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Documents] [2]

No. 95-1853

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM JEFFERSON CLINTON,

Petitioner,

v.

PAULA CORBIN JONES,

Respondent.

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

**BRIEF AMICUS CURIAE OF LAW PROFESSORS
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Statement of Interests of Amici Curiae	1
Summary of Argument	4
Argument	5
I. Temporary Presidential Immunity from Private Suits is Fairly Implied in Article II and in Traditional Principles of Separation of Powers	6
A. Presidential Duties Under Article II	7
B. Separation of Powers	12
C. Absence of a Compelling Counter- vailing Interest	15
II. The Temporary Immunity Should Extend to Discovery and Other Pretrial Matters	16
Conclusion	17

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Pages</i>
Atlee v. Nixon, 336 F. Supp. 790 (E.D. Pa. 1972)	14
Ferri v. Ackerman, 444 U.S. 193 (1979)	10
Franklin v. Massachusetts, 505 U.S. 788 (1992)	14, 15
Marshall v. Gordon, 243 U.S. 521 (1917)	8
McCulloch v. Maryland, 17 U.S. 316 (1819)	7, 8
National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974)	14
Nixon v. Administrator of General Services, 433 U.S. 425, 448 (1977)	11
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	4, <i>passim</i>
Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978)	17
United States v. Burr, 25 Cas. 30 (C.C.D. Va. 1807)	13
United States v. Lee, 106 U.S. 196 (1882)	5
United States v. Nixon, 418 U.S. 683 (1974)	6, 8, 12, 13
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	14
 <i>Constitutional and Statutory Provisions</i>	
U.S. Const. Art. II	4, <i>passim</i>
U.S. Const. Amend. XXV	7-8
Fed. R. Civ. P. 26	17
Fed. R. Civ. P. 26 Advisory Committee's Note, 1946	17

Other Authorities

Akhil Amar & Neal Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701 (1995)	8, 10
Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969)	7
10 The Works of Thomas Jefferson (Paul L. Ford ed. 1905)	13
Journal of William Maclay (E. Maclay ed. 1890)	12-13
3 Joseph Story, Commentaries on the Constitution of the United States (1st ed. 1833)	8-9

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INTERESTS OF AMICI CURIAE

The law professors named below teach and write about constitutional law. This brief sets forth their considered view from a scholarly perspective on the issue central to this case: whether the office of the Presidency should be presumptively protected from the distraction and diversion of energy caused by the pursuit of civil litigation against the President during his term of office. This brief does not speak to any other issue in this case

nor does it in any way address the merits of respondent's complaint. Amici join this brief solely on their own behalf and not as representatives of their universities.

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Counsel for both parties have consented to the filing of this brief; their stipulation to that effect has been lodged with the Court.

SUMMARY OF ARGUMENT

This case presents a narrow issue: whether "our constitutional heritage and structure," *Nixon v. Fitzgerald*, 457 U.S. 457 U.S. 731, 748 (1982), calls for a temporary delay of civil litigation against a sitting President when the cause of action arises out of alleged acts done in his non-presidential capacity well before he ever took office and the plaintiff cannot show a compelling exigency that requires the litigation to proceed immediately. This case does not raise any question of permanent immunity for non-official acts. The only question is whether the proceedings should be temporarily delayed.

Amici respectfully submit that such a delay is appropriate. A limited and temporary immunity from suit for unofficial acts is fairly implied in the structure of the executive branch established in Article II of the Constitution and in traditional principles of separation of powers. The solitary nature of the Presidency necessitates that the person occupying that office be free from the diversion of energy and distraction from duty that defending such a private damages action would cause. See *Fitzgerald*, 457 U.S. at 753. Furthermore, such temporary immunity is consistent with a long tradition of judicial avoidance of incursions upon the Presidency. Where, as here, the actions alleged long predated accession to the Presidency, and where, as here, there has been no showing of exigent need for immediate relief, there is no reason to override the structural considerations warranting temporary immunity.

ARGUMENT

This case presents the question whether a private civil action for damages, stemming from alleged actions predating and outside the Presidency, should be temporarily delayed during the President's tenure in office. Amici argue that it should be, so long as the plaintiff can show no compelling need for immediate relief.

At the outset, it is important to note the very narrow question before the Court. This case does not raise a claim of immunity from liability. As to the scope of presidential immunity from damages, this Court's decision in *Nixon v. Fitzgerald* inferred from Article II and the separation of powers an absolute Presidential immunity "from damages liability predicated on his official acts." 457 U.S. at 749. But this case involves solely non-official acts, and there is no claim that the presidency shields petitioner from liability on respondent's claims.

Additionally, this case raises no claim of permanent immunity for non-official acts. The President is not above the law, *see, e.g., United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."), and no one claims that he is. The only issue here is whether constitutional structure and separation-of-powers principles call for a *temporary* postponement of civil litigation until after the President leaves office. Everyone agrees that the action can proceed at that time.

Finally, this case does not raise the question whether exceptional exigent circumstances, as demonstrated in a court of law, might justify allowing a civil action to

proceed against the President even during his term in office. It may be that discovery or other proceedings should be allowed to go forward if there is a compelling need for immediate relief. No such need has been shown here. Thus, the only question presented here is whether a private plaintiff, with no special showing, can compel a sitting President to defend a civil action against him during his term in office. Amici respectfully suggest that the answer to that question should be "no."

I. TEMPORARY PRESIDENTIAL IMMUNITY FROM PRIVATE SUITS IS FAIRLY IMPLIED IN ARTICLE II AND IN TRADITIONAL PRINCIPLES OF SEPARATION OF POWERS

The Constitution nowhere specifies what immunities a sitting President should enjoy, but this Court has long recognized that "a specific textual basis has not been considered a prerequisite to the recognition of immunity." *Nixon v. Fitzgerald*, 457 U.S. at 750 n.31; see also *United States v. Nixon*, 418 U.S. at 705-06 n.16 (noting that "the silence of the Constitution [on executive privilege and immunity] is not dispositive"). The Court has inferred presidential privileges and immunities from the unique position of the President set forth in Article II of the Constitution and from the fundamental structural principle of the separation of powers.

Nixon v. Fitzgerald illustrates the Court's method. In *Fitzgerald*, the Court looked to "history and policy" as well as to constitutional text and structure. 457 U.S. at 748. In concluding that the President was entitled to absolute immunity from civil damages for official acts,

the Court stated that “[w]e consider this immunity 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. The Court reasoned in part from the functional necessities of the President’s unique responsibilities under Article II, and in part from the principle that no branch should be subject to crippling incursions by another branch. This sort of structural reasoning has a venerable pedigree in our constitutional law. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see generally Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969). Such structural reasoning is especially relevant to the issue of temporary immunity.

A. Presidential Duties Under Article II

“The President occupies a unique position in the constitutional scheme.” *Nixon v. Fitzgerald*, 457 U.S. at 749. Article II, § 1 of the Constitution vests the entire “executive Power” in the President. No other branch of government is entrusted to a single person. “This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.” *Id.* at 750. The President is Commander in Chief, and he alone is charged with the appointment power, the treaty power, and the duty to “take Care that the Laws be faithfully executed.” Article II, §§ 2 & 3. The President is the only officer in the government so vital that the mechanism for his or her succession is constitutionally prescribed, even in the

event of his or her temporary incapacity. U.S. Constitution, Amend. XXV, §§ 3-4.

As two commentators recently described the President's unique position:

Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed.

Akhil Amar & Neal Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev 701, 713 (1995).

At least since *McCulloch v. Maryland*, it has been well established that “that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant.” *United States v. Nixon*, 418 U.S. at 706 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)). In other words, “[c]ertain powers and privileges flow from the nature of enumerated powers” *Id.* at 705. Accordingly, Justice Joseph Story long ago concluded that the grant of executive power in Article II “necessarily” carried with it some privileges and immunities essential to make the office function:

There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them.... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

3 J. Story, *Commentaries on the Constitution of the United States* § 1563, pp.418-19 (1st ed. 1833), cited with approval in *Nixon v. Fitzgerald*, 731 U.S. at 749.

Following Justice Story, the Court in *Fitzgerald* fashioned an immunity to enable the President to “discharge the duties of his office.” Specifically, the Court recognized an absolute and permanent immunity from civil liability for official acts. This immunity applies even if a President maliciously abuses his or her official powers and continues even after he or she has left office. Obviously, this is strong medicine. The absolute and permanent protection of the President is accomplished at the cost of an absolute and permanent sacrifice of the plaintiff’s interest. This extraordinary result was justified by twin rationales.

One rationale was the need to avoid inhibiting Presidential decisionmaking. Because the threat of civil liability might render the President “unduly cautious,” *id.* at 752 n.32, absolute immunity was granted to guarantee that the President had “the maximum ability to deal

fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). Obviously, this rationale applies only to the President's official acts. It has no application to a claim of immunity from suit for acts committed outside the scope of office.

The other rationale, however, is directly applicable. The *Fitzgerald* Court recognized absolute immunity in order to prevent the distraction from duty that would ensue from *any* litigation against the President. "Because 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. For the *Fitzgerald* Court this concern was made particularly acute by the risk that the President's "sheer prominence" would make him an "easily identifiable target" for civil suits. *Id.* at 752-753.

The *Fitzgerald* Court's concern to prevent diversion of energy and distraction from duty is, of course, fully implicated by suits for non-official acts. Here, as in *Fitzgerald*, permitting the lawsuit to go forward during the President's term of office would impair his ability to discharge his duties under Article II. "We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time" Amar & Katyal, *supra*, 108 Harv. L. Rev. at 713. And here, as in *Fitzgerald*, permitting the lawsuit to go forward would risk making the President a litigation magnet for an ever-proliferating variety of civil suits.

It is true, of course, that the *Fitzgerald* Court regarded both rationales as essential for the absolute and permanent immunity there granted. For that reason, absolute immunity was limited, as the Eighth Circuit repeatedly emphasized, to the President's official acts. That is as it should be. But it does not follow that *no* immunity is available for non-official acts. The *Fitzgerald* Court's concern to protect the "fearless and impartial" discharge of the President's duties may have been crucial in justifying an absolute and permanent immunity for official acts, but the equally important concern to prevent diversion of energy and distraction from duty is sufficient to justify a temporary stay of suits for non-official acts. As Justice Story put the point, it is the President's "*person*" and not merely his job that must be "deemed, in civil cases at least, to possess an official inviolability." Only if the President's "*person*" is undistracted and undiverted can he or she carry out the unique duties imposed by Article II.

Thus the structural reasoning of *Nixon v. Fitzgerald* supports a temporary Presidential immunity for civil litigation even for claims based on private conduct. As the Court observed in *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977) (citations omitted), "[t]o the extent that [presidential] privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege."

B. Separation of Powers

Nixon v. Fitzgerald also reasoned that the balance of power between the Executive and the Judiciary would be upset if the President could be targeted for civil damages during his term in office:

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege, we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution."

457 U.S. at 753 (quoting *United States v. Nixon*, 418 U.S. at 708, footnotes omitted). The separation of powers embodied in the Constitution counsels judicial deference to the Executive unless there are strong countervailing interests.

