at 707, this Court applied this principle to President Nixon's attempt to use a claim of executive privilege to insulate his presidential papers and tapes from a subpoena. In rejecting President Nixon's claim, this Court relied on the Constitution's grant of power to the judiciary, as well as its own holding in *Marbury*, in concluding that such an expansive view of separation of powers principles would "gravely impair the role of the courts under Article III." 418 U.S. at 707.

In this case, the concern about interference with the other branches is less than in *Nixon* and *Marbury*. In those cases, this Court upheld its own authority to review actions of the executive and legislative branches taken in their official capacity. In this case, by contrast, the actions at issue arose before Mr. Clinton became President, and the dispute concerns scheduling of the President's time, not review of his official actions. The interference with executive functions and the separation of powers concerns are accordingly less.

## B. The Interests Of Plaintiffs

Although the President and his *amici* do not appear to directly address the question, *see, e.g.*, United States Br. at 21-22, it is clear that, in an appropriate case, immunity would not shield the President from being subjected to injunctive relief, even for acts committed at the center of his responsibilities as President. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579. It seems even more clear that the President could be subjected to injunctive relief for acts committed either before his presidency or committed during his presidency but irrelevant to his responsibilities. Thus, for example, a President would not be permitted to rely on any immunity doctrine, were his or her spouse to seek dissolution of the marriage; and a court would have the authority to resolve issues of child custody and support, notwithstanding that they affected the occupant of the presidency. *See, e.g.*, Pet.Br. at 42.

Assuming, therefore, that immunity does not automatically prevent a court from issuing injunctions against the President, whether the underlying issues arise out of his duties or not, the President's argument in this case appears to be that any plaintiff's interest in a damages remedy is always significantly less than any plaintiff's interest in injunctive relief. *See id.* Although this proposition may often be true, it cannot be said that it is always true. Adoption of the President's absolute view of immunity would thus result in some less important cases, pled to seek injunctive relief, going forward, while other more important cases, pled to seek damages, are long delayed. It is difficult to imagine the justification for such a rule.

In addition, cases seeking damages are often not purely, and sometimes not even primarily, about money. The ACLU takes no position on the motives of respondent in this case. However, she asserts that her interest in this case

is not in obtaining damages, but in restoring the damage that has been done to her reputation. Delay in obtaining damages can be overcome by the devices suggested by the President, including an award for past action in present dollars or an award of interest; although to plaintiffs of limited means, that delay may cause irreparable harm. Damage to one's reputation cannot be overcome. If respondent is correct, both in her version of the events and in her assertion of damage to her reputation, that damage will continue for the years of the Clinton Presidency. In this respect, the harm respondent asserts is continuing harm, as is the harm asserted when a plaintiff seeks injunctive relief. Her interest in repairing the damage she believes has been done to her reputation is no less important than the interest of many plaintiffs seeking forms of injunctive relief. It thus merits no greater immunity.

Moreover, as Judge Beam suggested in his concurrence below, delay in obtaining relief is not the only important effect of delay. "Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." 72 F.3d at 1363. The suggestion by the United States that testimony can be preserved, United States Br. at 21, of course applies to only the foreseen calamities, probably a less common category. At least one of respondent's claims might be extinguished if she were to unexpectedly die. 72 F.3d at 1364.

Finally, and perhaps most importantly, the ACLU acknowledges that the nation has an interest in ensuring that the President attend to his awesome responsibilities. However, the nation also has an interest in equal justice under law. Up to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporally. *Imbler v. Pachtman*, 424 U.S. 409 (1976), *Stump v. Sparkman*, 435 U.S. 349 (1978)(prosecutors and judges subject to

suit for acts outside their official responsibilities). The nation has an interest in ensuring that our system of justice, rightly a matter of national pride, is available to all of its people, regardless of whether the party is high-born or low, holds high office or does not. That interest -- that compelling interest -- is far more important than the facts of this case. That interest, combined with the other interests of plaintiffs seeking redress for harms, compels rejection of a rule that automatically immunizes the President from civil suits during the duration of his incumbency.

### **III. THE GRANTING OF IMMUNITY SHOULD BE DECIDED AT EACH PHASE OF A CASE AND NOT FOR THE CASE AS AN ENTIRETY**

The district court concluded that it would delay the trial of this case but would not delay the discovery. The district court was correct in concluding that the question of a stay or delay of this case should be decided at each phase and not for the case as a whole. At the same time, the court of appeals also correctly held that no particular phase of a case should be given an automatic stay and that it was an abuse of discretion for the district court to prejudge the question of delay of trial before that issue is ripe.

The specific facts of this case illustrate the need to look at the circumstances of each case rather than applying an automatic rule. The President asserted in his motion in the district court that, if his immunity claim were denied, he would be likely to move to dismiss on the grounds of statute of limitations, laches, and failure to state a claim. Each of these bases for a motion to dismiss must be established on the face of the complaint, and each presents a pure issue of law. Fed.R.Civ.P. 12. It will require little or none of the President's time for his counsel to file and argue those motions. If any of those motions are meritorious, the case will

be dismissed and will have required little or no expenditure of time by the President. Accordingly, a generalized concern over the President's time provides no basis for dismissing or adjourning this case prior to resolution of motions to dismiss.

The President and his *amici* suggest the need for a broader stay by arguing, correctly, that discovery can be as time consuming, and therefore as distracting, as trial. Of course, as suggested above, cases have more phases than discovery and trial, but even looking solely at the discovery phase, it is certainly true that some forms of discovery, such as the President's deposition, would inevitably require a considerable expenditure of his time. However, other forms of discovery, such as production of documents, are likely to require substantially less attention by the President. The district court has considerable authority to order that discovery proceed in the manner least disruptive of the President's time. For example, as trial courts have in the past, the district court in this case could require that any questioning of the President be done by written interrogatories. Fed. R.Civ.P. 26(c), 31. The lower courts' decisions in this case permit the President to seek such relief at an appropriate stage. *Jones v. Clinton*, 72 F.3d at 1362-63.

Both lower courts agreed that no automatic stay should be granted at any phase of this case. However, the court of appeals reversed the decision of the district court to delay trial, finding that the trial court had, in effect, granted an automatic stay of that phase of the case and had therefore abused its discretion. *Id.* at 1361. That decision was correct. The decision concerning trial is premature. If the President's alternative bases for moving to dismiss are meritorious, trial will never occur. If this case does reach a trial stage, a decision concerning timing can be made at that time.

In short, the President's request for an absolute rule of temporal immunity ultimately rests on three flawed propositions: that suits seeking injunctive relief will always require less expenditure of time than suits seeking damages, that plaintiffs seeking damages always have a less compelling need for immediate relief than plaintiffs seeking injunctive relief, and that all phases of all cases are equally distracting for a President. The lower courts properly rejected these propositions and properly held that questions of temporal immunity from civil damages should be decided at each phase of each case.

### CONCLUSION

For the reasons stated above, the judgment below denying the President's request for an automatic stay of all phases of this case for the duration of his presidency should be affirmed.

Respectfully submitted,

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