Nixon v. Fitzgerald also relied in part on historical evidence suggesting that "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31. President John Adams and Senator Oliver Ellsworth were reported by Senator Maclay to have said that "the President, personally, was not subject to any process whatever.... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Journal of William Maclay* 167

(E. Maclay ed. 1890), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

President Thomas Jefferson raised the separation-of-powers issue in his argument against being required to comply with a *subpoena duces tecum* in the treason trial of former Vice President Aaron Burr:

The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

10 *The Works of Thomas Jefferson* 404 n. (Paul L. Ford ed., 1905), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

As it happened, Chief Justice Marshall ruled that Burr's constitutional right to compulsory process overrode any executive privilege President Jefferson might have had. *United States v. Burr*, 25 Cas. 30, 33-34 (C.C.D. Va. 1807). Similarly, in *United States v. Nixon*, the Court held that the presumptive privilege of presidential confidentiality was overridden by a "demonstrated specific need for evidence in a pending criminal trial." 418 U.S. at 713. But neither Chief Justice Marshall in *Burr* nor the Court in *Nixon* suggested that such a balancing of interests was incompatible with a constitutional privilege grounded in the separation of powers.

Indeed, through the years, the courts have struggled to avoid the kind of impasse that might have developed had the *Burr* court sought to hold President Jefferson in contempt. When injunctive relief must issue against the executive branch, it has typically run against an executive official other than the President. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (enjoining the Secretary of Commerce); *Atlee v. Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972) (dismissing the President as party to suit in which the Secretary of Defense was also named as a party). Rather, the courts have an "apparently unbroken historical tradition" of refusing injunctive relief against the President himself. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia J., concurring in part and concurring in the judgment); see *id.* at 802 (plurality opinion). Courts that do maintain jurisdiction over the President as a party have resorted to declaratory rather than injunctive relief. See, e.g., *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("We so restrict ourselves at this time in order to show the utmost respect to the office of the Presidency and to avoid, if at all possible, direct involvement by the Courts in the President's constitutional duty faithfully to execute the laws and any clash between the judicial and executive branches of the Government."). And even that limited assertion of judicial authority has been disputed. See *Franklin v. Massachusetts*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in judgment) ("I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.").

If such encroachment of the judiciary upon the Presidency should be avoided in matters of public affairs, it should also be avoided if at all possible in private lawsuits against the President as a private citizen. The tradition of judicial restraint and deference not only avoids intrusion of the judiciary upon the independence of the Presidency, but also avoids the friction of "needless head-on confrontations between district judges and the Chief Executive." *Franklin v. Massachusetts*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). That friction is similarly threatened in private lawsuits against the President, as the Chief Executive is inseparable from the person occupying the office.

C. Absence of a Compelling Countervailing Interest

Article II and the separation of powers thus support a temporary presidential immunity against lawsuits unconnected to official acts. But that is not to say that such immunity would necessarily be absolute. It may well be that the President's right to delay such litigation until after he or she left office could be qualified or overridden on a showing of a compelling need.

That issue need not be resolved in this case, as it is plain that no compelling need for immediate proceedings has been demonstrated here. A civil damage suit such as this one, by definition, involves only discrete, past harms that are reparable, if merit be found, by money damages. Delay in payment can be compensated

by prejudgment interest. A plaintiff might in some case be able to demonstrate an urgent need for injunctive relief against the President, in his personal capacity, to end an ongoing harm. Were a President to fail to abate a nuisance on his private property, for example, neighbors seeking injunctive relief might be able to show that the continuing nature of the nuisance would justify an immediate injunction. But the burden of demonstrating exigency should rest on the plaintiff. Otherwise the President would have to bear the burden of diversion of energy and distraction from duty in order to establish an immunity based on the need to avoid those costs. The only way for a temporary immunity to accomplish its purpose is to make the immunity presumptively applicable in all cases, with exceptions only in those unusual and, on this record, hypothetical circumstances in which there would be a compelling need for immediate relief. If the President's privilege were overcome here, it would be no privilege at all.

II. THE TEMPORARY IMMUNITY SHOULD EXTEND TO DISCOVERY AND OTHER PRETRIAL MATTERS

Unlike the Eighth Circuit, the district court recognized the need for a presumption in favor of temporary immunity but undercut its decision by permitting discovery to proceed. This approach defeats the very purpose of granting temporary immunity. The same functional and separation-of-powers concerns that counsel against subjecting a sitting President to trial likewise counsel against imposing on him the burden of discovery and other pretrial motions. Indeed, the problem is not

merely that discovery can be as burdensome as trial itself; discovery, by design, can be considerably *more* invasive, and can give the plaintiff considerable control over the time and energies of his or her opponent.

Discovery under the Federal Rules of Civil Procedure reaches far beyond admissible evidence. Discovery is not limited to issues raised by the pleadings or by the merits of the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Nor need the information sought through discovery be admissible at trial. Fed. R. Civ. P. 26(b)(1). Discovery is intended to be far-ranging "to allow a broad search for ... any ... matters which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26 advisory committee's note, 1946. Obviously, this intentionally broad nature of the discovery process directly and severely conflicts with the constitutional interest in an unencumbered Chief Executive.

CONCLUSION

It may be that delaying discovery and trial of civil actions based on non-official acts until the President has left office will work some hardship on some plaintiffs. The same is true of all immunities. Compared to the burden on those who complain of official misconduct, however, the burden is rather slight. Those who claim injury resulting from the President's official acts are absolutely and permanently barred from recovery, no matter how egregious the alleged misconduct. Those who claim only injury resulting from the President's non-

official acts are not comparably disadvantaged. At most, they are required to wait a few years until the President has left office or to shoulder the burden of demonstrating a compelling need to proceed at once. This hardship is unfortunate, but it is a necessary and inescapable feature of avoiding the “unique risks to the effective functioning of government” that would be posed by unrestricted civil actions against a sitting President.

Therefore, *amici* urge this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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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)

TABLE OF CONTENTS

	Page
Statement	2
Summary of argument	4
Argument:	
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	7
II. Private suits against a sitting President should be stayed until the President leaves office	19
Conclusion	31

TABLE OF AUTHORITIES

Cases:

<i>Allied Chemical Corp. v. Daiflon, Inc.</i> , 449 U.S. 33 (1980)	29
<i>Anonymous v. Anonymous</i> , 581 N.Y.S.2d 776 (App. Div. 1992)	2
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	18
<i>Capital Traction Co. v. Hof</i> , 174 U.S. 1 (1899)	23
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	10
<i>Coburn v. Coburn</i> , 412 So. 2d 947 (Fla. Dist. Ct. App. 1982)	20
<i>Ccit Independence Joint Venture v. FSLIC</i> , 489 U.S. 561 (1989)	20
<i>Deakins v. Monaghan</i> , 484 U.S. 193 (1988)	21
<i>England v. Louisiana State Bd. of Medical Examiners</i> , 375 U.S. 411 (1964)	20
<i>Feldman v. United States</i> , 322 U.S. 487 (1944)	29
<i>Franklin v. Massachusetts</i> , 505 U.S. 788 (1992)	8
<i>Halpern v. Kissinger</i> , 401 F. Supp. 272 (D.D.C. 1975)	26
<i>Hancock v. Train</i> , 426 U.S. 167 (1976)	29

IV

Cases—Continued:	Page
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	8, 17, 24
<i>Harris County Comm'rs Ct. v. Moore</i> , 420 U.S. 77 (1975)	20
<i>Heck v. Humphrey</i> , 114 S. Ct. 2364 (1994)	20
<i>Hill v. Harding</i> , 107 U.S. 631 (1882)	20
<i>Koester v. American Republic Invs., Inc.</i> , 11 F.3d 818 (8th Cir. 1993)	20
<i>LaFontant v. Aristide</i> , 844 F. Supp. 128 (E.D.N.Y. 1994)	2
<i>Landis v. North American Co.</i> , 299 U.S. 248 (1936)	19
<i>Loring v. United States</i> , 116 S. Ct. 1737 (1996)	7, 8, 9, 14
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	9
<i>Marek v. Chesney</i> , 473 U.S. 1 (1985)	8
<i>Mesa v. California</i> , 489 U.S. 121 (1989)	30
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	8, 24
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	20
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	10
<i>Nixon v. Administrator of Gen. Serv.</i> , 433 U.S. 425 (1977)	7
<i>Nixon v. Fitzgerald</i> , 457 U.S. 831 (1982)	<i>passim</i>
<i>Oscar Mayer & Co. v. Evans</i> , 441 U.S. 750 (1979) ..	19
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	18
<i>Proceedings of the Grand Jury Impaneled December 5, 1972, In re</i> , Civil No. 73-965 (D. Md., mem. filed Oct. 5, 1973)	2, 16
<i>Ricci v. Chicago Mercantile Exch.</i> , 409 U.S. 289 (1973)	19-20
<i>Semler v. Oertwig</i> , 12 N.W.2d 265 (Iowa 1943)	20
<i>Siegert v. Gilley</i> , 500 U.S. 226 (1991)	8, 17, 24
<i>United States v. Branscum</i> , No. LR-CR-96-49, (E.D. Ark. June 7, 1996)	26

V

Cases—Continued:	Page
<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d)	25
<i>United States v. Burr</i> , 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694)	8
<i>United States v. Curtiss-Wright Export Corporation</i> , 299 U.S. 304 (1936)	9
<i>United States v. Drogoul</i> , No. 1:91-CR-78-1-GET (N.D. Ga., order filed Sept. 21, 1993)	26
<i>United States v. Fromme</i> , 405 F. Supp. 578 (E.D. Cal. 1975)	25
<i>United States v. McDougal</i> , No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996)	25
<i>United States v. Mellon Bank, N.A.</i> , 545 F.2d 869 (3rd Cir. 1976)	20
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	8, 25, 26
<i>United States v. Poindexter</i> , 732 F. Supp. 142 (D.D.C. 1990)	2, 26
<i>Will v. Calvert Fire Ins. Co.</i> , 437 U.S. 655 (1978)	29
<i>Wilson v. Westinghouse Elec. Corp.</i> , 838 F.2d 286 (8th Cir. 1988)	21
<i>Wilton v. Seven Falls Co.</i> , 115 S. Ct. 2137 (1995)	21
Constitution, statutes and rules:	
U.S. Const.:	
Art. I:	
§ 4	12
§ 5	13
Amend. VI	23
Amend. VII	23
Amend. XXV	13
Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.	
App. 501 <i>et seq.</i>	20
11 U.S.C. 362	20
21 U.S.C. 881(i)	20
42 U.S.C. 1983	3
42 U.S.C. 1985	3

VI

Rules—Continued:	Page
Fed. R. Civ. P.:	
Rule 27(a)	21
Rule 27(c)	21
Miscellaneous:	
2 Sara S. Beale & William C. Bryson, <i>Grand Jury Law and Practice</i> (1986)	20
111 Cong. Rec. 15,595 (1965)	13
Edward Corwin, <i>The President: Office and Powers, 1787-1984</i> (1984)	9
Thomas E. Cronin, <i>The State of the Presidency</i> (1980)	10
2 Max Farrand, <i>Records of the Federal Convention of 1787</i> (New Haven 1911)	16
<i>The Federalist</i> (Hamilton) (C. Rossiter ed. 1961):	
No. 69	16
No. 70	30
No. 77	30
Herman Finer, <i>The Presidency: Crisis and Regeneration</i> (1960)	6, 11, 12
Jerome Frank, <i>Courts on Trial</i> (1950)	9
Godfrey Hodgson, <i>All Things to All Men: The False Promise of the Modern American Presidency</i> (1980)	11
Lyndon B. Johnson, <i>The Vantage Point</i> (1971)	12
3 Phillip B. Kurland & Ralph Lerner, <i>The Founders' Constitution</i> (1987)	11, 13, 28
Richard E. Neustadt, <i>Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan</i> (1990)	11
<i>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.</i> (1964)	13
<i>Presidential Inability: Hearings Before the House Comm. on the Judiciary, 89th Cong., 1st Sess.</i> (1965)	13

VII

Miscellaneous—Continued:	Page
Clinton Rossiter, <i>The American Presidency</i> (1987)	10
Ronald D. Rotunda, <i>Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote</i> , 1975 U. Ill. L.F. 1	25
11 <i>The Writings of Thomas Jefferson</i> (A. Lipscomb ed. 1904)	25
Arthur B. Tourtellot, <i>The Presidents on the Presidency</i> (1964)	11, 12, 27
U.S. Bureau of the Census, <i>Statistical Abstract of the United States: 1995</i> (1995)	10

In the Supreme Court of the United States

OCTOBER TERM, 1995

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**

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.¹

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-

¹ 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.² 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.

² 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 unofficial 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.³

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.⁴ The court also misunderstood the

³ 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.

⁴ 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-

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.⁵ 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).⁶

⁵ 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.

⁶ 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." *Loving*, 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 749.⁷

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

⁷ 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.⁸

⁸ 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-*

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.⁹

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.

⁹ 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. 900, 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).¹⁰ 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

¹⁰ 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*.¹¹

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

¹¹ 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.¹² 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.¹³

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. 70.¹⁴ 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.

¹² 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.

¹³ 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").

¹⁴ 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.¹⁵ We know of no instance, however, in

¹⁵ 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.¹⁶ 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.¹⁷ 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.

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).

¹⁶ 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).

¹⁷ 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.¹⁸ 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.

¹⁸ 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.¹⁹ 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.²⁰

¹⁹ 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. Daiylon, Inc.*, 449 U.S. 33, 36 (1980); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-666 & n.7 (1978) (plurality opinion).

²⁰ 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, 173-179 (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.

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

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

WILLIAM JEFFERSON CLINTON
Petitioner,
v.
PAULA CORBIN JONES,
Respondent.

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

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

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT.....	3
I. THE RELIEF SOUGHT REMAINS AN EXTRAORDINARY REMEDY AND AN UNWARRANTED EXTENSION OF A PROTECTION AFFORDED BY CONGRESS TO SOMEONE IT DID NOT INTEND TO PROTECT	3
II. GRANTING THE RELIEF SOUGHT WOULD PLACE THE PETITIONER "ABOVE THE LAW."	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

<i>Bailey v. Kennedy</i> , Opinion No. 757, 200 (Cal. Super. Ct. 1962)	10
<i>Boone v. Lightner</i> , 319 U.S. 561 (1942)	8
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	11
<i>Hills v. Kennedy</i> , Opinion No. 756,201 (Cal. Super. Ct. 1962)	10
<i>Imbler v. Pachtman</i> 424 U.S. 409 (1976).....	11
<i>Jamaica Savings Bank v. Bryan</i> , 25 NYS 2d 17 (New York, 1941)	9
<i>Jones v Clinton</i> (8th Circuit 1995) 72 F.3d 1354.....	12
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	10
<i>National Treasury Employees Union v. Nixon</i> , 492 F 2d 587 (D.C. Circuit 1974)	11
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982)	12
<i>Sturm v. Ulrich</i> , (8th Circuit 1925) 10 F.2d 9.....	7
<i>Trujillo v. Wilson</i> , 189 P2d 147 (Colorado, 1948)	9

United States v. Nixon,
418 U.S. 683 (1974)11

STATUTES

Soldiers' and Sailors' Civil Relief Act of 1940,
50 U.S.C. App. Sec. 501-25 (1988 and
Supp. V 1933seriatim

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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 Act¹. 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.+

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 expedience², the President dropped his original claim that he was on active duty status and, therefore, exempt. Yet

² 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.

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No. 95-1853

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

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

BRIEF FOR RESPONDENT

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September 9, 1996

QUESTIONS PRESENTED

This uncomplicated civil action for damages against petitioner, who is President of the United States, for acts committed before he became President, bears no possible relation to his official responsibilities. No showing was made in the district court that the lawsuit, or any aspect of it, would impair the functioning of the presidency. The court of appeals ordered the district court to refrain from "creating scheduling conflicts" for petitioner on remand. The following questions are presented:

1. Whether the court of appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his presidency, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond "the outer perimeter of [the President's] official responsibility," the limit for presidential immunity set forth in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).
2. Whether the court of appeals erred in reversing the district court's grant to petitioner of what the district court termed a "limited or temporary immunity from trial," Pet. App. 68, for acts beyond the outer perimeter of his official responsibility.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	8
ARGUMENT.....	10
I. THE TEMPORARY PRESIDENTIAL IMMUNITY ASSERTED BY PETITIONER IS LEGALLY INSUPPORTABLE AND IS UNNECESSARY TO PROTECT THE INTERESTS OF THE PRESIDENCY.....	10
A. The immunity case law does not support petitioner’s immunity claim.	10
B. Petitioner’s immunity claim would be contrary to the intention of the Framers, is not supported by any decisions of this Court, and would place petitioner above the law.....	16
C. Petitioner’s immunity claim cannot be justified under Article II or the separation of powers.....	26
1. This simple civil case will not prevent the Executive Branch from accomplishing its constitutionally assigned functions..	27

	PAGE
2. Proper judicial case management is sufficient to protect the interests of the Executive Branch in this case and would not violate the separation of powers.....	34
II. THE COURT OF APPEALS CORRECTLY FOUND THAT, ON THIS BARREN FACTUAL RECORD, THERE IS NO BASIS FOR A STAY OF THE TRIAL OR THE LITIGATION GENERALLY.....	39
CONCLUSION.....	47

TABLE OF AUTHORITIES

Cases	PAGE
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959)	13
<i>Boone v. Lightner</i> , 319 U.S. 561 (1943)	23n, 26
<i>Bradley v. Fisher</i> , 80 U.S. (13 Wall.) 335 (1872)	12n
<i>Brennan v. Township of Northville</i> , 78 F.3d 1152 (6th Cir. 1996)	45n
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	PAGE
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<i>Mississippi v. Johnson</i> , 71 U.S. (4 Wall.) 475 (1866) .	22
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989) ..	27, 29, 38
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	43, 45
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	27, 38
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425 (1977)	20, 27, 39
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982)	<i>passim</i>
<i>Nixon v. Sirica</i> , 487 F.2d 700 (D.C. Cir. 1973) (en banc; per curiam)	19
<i>Pennzoil v. Texaco</i> , 481 U.S. 1 (1987)	38
<i>Romer v. Evans</i> , 116 S. Ct. 1620 (1996)	38n
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	PAGE
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<i>Swint v. Chambers County Comm'n</i> , 115 S. Ct. 1203 (1995).....	44, 45, 46
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<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).....	9, 29
<i>United States v. Burr</i> , 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).....	9, 19, 20, 21n
<i>United States v. Fromme</i> , 405 F. Supp. 578 (E.D. Cal. 1975).....	30n
<i>United States v. Lee</i> , 106 U.S. 196 (1882).....	17, 24
<i>United States v. Nixon</i> , 418 U.S. 683 (1974) ...	9, 20, 21, 23
<i>United States v. Poindexter</i> , 732 F. Supp. 142 (D.D.C. 1990).....	30n
 Statutes and Rules	
11 U.S.C. § 362 (1994).....	25
28 U.S.C. § 1332(a)(1) (1994).....	37n
28 U.S.C. § 1441(b) (1994).....	37n
42 U.S.C. § 1983 (1994).....	3
42 U.S.C. § 1985 (1994).....	3
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-93 (1988 & Supp. V. 1993).....	22n, 25
Fed. R. Civ. P. 11.....	33
Fed. R. Civ. P. 40.....	39n

	PAGE
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	PAGE
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	PAGE
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IN THE
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OCTOBER TERM, 1995

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WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

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

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a \$6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Mrs. Jones (Miss Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Mrs. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite

number written on it. When Mrs. Jones wondered what the Governor wanted, Trooper Ferguson responded: "It's okay, we do this all the time for the Governor." Trooper Ferguson then escorted Mrs. Jones to the Governor's floor. Complaint ¶¶ 6-13.

Mrs. Jones, who had never met the Governor before, entered his suite at his invitation. Small talk followed. Mr. Clinton asked Mrs. Jones about her job. The Governor noted that David Harrington, his appointee who served as the director of Mrs. Jones's agency and her superior there, was his "good friend." The Governor then made a series of verbal and physical sexual advances toward Mrs. Jones, and undressed himself from the waist down. Horrified, Mrs. Jones moved away from Mr. Clinton and said, "Look, I've got to go." Pulling up his pants, Mr. Clinton said, "If you get in trouble for leaving work, have Dave [Harrington] call me immediately and I'll take care of it." As Mrs. Jones left, the Governor looked at her sternly and said: "You are smart. Let's keep this between ourselves." Visibly shaken and upset, Mrs. Jones resumed her post downstairs. In the following hours and days, she told her coworker, friends and relatives about what had happened. Mrs. Jones made no immediate official or public complaint because of fear for her job and for her relationship with her fiancé, and because she felt there was no one to whom she could complain since both her ultimate boss and the police were involved. She remained at her agency for the next twenty-one months, where she both feared and experienced job retaliation for her refusal to submit to Mr. Clinton's advances. In 1993, Mrs. Jones moved to California, and Mr. Clinton became President of the United States. Complaint ¶¶ 14-40, 48.

In January 1994, a widely publicized magazine article reported that, while he was Governor of Arkansas, Mr. Clinton regularly used his state police security detail to solicit women for sex with him. The article, apparently based upon the accounts of various Arkansas state troopers, reported that

an unidentified trooper (clearly Mr. Ferguson) told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and escorted her to Mr. Clinton's room at the Excelsior Hotel. The article reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Mrs. Jones was one of the many women who, according to the article, had consensual sexual relationships with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Mrs. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances and asked that Mr. Clinton acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Mrs. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, only four months after learning about the damaging magazine article, and after attempting unsuccessfully to obtain an acceptable statement by Mr. Clinton to settle the matter and to restore her reputation, Mrs. Jones filed suit against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

Mr. Ferguson's answer to complaint admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer

¶ 11. He disclaimed any “personal knowledge of what took place in the hotel room.” *Id.* ¶ 14.

Mr. Clinton did not answer the complaint, but instead requested and obtained an order allowing him to defer a response pending a motion to dismiss on grounds of “presidential immunity.” Pet App. 40. On August 10, 1994, he filed what he called a “Motion to Dismiss on Grounds of Presidential Immunity.” See Pet. App. ii. Citing the same principal authorities he cites here, Mr. Clinton argued that “immunity for the duration of the President’s tenure is constitutionally mandated in the instant case.” Memorandum in Support of President Clinton’s Motion To Dismiss on Grounds of Presidential Immunity 6, *Jones v. Clinton*, Civil Action No. LR-C-94-290 (E.D. Ark. filed Aug. 10, 1994). As the district court noted, Mr. Clinton’s claim “that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office,” is “a claim of absolute immunity.” Pet. App. 55. Mr. Clinton argued that the complaint should be dismissed without prejudice to being refiled after he leaves the White House; in the alternative, he argued that the district court should stay the case until that time. Pet App. 55.

Mr. Clinton’s motion was predicated simply upon his occupancy of the Office of President of the United States. He made no factual showing that any aspect of the pretrial or trial proceedings would hinder him from carrying out the duties of that Office.

The district court denied the substance of Mr. Clinton’s motion on December 28, 1994. Pet. App. 54. Rejecting Mr. Clinton’s immunity claim, the court denied the motion to dismiss, and observed that “[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support . . . be found” for Mr. Clinton’s claim that he has “immunity from civil causes of action arising prior to [his] assuming the office” of the presidency. Pet.

App. 68. The court found Mr. Clinton's contention to be "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." Pet. App. 68. Nevertheless, in a self-contradictory holding that was apparently premised upon isolated language in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the district court granted Mr. Clinton what it called a "limited or temporary immunity from trial," Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief and properly managed, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton *and* Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be 1997 or 2001. Pet. App. 68-71. The court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Mrs. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the district court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74. Mr. Clinton asserted that appellate jurisdiction existed under the rule that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." Opening Brief of Appellant President William Jefferson Clinton 10, 23, *Jones v. Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995).

On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never*

been “any case in which any public official . . . has been granted any immunity from suit for his *unofficial* acts.” Pet App. 7 (emphasis added). The court of appeals noted that this Court’s decision in *Nixon v. Fitzgerald* recognized a presidential immunity that extended only to “‘acts within the ‘outer perimeter’ of [the President’s] official responsibility,’” and that “unofficial acts” are “[b]y definition . . . not within the perimeter of the President’s official responsibility at all, even the outer perimeter.” Pet. App. 8-9 (quoting *Fitzgerald*, 457 U.S. at 756). The court concluded that *Fitzgerald*’s rationale—“that, without protection from civil liability for his *official* acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability”—is “inapposite where only personal, private conduct by a President is at issue.” Pet. App. 11 (emphasis added). The district court’s denial of Mr. Clinton’s motion to dismiss was accordingly affirmed.

The court of appeals reversed the district court’s grant of a “limited or temporary immunity from trial” for the same reasons. While recognizing that “[t]he trial court has broad discretion to control the scheduling of events in matters on its docket,” Pet. App. 13 (footnote omitted), the court of appeals held that, to the extent the district court’s ruling could be characterized as an attempt to exercise that discretion, it was an “abuse of discretion” because it was “the functional equivalent of a grant of temporary immunity to which . . . Mr. Clinton is not constitutionally entitled,” *id.* at 13 & n.9. The court of appeals stressed that the district court had considerable power to ensure that the litigation would not interfere with Mr. Clinton’s official duties, and that the district court was to engage in “judicial case management sensitive to the burdens of the presidency and the demands of the President’s schedule,” Pet. App. 13:

We have every confidence that the District Court will exercise its [scheduling] discretion in such a way that

this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .

If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .

The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

Judge Beam, concurring, emphasized that Mr. Clinton had failed to point out *any* "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case

was “not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government.” Pet. App. 22. He concluded:

Mrs. Jones’s complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President’s schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President and Mrs. Jones’s representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton’s real concern, is being vastly magnified, especially assuming the trial judge’s careful supervision of the litigation with maximum consideration of the President’s constitutional duties. . . .

As I have attempted to stress, nothing [in our decision] prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled.

Pet. App. 23-25 (emphasis added).

SUMMARY OF ARGUMENT

Mr. Clinton asks for the recognition of an entirely unprecedented presidential immunity, a purely personal privilege against lawsuits that have nothing to do with official, presidential duties. Nothing in *Nixon v. Fitzgerald*, 457 U.S. 731

(1982), or in this Court's immunity case law, however, supports his theory. The essential rationale of official immunity is that the imposition of personal damages liability on public officials for official acts would cause them to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.'" *Id.* at 744-75 (citation omitted). As a consequence, presidential immunity was limited in *Fitzgerald* to "acts within the 'outer perimeter' of [the President's] *official responsibility*," *id.* at 756 (emphasis added), and Chief Justice Burger's concurring opinion in that case made clear that Presidents "are *not* immune for acts outside official duties," *id.* at 759 (Burger, C.J., concurring). The claim that *Fitzgerald* supports protection for unofficial acts is based upon language taken out of context.

Mr. Clinton's other authorities do not support his immunity claim. The Framers did not intend to place the President above the law, and thus did not confer upon Presidents any personal privileges akin to those of a monarch who is sovereign in both person and office. Nor do *United States v. Burr*, 25 F. Cas. 30, 187 (C.C.D. Va. 1807) (Nos. 14,692d and 14,694), and *United States v. Nixon*, 418 U.S. 683 (1974), support immunity. They simply stand for the proposition that confidential and official presidential communications are presumptively protected by executive privilege, which may nonetheless be overcome upon a sufficient showing of need. Here, no official acts or confidential communications are involved, and no balancing of interests between privilege and need is required. This Court's cases, indeed, have always limited Presidential privileges to official communications and acts, and there is no reason to abandon that course here.

Nor is Mr. Clinton's immunity claim supported by separation-of-powers principles. He made no showing below that this case will actually prevent him from carrying out his duties. Nor could he, given the manifest simplicity of the case. Mr. Clinton is thus reduced to the contention that in general, litigation (including a hypothetical torrent of future

cases) will always interfere with Presidential duties. Mr. Clinton overstates the vulnerability of his Office's work to civil litigation involving unofficial actions. In addition, Mr. Clinton also overstates a supposed danger that a trial court, by engaging in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," as the court of appeals directed, Pet. App. 13, will somehow interfere with the functioning of the Executive Branch.

ARGUMENT

I. THE TEMPORARY PRESIDENTIAL IMMUNITY ASSERTED BY PETITIONER IS LEGALLY INSUPPORTABLE AND IS UNNECESSARY TO PROTECT THE INTERESTS OF THE PRESIDENCY.

A. The immunity case law does not support petitioner's immunity claim.

Mr. Clinton, the Government, and the academic *amici* supporting him ask this Court to create a heretofore unrecognized presidential immunity: a purely personal privilege against lawsuits that have nothing to do with official, presidential duties. They argue that, even in cases having nothing to do with official action of any kind, "private civil damages litigation against an incumbent president must, in all but the most exceptional cases, be deferred until the president leaves office." Pet. Br. 11. And while Mr. Clinton now shies away from using the word "immunity" to describe the relief he seeks, the academic *amici* supporting him candidly do not. As they explain, the gist of Mr. Clinton's claim is that "*Nixon v. Fitzgerald* supports a temporary Presidential immunity for civil litigation even for claims based on private conduct." Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 11. Mr. Clinton and his *amici* indeed rely principally upon the leading presidential immunity case, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which, they say, recognizes that, regardless of the

basis of the claim, “one [cannot] hale an incumbent President into court and seek damages from him personally,” Pet. Br. 17, and “indicates that the instant suit should be deferred,” Br. for United States as *Amicus Curiae* 4. Neither the *Fitzgerald* holding nor its rationale, however, supports the extraordinary and novel immunity claim advanced here.

In *Fitzgerald*, a five-Justice majority of this Court held that Presidents are entitled to an absolute immunity for suits for civil damages relating to any of their official acts. Four Justices dissented, arguing that presidential immunity should be limited only to particular functions performed by the President. Both the majority and concurring opinions made clear that the President’s official immunity only forecloses “damages liability for acts within the ‘outer perimeter’ of [the President’s] official responsibility.” *Fitzgerald*, 457 U.S. at 756 (emphasis added). Chief Justice Burger explained that presidential immunity covers only *official* actions and “does not extend beyond such actions”—that “a President, like Members of Congress, judges, prosecutors or congressional aides . . . [is] not immune for acts outside official duties.” *Id.* at 761 n.4, 759 (Burger, C.J., concurring; emphasis added). That very limitation, Chief Justice Burger observed, was precisely why the Court’s decision did not “place[] a President ‘above the law,’” as the dissent had vigorously argued. *Id.* (Burger, C.J., concurring); *see id.* at 766-67 (White, J., dissenting); *id.* at 797 (Blackmun, J., dissenting).

The limitation of immunity to official acts is backed by a long and unbroken line of authority cited in *Fitzgerald*. As Judge Learned Hand once explained, “[t]he decisions have, indeed, *always* imposed as a limitation upon the immunity that the official’s act must have been within the scope of his powers.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (emphasis added), *cert. denied*, 339 U.S. 949 (1950). The essential rationale of immunity is that imposing personal liability for *official* acts would distort official judgment or make officials unwilling to act. Thus, *Fitzgerald* observed that,

“[i]n the absence of immunity, . . . executive officials would hesitate to exercise their discretion in a way ‘injuriously affect[ing] the claims of particular individuals,’ even when the public interest required bold and unhesitating action.” *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding v. Vilas*, 161 U.S. 483, 499 (1896)). The Court cited “the prospect that damages liability may render an official unduly cautious in the discharge of his official duties” as being “[a]mong the most persuasive reasons supporting official immunity.” *Id.* at 752 n.32. Immunity, the Court explained, was necessary to “provid[e] an official ‘the maximum ability to deal fearlessly and impartially with’ the duties of his office.” *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)).¹

In following this central rationale undergirding this Court’s immunity cases, *Fitzgerald* held that official immunity could only be invoked as a defense in litigation involving official acts:

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his *official* acts.

* * *

In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts *within the ‘outer perimeter’ of his official responsibility.*

¹ See also, e.g., *Mireles v. Waco*, 502 U.S. 9, 10-11 (1991) (per curiam) (judges immune for judicial acts so that they may act in official capacity without apprehension of personal liability); *Forrester v. White*, 484 U.S. 219, 226-29 (1988) (same); *Butz v. Economou*, 438 U.S. 478, 504-17 (1978) (same for executive agency officials); *Imbler v. Pachtman*, 424 U.S. 409, 424-31 (1976) (state prosecutors); *Scheuer v. Rhodes*, 416 U.S. 232, 240-49 (1974) (state executive officials); *Tenney v. Brandhove*, 341 U.S. 368, 376-79 (1951) (state legislators); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-53 (1872) (judges).

Id. at 749, 756 (emphasis added). These words were not mere dicta. Sharply disputed in *Fitzgerald* was the issue of which acts were to be subject to immunity. The Court noted that, in the past, it had linked absolute immunity to particular official functions: “Frequently our decisions have held that an official’s absolute immunity should extend only to acts in performance of particular functions of his office.” *Id.* at 755. But because of the variety of functions performed by the President, the Court selected the broadest scope of absolute immunity recognized in the case law: immunity “for acts within the ‘outer perimeter’ of . . . official responsibility.” *Id.* at 756; see, e.g., *Spalding v. Vilas*, *supra*, 161 U.S. at 498; *Barr v. Matteo*, 360 U.S. 564, 575 (1959). The Court then applied its holding to the facts of the case. Citing a specific provision of the United States Code, it held that the alleged conduct for which President Nixon had been sued indeed fell within the outer perimeter of presidential responsibility. *Id.* at 757.

Conceding, as he must, that “[t]his case is different from *Fitzgerald* . . . in that it largely does not touch upon official actions,” Mr. Clinton nevertheless contends that “[t]he logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here—the temporary deferral of private civil litigation.” Pet. Br. 20. In support of this argument, Mr. Clinton points to two sentences in a single paragraph of *Fitzgerald*: one sentence stating 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”; and another stating that “the sheer prominence of the President’s office [cannot] be ignored.” *Fitzgerald*, *supra*, 457 U.S. at 751-53, *quoted in* Pet. Br. 20. This language, the argument goes, applies as fully to lawsuits involving private conduct as to those involving official conduct, and so requires recognition of the temporary immunity sought here. See Pet. Br. 20-21; see also Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 10; Br. for United States 16.

Mr. Clinton misreads *Fitzgerald* because, as even the Government admits, “[w]hen 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.” Br. for United States 15. The language upon which Mr. Clinton relies simply cannot be stripped from the context of that concern. Indeed, it comes from the Court’s explanation of why the absolute immunity given to “prosecutors and judges,” rather than the qualified immunity given to “governors and cabinet officers,” was appropriate for the President’s official actions, *Fitzgerald*, 457 U.S. at 750-51; and it makes clear that the “unique risks to the effective functioning of government” to which the Court referred stemmed from private lawsuits concerning *official* acts. The Court said that the overriding policy consideration underlying official immunity—that lawsuits over official acts might compromise an official’s “‘ability to deal fearlessly and impartially with’ the duties of his office,” 457 U.S. at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979))—applied with greater force to the President because (1) the President’s official acts were more likely to be controversial ones affecting “countless people” than those of other officials, and (2) the President’s “sheer prominence” made him the most likely target for suits about controversial official acts of the Executive Branch. Thus, the relevant portion of the Court’s opinion reads as follows:

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E.g.*, *Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). We find these cases to be inapposite. The President’s unique status under the Constitution distinguishes him from other officials.

Because 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. *As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to “arouse the most intense feelings.” Pierson v. Ray, 386 U.S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official “the maximum ability to deal fearlessly and impartially with” the duties of his office. Ferri v. Ackerman, 444 U.S. 193, 203 (1979). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President’s office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the presidency was designed to serve.*

457 U.S. at 751-53 (footnotes omitted; emphasis added). In short, the Court reasoned that the President was potentially more vulnerable than other officials to lawsuits for *official* acts, and that absolute, not qualified, immunity should therefore apply to those acts.

The Court’s reasoning in *Fitzgerald* thus has no application to the case at bar. As the court of appeals concluded, “[i]t is clear from a careful reading of *Fitzgerald*” that this Court was “concern[ed] that the President’s awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process,” and might cause the President to “make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid

lawsuits and personal liability.” Pet. App. 11. No such dangers arise, of course, from suits relating to personal conduct. Imposing liability for pre-presidential or other unofficial conduct will simply not cause Presidents to “hesitate to exercise their discretion in a way ‘injuriously affect[ing] the claims of particular individuals.’ ” *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding v. Vilas*, 161 U.S. at 499). It will not diminish a President’s “‘ability to deal fearlessly and impartially with’ the duties of his office.” *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). It will not place the President “‘under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.’ ” *Id.* at 745 (quoting *Spalding*, 161 U.S. at 498). And it will not require any court “to probe into the elements of Presidential decisionmaking,” or to engage in “judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information.” *Id.* at 761-62 (Burger, C.J., concurring).

B. Petitioner’s immunity claim would be contrary to the intention of the Framers, is not supported by any decisions of this Court, and would place petitioner above the law.

Mr. Clinton also contends that allowing this litigation to proceed would run contrary to the “teaching of the Framers,” Pet. Br. 15, and would contravene both “historical doctrine” and “traditional practice,” *id.* at 17. To the contrary, the Framers did not intend to place the President above the law, and did not invest the President with any personal privileges akin to those of the English King. As the district court wrote, “[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any support . . . be found” for giving the President special protection from “civil causes of action arising prior to assuming the office.” Pet App. 68. Mr. Clinton’s claim is simply “contrary to our form

of government.” *Id.* Indeed, to the extent that there is any “traditional practice” on the point at all, it is that lawsuits involving a President’s unofficial acts must be allowed to proceed.

The Framers believed that every constitutional power and every constitutional actor must be constrained. “Federalists and antifederalists both agreed . . . that no one should ever be entrusted with unqualified authority.” Bernard Bailyn, *The Ideological Origins of the American Revolution* 368 (1992). Having fought to escape the reign of a king whose power was unchecked, they were certain “that any release of the constraints on the executive—any executive—was an invitation to disaster.” *Id.* at 379 (citing remarks of Edward Rutledge); see also 4 Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention of Philadelphia in 1787* 276 (2d ed., reprinted 1987).

As a result, the Framers adhered to a notion reflected time and again in this Court’s decisions: “No man in this country is so high that he is above the law.” *United States v. Lee*, 106 U.S. 196, 220 (1882). It was understood that the President had no personal privileges beyond those of an ordinary citizen:

His person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law.

An American Citizen (Tench Coxe) I, *Independent Gazetteer* (Philadelphia) September 26, 1787, reprinted in I Bernard Bailyn, ed., *The Debate on the Constitution* 20, 24 (1993) (emphasis in original). As Charles Coatsworth Pinckney, an important Framers, explained on the Senate floor only a few years after the Constitution’s adoption, the Framers

well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.

Annals of Congress, March 5, 1800, at 72. Pinckney continued:

let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? . . . The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

Id. at 74; *cf. Nixon v. Fitzgerald, supra*, 457 U.S. at 755 (immunity must be “closely related to [its] justifying purpose,” and “the sphere of protected action must be related closely to the immunity’s justifying purpose”). Similarly, James Wilson explained that the President

is placed high, and is possessed of power far from being contemptible; *yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.*

2 Elliot, *Debates on the Federal Constitution, supra*, at 480 (emphasis added and omitted).

Mr. Clinton’s own description of the historical record only serves to confirm the district court’s conclusion that he has no credible support for his claim. As he did below, Mr. Clinton relies primarily upon Justice Story’s isolated statement that a President’s “person must be deemed, in civil cases at least, to possess an official inviolability.” Pet. Br. 16 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563, pp. 418-19 (1st ed. 1833)). By its terms, however, Justice Story’s statement referred only to the President’s

“official inviolability,” and described only the protections for actions taken by a President “while he is in the discharge of the duties of his office,” *id.* (citation omitted), and thus goes no farther than *Nixon v. Fitzgerald*, which did not recognize any “immun[ity] for acts *outside* official duties,” *Fitzgerald*, 457 U.S. at 759 (Burger, C.J., concurring). Beyond this, Justice Story was referring only to a presidential privilege from “arrest, imprisonment, or detention”—none of which, of course, is involved here—and the “official inviolability” he described was only for “*this* purpose.” Pet Br. 16 (citation omitted; emphasis added).² And as for Mr. Clinton’s citation of Presidents Adams and Jefferson to the effect that “the President personally is not subject to any process whatsoever,” Pet. Br. 16, that view was refuted by Chief Justice Marshall early in our Nation’s history in *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (“That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted”). *See also Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc; per curiam) (noting that Chief Justice Marshall “squarely ruled that a subpoena may be directed to the President”).³ It is thus now

² An ordinary modern civil case, of course, presents no danger of arrest, imprisonment or detention of the defendant. Accordingly, the debate over whether a “President must be impeached and removed from office before he can be prosecuted” for a crime, Pet. Br. 14-15 & n.11; *see also* Br. for United States 15 n.8, is irrelevant here.

³ In fact, the Jefferson letter that Mr. Clinton quotes was one in which President Jefferson was expressing his criticisms of the Chief Justice’s decision in *Burr*. *See Fitzgerald*, 457 U.S. at 751 n.31; *see also* Bradford E. Biegon, Note, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone’s Commentaries*, 82 Va. L. Rev. 677, 698 & nn.127-28 (1996) (“Jefferson’s close of the letter is illustrative of the distemper that Marshall’s opinion must have caused him”).

As for President Adams, he is almost universally regarded as an exponent of an excessively expansive view of executive power. He was regarded by most of his contemporaries as being almost a monarchist. *See*

“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.

The law ever since Chief Justice Marshall’s pronouncement in *Burr*, *supra*, supports not a distinction between testimony in criminal and testimony in civil cases, as Mr. Clinton contends (*see, e.g.*, Pet. Br. 17, 26-27), but a line between matters that pertain to the President’s official duties and those that do not—in other words, precisely the line followed in *Fitzgerald*. Thus, in *Burr*, Chief Justice Marshall observed that the President was “subject to the general rules which apply to others,” and recognized *only* a privilege “to withhold private letters . . . written . . . in consequence of [the President’s] public character, and may relate to public concerns.” *Burr*, 25 F. Cas. at 191-92. Similarly today, the threshold issue of whether there is a presidential privilege turns not upon whether a proceeding is civil or criminal, but upon the nature of the materials subpoenaed. When faced with a subpoena, a President may “legitimately assert privilege, of course, *only* to those materials whose contents fall within the scope of the privilege recognized in *United States v. Nixon*”—which is “limited to communications ‘in performance of [a President’s] responsibilities,’ ‘of his office,’ and made ‘in the process of shaping and making decisions.’” *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (quoting *United States v. Nixon*, 418 U.S. 683, 711, 713, 708 (1974)). Only if that stringent test is met is there a “presumptive privilege.” *United States v. Nixon*, 418 U.S. at 708. But even this presumptive privilege may be overcome, since the interests of the Executive Branch must be balanced against “our historic commitment to the rule of law,” which “depend[s] on full disclosure of all the facts, within the framework of the rules evidence.” *Id.* at 709. Only when that balancing is required—where *official* acts and communications are at issue—does it

W. Page Smith, *John Adams* 755 (1962); *see also* Biegon, *supra*, 82 Va. L. Rev. at 696.

become relevant whether a judicial proceeding is civil or criminal in nature. *See id.* at 707-13.

Thus, the executive privilege recognized by this Court in *United States v. Nixon* in no way supports Mr. Clinton's argument. Executive privilege is analogous to the protection recognized in *Nixon v. Fitzgerald*, and its limitations are similar. Both protections are designed to preserve the presidential decision-making process, and both are narrowly crafted to achieve that end. Executive privilege is necessary because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. at 708. Because official conduct and communications are not involved here, there is no warrant to engage in the balancing of interests required in *United States v. Nixon*, and no basis to hold that there must be Sixth Amendment interests at stake for this litigation to proceed.⁴ This case would no more threaten "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," *id.*, than it would threaten to cause Presidents "to hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' " *Nixon v.*

⁴ Mr. Clinton is accordingly wrong to suggest that *United States v. Nixon* can be read as implying that the testimony of someone serving as President cannot be compelled in "civil proceedings." Pet. Br. 27. The Court simply left open the question whether the presumptive *executive privilege* for executive communications could be overcome in civil proceedings. *See Nixon*, 418 U.S. at 711-12 & n. 19. Here, of course, there is no question of privilege, and therefore no need to look to whether the need to produce evidence in a civil case may be overcome by the need to protect the privacy of official presidential deliberations. Similarly, Mr. Clinton's observation that the Court in *Nixon* twice quoted Chief Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual," Pet. Br. 27 (quoting *Nixon*, 418 U.S. at 708, 715 (quoting *Burr*, 25 F. Cas. at 192)) is beside the point: both Chief Justice Marshall in *Burr* and the *Nixon* Court were addressing the question of how claims of executive privilege must be handled by the courts.

Fitzgerald, 457 U.S. at 744-75 (quoting *Spalding v. Vilas*, 161 U.S. at 498-99).

This Court has recognized the distinction between official and unofficial acts when determining the President's amenability to suit in contexts other than civil damages actions as well. The judiciary "has no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866); the courts "cannot direct the President to take a specified executive act," *Franklin v. Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part and in judgment). This rule serves the same functions as the immunity recognized in *Fitzgerald*, see *Franklin*, 505 U.S. at 827-28 (Scalia, J., concurring in part and in judgment), and is likewise expressly limited to official acts. Indeed, in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) at 501, "the bill contain[ed] a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee." In responding to this contention, the Court did not dispute that injunctive proceedings could be had against a citizen serving as President. Rather, the Court held that what was prohibited was "relief *as against the execution of an Act of Congress* by Andrew Johnson"—an injunction relating to the President's *official* acts. *Johnson*, 71 U.S. (4 Wall.) at 501 (emphasis added).

Finally, there is no support for Mr. Clinton's claim that the paucity of cases against Presidents for unofficial acts is due to a "nearly universal understanding that such litigation is inconsistent with our constitutional scheme." Pet. Br. 18. There has been no such understanding. None of the prior Presidents who were sued for nonpresidential acts (Presidents Theodore Roosevelt, Harry Truman, and John Kennedy) asserted any immunity claim. Pet. App. 14 n.10.⁵ And Presi-

⁵ President Kennedy attempted to obtain a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 &

dent Nixon *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States v. Nixon, supra*, and then later, in his briefs in *Nixon v. Fitzgerald, supra*.⁶ In any event, the understanding reflected in Mr. Clinton's brief is that such litigation may indeed be brought, but must be stayed. If *that* were the universal historical understanding, then plaintiffs with claims against Presidents for unofficial acts would not have withheld their claims, but would have *asserted* them to preserve their timeliness, even if the claims were going to be stayed.

In short, to create a blanket rule protecting a President from litigation relating to his unofficial acts would cross a line that this Court has never crossed and that the Framers never contemplated would be crossed. It would create the first purely personal presidential privilege. It would provide, as the court of appeals noted, a "degree of protection from suit for

Supp. V 1993), Pet. App. 14 n. 10, but the state trial court denied his motion, which was plainly meritless in light of this Court's decision in *Boone v. Lightner*, 319 U.S. 561 (1943).

⁶ At oral argument in *United States v. Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?

MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument at 80, *United States v. Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon at 8-9 n.6, *Nixon v. Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

his private wrongs enjoyed by no other public official (much less ordinary citizens)." Pet. App. 13. It would violate the precept that "[n]o man in this country is so high that he is above the law," *United States v. Lee, supra*, 106 U.S. at 220, or, as President Theodore Roosevelt said, that "[n]o man is above the law, and no man is below it; nor do we ask any man's permission when we require him to obey it."⁷

This is so even though the relief sought here is termed a "temporary deferral," Pet. App. 13, as opposed to dismissal. For far from being a brief delay, Mr. Clinton's requested "deferral" may be very long indeed. This action was commenced in 1994, and discovery is currently stayed by order of the District Court, Pet. App. 74. If Mr. Clinton is reelected, and if his temporary immunity claim is upheld, *discovery* would not even begin until early 2001—almost *seven years* after the claim was first brought. As for a claim more complex than Mrs. Jones's that is brought at the beginning of a two-term President's service in office, it is likely that more than a *decade* (and possibly more) would pass before the claim is tried, and perhaps more than *dozen* years would pass before any judgment became final on appeal.

Even in an age of heavy dockets, delays of such length are extraordinary, and by any standard exceed the "bounds of moderation," *Landis v. North American Co.*, 299 U.S. 248 (1936); indeed, as any unbiased litigator would attest, they are a defendant's dream. For under Mr. Clinton's proposed scheme of "deferral," a President may, in his capacity as an ordinary citizen, fail to meet a contractual covenant, or to pay a debt; he may commit a battery or a trespass or other tort, or commit any type of civil violation of law; and yet, unlike any other citizen, for a period of possibly eight years or even more, he is privileged not to pay any judgment, to submit to

⁷ John Bartlett, *Familiar Quotations* 687 (15th ed. 1980). With more spice as an apt egalitarian principle, is Montaigne's aphorism that "on the highest throne in the world, we still sit only on our own bottom." *Id.* at 166.

a trial, to give a deposition, to produce any document, or even to admit or to deny any of the allegations of a complaint. During this period of many years, evidence inevitably will be lost, as witnesses become unavailable, memories fade, and documents are mislaid or destroyed, all to the likely detriment of the plaintiff, who still must bear the burden of proof. If such delay were commanded by law, a plaintiff might be wise not to bother to assert even the strongest of claims. And in a case such as this, where the plaintiff seeks vindication for damage to her reputation, no amount of prejudgment interest will compensate for any delay. The presumptive “deferral” rule sought by Mr. Clinton is indeed a special privilege or “immunity”—which is why Mr. Clinton repeatedly described it as such throughout the proceedings below.

Mr. Clinton’s description of stays in other litigation contexts only serves to confirm the extraordinary nature of the privilege he seeks here. With one exception—the stay provision in the Soldiers’ and Sailors’ Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993) (Pet. Br. 36)—each of the examples of stays he cites are ones required in order to allow *other* judicial or administrative cases to proceed. And none of these examples involves the creation of a special, personal privilege. Thus, the automatic bankruptcy stay (Pet Br. 34-35), which is the product of a statute, 11 U.S.C. § 362 (1994), serves to allow claims to be immediately addressed in the bankruptcy forum; and it affords protection not only to debtor-defendants but to claimant-plaintiffs, by preserving the value of the bankrupt estate. And as for the protection afforded debtors, it is available to any person who may file a bankruptcy petition—and not to a special privileged class of one. Similarly, the stay of civil litigation in favor of criminal litigation (Pet. Br. 35) serves the interests of justice, judicial economy, and constitutional rights such as the privilege against self-incrimination, and, through the doctrines of *res judicata* or collateral estoppel, may even benefit the civil plaintiff. And facilitating the conduct of criminal litigation

against the defendant hardly amounts to a privilege for the defendant. The doctrine of primary jurisdiction (*id.* at 36) likewise serves the interests of economy, and does not place any citizen above any other in the eyes of the law. Finally, a stay of proceedings pending appeal (*id.*), like that entered here, is hardly unique to official-immunity litigation; it serves to preserve an issue for appellate review and creates no privilege for anyone.

As for the Soldiers and Sailors' Civil Relief Act, its stay procedure was expressly created by Congress, which could have just as easily granted relief to Presidents, but has not. In any event, as this Court has held, stays under that Act are not to be liberally granted; for example, "[t]he Act cannot be construed to require continuance on [a] mere showing that the defendant was in Washington in the military service," *Boone v. Lightner*, 319 U.S. 561, 565 (1943), and thus could not help Mr. Clinton even if the Act's military-service requirement could be ignored. Unlike the examples he cites, the relief Mr. Clinton seeks is indeed extraordinary, and would unquestionably provide a "degree of protection from suit for . . . private wrongs enjoyed by no other public official (much less ordinary citizens)." Pet. App. 13. Indeed, as the example of the Soldiers and Sailors' Civil Relief Act shows, any such protection should not be for the courts to create, but for Congress to enact.

C. Petitioner's claim of temporal immunity cannot be justified under Article II or the separation of powers.

Mr. Clinton and *amici* also contend that Article II and separation-of-powers principles establish the temporary immunity from suit that he seeks. To make out a separation-of-powers violation under this Court's cases, however, Mr. Clinton must demonstrate how proceeding with this litigation would cause the "encroachment or aggrandizement of one branch at the expense of the other," *Metropolitan*

Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)), or would otherwise “prevent[] the Executive Branch from accomplishing its constitutionally assigned functions,” *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). Mr. Clinton’s burden of showing a separation-of-powers violation, or showing that a stay of all proceedings is otherwise justified, is unmet. Nor is a blanket temporary-immunity protection required in *every* personal action against the President as a matter of law.

1. This simple civil case will not prevent the Executive Branch from accomplishing its constitutionally assigned functions.

As the court of appeals observed, Mr. Clinton has presented a “sweeping claim that this suit . . . will violate the constitutional separation of powers doctrine . . . without detailing any specific responsibilities so explaining how or the degree to which they are affected by the suit.” Pet. App. 12. He made no attempt in the district court to show how this case could possibly keep him from carrying out his official duties. He did not do so for a very simple reason—he cannot.

It is not even necessary to look to Mr. Clinton’s duties to establish the point. Given its simple factual predicate and the utterly barren record, this case could not be deemed to impose hardship upon the Executive Branch. It has nothing to do with Mr. Clinton’s official duties. It is at bottom a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably he has already spent with his counsel the short time required to obtain his recollection of events, for according to what he has publicly said, his recollection is nonexistent. By its nature, the case will not require the production of many

documents. Discovery and trial in this case will not be burdensome, and can be controlled by the ample powers of the district court to prevent any interference with Mr. Clinton's official duties. On the other hand, the dimming of memories and the risk that other evidence may be lost could prove fatal to corroboration of Mrs. Jones's claims, and possibly to the case itself.

In his brief, Mr. Clinton cites television reports describing "[r]espondent's counsel's . . . intention to pursue discovery aggressively." Pet. Br. 21. Even aggressive discovery, however, would not make this case very complex—as *Mr. Clinton's* own counsel has publicly acknowledged. Mr. Clinton's counsel has admitted that "[t]he President's case is not a complicated case," and has explained that "[i]f the President were Joe Schmo [*sic*], we wouldn't be wasting time with motions. I'd go to trial next week" ⁸ He has also publicly acknowledged that the trial in this case would be very short. ⁹ In short, of the sorts of lawsuits that one could imagine being brought against any individual, this one is just about the simplest—even in the view of Mr. Clinton's own counsel. But the Court certainly need not rely upon the press clippings offered by the parties to decide whether the case is really that simple. The allegations of the complaint bespeak their own factual simplicity, and Mr. Clinton can point to nothing in the record suggesting that this case cannot be quickly and easily tried.

Mr. Clinton has thus offered no case-specific facts to show that *this case* would actually be so burdensome that it would impair his ability to carry out his official duties. Instead, he and his *amici* devote most of their efforts to establishing—generally, and not with reference to *this* simple case—that his duties are so vast and litigation over personal matters so

⁸ Ruth Shalit, *The President's Lawyer*, N.Y. Times, Oct. 2, 1994, § 6, at 42, 47 (quoting Robert S. Bennett, Esq.).

⁹ Frank Deford, *The Fabulous Bennett Boys*, Vanity Fair, August 1994, at 80, 85.

potentially burdensome that the two are bound to conflict, and a blanket rule requiring a stay is called for.

These arguments fail. The Chief Executive's duties are difficult and important, but the fact remains that they are, as Chief Justice John Marshall once observed, "not unremitting," and do not "demand his whole time for national objects." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692d). That is no doubt because, as common sense makes clear, a President does not and cannot exercise all executive power himself; unlike legislative or judicial powers, executive powers can be, and for the most part, are, delegated. "Although the Constitution says that '[t]he executive Power shall be vested in a President of the United States of America,' Art. II, it was never thought that the President would have to exercise that power *personally*. He may generally authorize others to exercise executive powers, with full effect of law, in his place." *Mistretta v. United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) (emphasis in original). The President's powers are mostly exercised through others. As a result, Presidents have always had time to fulfill personal commitments that do not involve the exercise of their Article II powers. Mr. Clinton's activities in the weeks after his brief was filed, which are a matter of public record, provide an apt example: a book that Mr. Clinton had authored was published; he spent a week vacationing in Wyoming, where he hiked and played golf; he spent a day in New York to attend a large birthday party in his honor; he spent four days riding a train through the Midwest; attended a political convention in Chicago; went on a two-day bus trip through another route in the Midwest and South; and spent a day in Little Rock, where he played golf.¹⁰ There is, of

¹⁰ E.g., *Clinton's Book Reinforces Administration's Themes*, Wash. Post, Aug. 22, 1996, at A8, col. 1; *Clinton Puts Off Politics As Vacation Winds Down*, Wash. Post, Aug. 17, 1996, at A15, col. 1; Alison Mitchell, *Clinton Has \$10 Million Wish for Birthday Bash*, N.Y. Times, Aug. 19, 1996, at A1, col. 4; John F. Harris, *President Finds 'Heaven' on the Campaign Rails*, Wash. Post, Aug. 27, 1996, at A1, col. 3; Dan Balz, *Despite*

course, absolutely nothing inappropriate with any of these activities, because the business of the Executive Branch indisputably went on unimpaired. But they refute the claim that the demands of this “civil damages litigation against a sitting President would seriously impair the President’s ability to discharge his constitutional responsibilities.” Pet. Br. 20.

The past experience of Presidents with judicial and other legal proceedings likewise refutes Mr. Clinton’s argument. Presidents have given evidence under judicial supervision even as to matters relating to their office, without any ill effect.¹¹ Mr. Clinton’s own experience with the Whitewater affair by itself proves the point: In addition to giving grand jury testimony by videotape on more than one occasion, Mr. Clinton has given testimony by videotape in two separate criminal trials in the district court, which successfully and uncontroversially balanced his schedule with the rights of the litigants and the evidentiary needs of the case.¹² Indeed, given

Key Strategist’s Fall, President Says ‘Hope Is Back’, Wash. Post, Aug. 30, 1996, at A1, col. 5; Todd S. Purdum, *Campaigns Over, the Candidates Take To the Road*, N.Y. Times, Aug. 31, 1996, at A1, col. 6; Todd S. Purdum, *Clinton Starts at the Beginning Once Again*, N.Y. Times, Sept. 2, 1996, § 1, p. 10, col. 1.

¹¹ E.g., *United States v. Fromme*, 405 F. Supp. 578, 582-83 (E.D. Cal. 1975); see also *United States v. Poindexter*, 732 F. Supp. 142, 143-146, 149-160 (D.D.C. 1990); 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 7.1 (2d ed. 1992); Laurence H. Tribe, *American Constitutional Law* 78 (2d ed. 1988) (rejecting the view “that the President [is] beyond the pale of judicial direction”).

¹² *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark.); *United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.); see, e.g., Stephen Labaton, *Clinton Denies Any Link to Whitewater Case Loan*, N.Y. Times, May 10, 1996, § A, p. 1, col. 1; Alison Mitchell, *Clinton Is Ordered To Testify in Ex-Partners’ Fraud Trial*, N.Y. Times, Feb. 6, 1996, § A, p. 16, col. 5; Ronald Smothers, *Judge Rules Clinton Testimony Will Be Videotaped for Trial*, N.Y. Times, Mar. 21, 1996, § A, p. 16, col. 1; Hugh Aynesworth, *Clinton Deposition Could Take 8 Hours, Judge Tells Lawyers*, Wash. Times, Apr. 18, 1996, part A, p. 18; Tim

the fact that they were indeed criminal proceedings, that Mr. Clinton is expressly a principal subject of the Independent Counsel's criminal investigation into Whitewater,¹³ and given that this investigation encompasses a number of complex and disparate financial transactions, Mr. Clinton has surely already spent more time dealing with Whitewater than he ever will with this case. At the least, it is clear that he has had to do in the criminal realm the burdensome things he now claims he cannot do in any civil litigation against him: "to review [pleadings]; prepare and assure the veracity of discovery responses; retrieve and review documents; . . . review . . . other evidence in the case; review the opposition's pleadings and motions; . . . consult with counsel throughout the case"—and testify. Pet. Br. 23; *see also* Br. for United States 9. If the Independent Counsel's investigation has not kept Mr. Clinton from his official duties, neither will most personal civil cases—and *certainly* not *this* one.

The very trial judge who will try this case, indeed, was very solicitous of Mr. Clinton in one of the Whitewater trials,¹⁴ and even came to Washington to moderate his videotaped deposition in that case. She also granted his request that the tape not be shown to third parties. Far from intruding into presidential business, she has managed litigation to prevent judicial intrusion. She would no doubt be very accomodating of Mr. Clinton's scheduling concerns in this case through the use of her case-management experience (and through *in camera* and *ex parte* conferences when needed), and could ensure that no presidential business would be impaired. And she would no doubt be highly cognizant of the public mistrust of

Weiner, *Clinton Testifies on Tape in Trial of Bankers*, N.Y. Times, July 8, 1996, § A, p. 11, col. 1.

¹³ Order, *In re Madison Guaranty Savs. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir., Sp. Div. Aug. 5, 1994) (appointing Independent Counsel).

¹⁴ *United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.).

the justice system that would result if the President were not treated fairly in the conduct of litigation while he is President.

Only by *ipse dixit* does Mr. Clinton assert that, "if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events." Pet. Br. 23. As the court of appeals correctly noted, however, Mr. Clinton's assertion about a flood of future cases is "not only speculative, but historically unsupported." In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." Pet App. 14 n.10; *see also* Br. for United States 6-7 n.4. The historical record reveals no presidential hardship caused by these cases. *Id.*¹⁵

The reason why there have been so few cases is precisely that identified in the opinion of the court of appeals. Very few people actually "traffic with the President in his *personal* capacity," Pet. App. 15, leaving even fewer who could have any conceivably colorable claim. It is fanciful to suggest that Presidents, who have absolute immunity from damages for their official acts under *Nixon v. Fitzgerald*, are "especially vulnerable to politically motivated 'strike suits'" for their unofficial acts. Pet. Br. 23. Even apart from the fact that plaintiffs would be few and far between, it is highly unlikely that political partisans would make litigation their attack vehicle of choice. As the Nation's political history shows, litigation is hardly necessary to accuse, attack, or embarrass a public figure. Indeed, if accusations against a public figure

¹⁵ The lawsuit against President Truman, in particular, was filed just a few months before he became President, and was actively litigated during his term of office. Biegon, *Presidential Immunity, supra*, 82 Va. L. Rev. at 711-12. But "[d]espite the enormous demands of the Presidency during this tumultuous period in history, Mr. Truman did not find it necessary to seek the tolling of Mr. DeVault's suit." *Id.*; *see DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946).

are unjustified or purely partisan, one would think that litigation—which gives the public figure access to discovery and to a neutral forum in which to obtain vindication—is the *least* likely mode of attack. Mrs. Jones, for example, has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a neutral, nonpartisan forum empowered not only to dismiss her claims, but to impose severe sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including purely private ones against Presidents.

Further, Mrs. Jones's life as a plaintiff is not attractive. She is subject to scurrilous comments in the media and minute examination of her past, is living in a controlled environment to prevent unwanted intrusion, and is exposed to intense interest and comments whenever she is recognized in public by all manner of people. It takes a person with great courage to sue someone with more influence, wealth, privilege, and power. If anything, Mrs. Jones's experiences would discourage others from ever suing a sitting President, especially since her case has now been delayed for more than two years.¹⁶

¹⁶ To compound matters, a supposed delay in filing her claim is claimed by Mr. Clinton to suggest that Mrs. Jones's motives were bad. Pet. Br. 41-42. If a political strike suit was her desire, the presidential campaign of 1992 would have been the time to attempt to politically harm Mr. Clinton. The possibility that Mrs. Jones had no such motive, as proven by her lack of desire to sue for almost three years until she was libeled, does not suggest itself to Mr. Clinton, who can see no harm in any post-filing delay to Mrs. Jones's cause in quickly restoring her reputation.

An improper motive is also implied by Mr. Clinton when he notes that Mrs. Jones did not sue the publication that published the libel. Pet. Br. 3 n.1. But the standard of proving libel in the face of the First Amendment rights of the press is difficult.

2. Proper judicial case management is sufficient to protect the interests of the Executive Branch in this case and would not violate the separation of powers.

None of this is to say that the courts do not owe great deference to the presidency in overseeing litigation. What is needed in *this* case to protect the public's interest in the presidency, however, is exactly what the court of appeals prescribed. Emphasizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on its docket," the court of appeals directed the district court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. The district court was directed to "exercise its discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties." *Id.* at 13-14.

The decision below recognizes that a stay, not yet shown to be warranted in this case, may be required in some *other* case, or upon changed circumstances in this one. The court of appeals reversed the district court's stay of trial as an "abuse of discretion" because the district court failed to identify, and the record failed to present, any particularized reason to believe that a trial would hinder Mr. Clinton's execution of official duty. *Id.* at 13 n.9. The district court actually saw "no reason why the discovery and deposition process could not proceed as to all persons including the President himself," and pointed to no burden unique to a trial that could justify a different result. *Id.* at 71. Given this holding, and given that Mr. Clinton and the Government claim that discovery would be at least as burdensome (if not more so) than a trial, *see* Pet. Br. 21; Br. for United States 24, it should be clear that there was "no reason why [a trial] could not proceed" as well on this record and in the particular circumstances of this case.

The opinion under review emphasized that a different record could indeed lead to a different result, and that the district court is *required* to do everything necessary to allow the President to carry out his constitutional duties:

If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15. Thus, the trial judge remains completely free under the circuit court's decision to "halt[] or delay[] or reschedul[e] *any* proposed action by *any* party at *any* time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (Beam, J., concurring; emphasis added). And Mr. Clinton remains free "to pursue motions for rescheduling, additional time, or continuances." Pet. App. 16.

Contrary to Mr. Clinton's assertions, such motions would not "entangle[]" the Judicial and Executive Branches "in an ongoing and mutually harmful relationship," would not require "the President . . . to provide detailed information about the nature of pending Executive Branch matters," and would not involve "the trial judge . . . passing judgment on the President's priorities." Pet. Br. 29. The court of appeals' decision directs *deference* to the presidency and mandates "judicial case management *sensitive* to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13 (emphasis added). The circuit court's reference to the need to "control[] the scheduling of the case as necessary to avoid interference with specific, particularized, clearly

articulated presidential duties," Pet. App. 16, when read in context, clearly does not invite scrutiny of Executive Branch affairs; it was meant to convey that the proper approach to protection of the presidency lay not in a blanket granting of immunity, for which Mr. Clinton argued, but in deferentially scheduling around the President's duties. While Mr. Clinton may not take the approach he took the below—to assert that his duties do not permit litigation of this or any case until he leaves office—he may properly assert, for example, that on particular days or weeks, he is not available for deposition or trial testimony because of presidential business, or that any matter, including his deposition, must be interrupted for official business. The district court is "duty-bound . . . to protect the President's ability to fulfill his . . . responsibilities," and thus "duty-bound" to defer to him. Pet. App. 15. For again, "nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25 (Beam, J., concurring).

Nothing in the court of appeals' decision requires or permits a trial judge to engage in judicial second-guessing of presidential priorities. The district court would have little opportunity to do so in any event. Busy and important people, like corporate chief executives and Cabinet secretaries, are frequently defendants in litigation—litigation far more complex than this—but their constant involvement in the cases is not required, because, like Mr. Clinton, they have good lawyers and assistants. But as the opinion below directs, Mr. Clinton will have even greater solicitude than would other defendants. While the only possible time other busy defendants would have to appear personally before the district court would be to testify, Mr. Clinton's appearance could be avoided by allowing him to testify by videotape. *Cf.* Pet. App. 23 (Beam, J., concurring); Pet. Br. 28 & n.25 (noting Mr. Clinton's videotaped testimony in Whitewater trials). Worry over money for defense costs and payment of a judgment is

even mitigated here, because Mr. Clinton is reportedly covered by insurance for an amount in excess of the *ad damnum* and by a legal defense fund.

Mr. Clinton attempts to assail the benefits of judicial deference by postulating remote hypotheticals that in any event do not advance his claim. His “national security” scenarios, for example, raise no realistic specter of danger to the functioning of the Executive Branch. The trial judge, under the court of appeals’ decision, is to show deference to presidential interests in all circumstances, and surely there is no reason to believe that this deference will not be maintained when national-security issues are at stake. *Ex parte* and *in camera* procedures, moreover, may be used to protect the interests of the presidency. As for the hypothetical crisis offered by Mr. Clinton in which a President must “seek to maintain a pretense of ‘business as usual’ ” and “simply having to ask a court for a change in the litigation schedule could be highly damaging,” Pet. App. 31, any difficulty there would not be caused or exacerbated by the litigation; if the President were previously scheduled to give a speech, attend a conference, play golf, conduct a meeting, or go on a campaign tour, “simply having to [seek] a change in the . . . schedule” would be just as “damaging” in those circumstances as well.

Mr. Clinton’s assertions about hypothetical litigation in state courts do not help his argument. This case is in federal court, and there is no need for this Court to address events in a state-court litigation that may never occur. And if a President is ever to be sued for personal acts in a state court, it would most likely be in a court of his own home state, a forum that would likely be convenient and familiar to him.¹⁷

¹⁷ One scenario would be assertion of purely state-law claims by a plaintiff from his own state, in which case there would be no diversity jurisdiction, 28 U.S.C. § 1332(a)(1) (1994). Such claims, given the citizenship of the parties, would most likely be brought in the state courts of that state. Another scenario would be the situation in which a diverse plaintiff chose to sue the President in the state courts of his home state,

In any event, Mr. Clinton's claim that " 'case management' by state trial courts is inconsistent with principles of federalism," Pet. Br. 33, actually stands those principles on their head. Under the principles of federalism repeatedly articulated by this Court, it may not be presumed that "state trial judges" will display "local partisan hostility," *id.* at 33-34, or that they will refuse to respect the constitutional duties of the President. The opposite presumption is required. "Article VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties." *Pennzoil v. Texaco*, 481 U.S. 1, 15 (1987). Accordingly, "[m]inimal respect for the state processes . . . precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Even if this case had been brought in state court, this Court could not decide it by assuming that a state court would act unlawfully.¹⁸

The scheme of deference established by the court of appeals will not "work any judicial usurpation of properly executive functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), and will not " 'prevent[] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989)

in which event the President would not be able to remove the action to federal court on diversity grounds, *id.* § 1441(b). But in all other cases in which a diverse plaintiff sued a President in state court on state-law claims, the action would of course be removable.

¹⁸ Nor is there any merit to Mr. Clinton's suggestion that this case should be deferred because, given the President's position as a political official, it would supposedly thrust the courts into the "political arena." Pet. Br. 32. Needless to say, there is no "political person" doctrine, and in fact the federal courts find it frequently necessary to address cases that, unlike this one, actually do involve questions of law and fact having direct and controversial implications in the political arena. *E.g.*, *Shaw v. Reno*, 116 S. Ct. 1894 (1996) (redistricting); *Romer v. Evans*, 116 S. Ct. 1620 (1996) (homosexual rights).

(quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). It will instead ensure that this case will not cause even the slightest impairment of presidential business.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT, ON THIS BARREN FACTUAL RECORD, THERE IS NO BASIS FOR A STAY OF THE TRIAL OR THE LITIGATION GENERALLY.

Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary *immunity* from trial," an "immunity from trial as [*Nixon v.*] *Fitzgerald* seems to require." Pet. App. 68 (emphasis added); see Pet. Br. 45-47. Citing this Court's decision in *Landis v. North American Co.*, 299 U.S. 248 (1936), which governs the issuance of discretionary litigation stays, Mr. Clinton argues that the district court did not abuse its discretion in ordering a postponement of trial. But he made no record below that would justify *any* stay whatsoever under *Landis*. Accordingly, the Court of Appeals correctly found that what the District Court ordered—a postponement of the trial until perhaps the year 2001—not only was "the functional equivalent of a grant of temporary immunity," but was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays. Pet App. 13 n.9.¹⁹

In *Landis v. North American Co.*, 299 U.S. 248 (1936), the Court did indeed hold that "the power to stay proceedings is incidental to the power inherent in every court to control the

¹⁹ The district judge cited her equity powers and Fed. R. Civ. P. 40, together with a finding of a "temporary or limited immunity from trial," to put the case on hold as far as a trial is concerned. Pet. App. 70-71. But her equity powers and Rule 40 were invoked because she incorrectly found an immunity from trial, as both she and the court of appeals made clear. *Id.*; accord *id.* at 13 & n.9. Thus, if her holding as to an immunity from trial fails, so should the alternative grounds for postponement fail as an abuse of discretion.

disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. But the Court made clear that a stay of litigation could be granted "[o]nly in rare circumstances." *Id.* at 255. In particular, "the *suppliant* for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* (emphasis added). "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the . . . suppliant[] for relief, and discretion [is] abused if the stay [is] not kept within the bounds of moderation." *Id.* at 256.

Under *Landis*, it was Mr. Clinton's "heav[y]" burden to show why a stay was required. As stated above, however, he made no effort to show why the litigation of *this* simple case would *in fact* present him, or the presidency, any "clear . . . hardship or inequity." Rather than try to make such a showing—which, given the simplicity of this case, was impossible to make—Mr. Clinton resorted to reliance on hypothetical circumstances. He chose to argue in the abstract, as he does here, that litigation generally (including a hypothetical torrent of future cases) could someday pose an undue burden upon his Office. Apart from being incorrect, that argument fails to meet the *Landis* criteria. It fails to establish—indeed, it fails really to assert—that there will in fact be "hardship or inequity" in *this* case, or that *this* case was of such an "extraordinary public moment," *Landis*, 299 U.S. at 256, that any part of it should not be allowed to proceed.

The court of appeals was entirely faithful to *Landis* in reversing the district court's categorical and indefinite postponement of trial. In granting trial "immunity" to Mr. Clinton, far from considering "the particular facts at hand" (Pet. Br. 45), the district court made no finding that Mr. Clinton had made any showing of an actual "clear case of hardship," and cited *no* facts that would support such a finding (and could not, because, again, Mr. Clinton did not even try to present

such facts). The closest the district court came to a finding was a conclusory statement that “[n]either is this a case that would likely be tried with few demands on Presidential time”—a statement that not only came without any indication of whether those demands would amount to clear inequity or hardship, but was manifestly insupportable in a case centering upon a short encounter between two people in a room.

On the other side of the balance, as Judge Beam explained, the danger of harm to Mrs. Jones is manifest. She “faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time.” Pet. App. 17. The district court not only incorrectly disregarded this harm, but ignored Mrs. Jones’s well-pleaded reasons why the commencement of this action was delayed, and ignored the fact that public aspersions upon Mrs. Jones reputation had made it necessary for her to proceed. Complaint ¶¶ 41-51.²⁰ Beyond this, the passage of time contemplated by the District Court’s order—possibly into the next century—was surely “immoderate” and impermissible under *Landis*. Even in “cases of extraordinary public moment”—which this one, given the lack of burden, is not—*Landis* requires that a delay cannot be “immoderate in extent.” 299 U.S. at 256. In *Landis* itself, the Court found “the limits of a fair discretion” to have been “exceeded” by a stay that had suspended “the proceedings in the District Court . . . more than a year.” 299 U.S. at 256.

²⁰ Throughout the briefs of Mr. Clinton’s Solicitor General and academic *amici*, the importance of Mrs. Jones’ case is downplayed because of a supposed delay in filing her case. As noted above, public defamation in early 1994 caused her to proceed immediately to file a case that would not otherwise have been brought when few people knew about the harassment in 1991. Also to be noted is that the defamation action had recently accrued when she sued in May 1994. Of course, the speed of filing has never, so far as we can tell, governed the speed of litigation. Otherwise, a litigant Smith, whose cause of action arose after another plaintiff, Jones, had filed a similar action just before the limitations deadline, would have precedence on the court’s docket even if Smith filed one day after his cause of action arose!

The district court was neither presented with, nor did it point to, a record of “clear hardship and inequity” as required by *Landis*. What the district court really did was what it candidly said it had done: to create a new rule of law establishing a “limited or temporary *immunity* from trial,” a new kind of immunity that it believed, quite incorrectly, “[*Nixon v. Fitzgerald* seems to require.” Pet. App. 68, 70 (emphasis added). Apart from being based upon a clear error of law, the district court’s ruling was an abuse of discretion because it was *not* an exercise of discretion. Reversal of the district court’s “stay” order, if anything, was all but *required* under *Landis*.

Mr. Clinton makes a final effort to restore the district court’s “trial immunity” order by contending that the court of appeals lacked jurisdiction to review it. Pet. Br. 43-45. This argument, which Mr. Clinton has not even mentioned in his list of questions presented, is meritless.

In appealing the denial of his claim of “immunity” (which was the word Mr. Clinton repeatedly used in both courts below to describe his claim), Mr. Clinton argued that the district judge’s decision was “inherently inconsistent,” that the “result that the District Court arrived at here—deferring trial but not discovery”—was “illogical” because principles of “immunity” under *Nixon v. Fitzgerald* required deferral of both. Opening Brief of Appellant President William Jefferson Clinton at 10, 23, *Jones v. Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995). His “statement of issues” and list of principal authorities in that court thus read:

1. Whether the Constitution and principles of separation of powers require the dismissal without prejudice of this civil damages suit against an incumbent President and his co-defendant, and the tolling of any statutes of limitation applicable to the claims asserted therein, until such time as the President is no longer in office.

Nixon v. Fitzgerald, 457 U.S. 731 (1982);

2. Whether the District Court erred in holding that the Supreme Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), requires that sitting Presidents be immune only from trial, but not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the Office of the President.

Nixon v. Fitzgerald, 457 U.S. 731 (1982);

3. Whether the District Court, having found that it is not in the national interest to distract the President with the burdens of trial in private civil litigation, erred in refusing on the same basis to stay the proceedings in their entirety, until such time as the President leaves office.

Nixon v. Fitzgerald, 457 U.S. 731 (1982);

Id. at vii-ix.

All of Mr. Clinton's questions presented in the Eighth Circuit were to the same effect: *Nixon v. Fitzgerald* and the principles of immunity expressed in that case required the postponement of *both* discovery and trial (regardless of whether the postponement takes the form of a stay or dismissal). Jurisdiction over Mr. Clinton's appeal was premised upon the principle that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." *Id.* at vii (citing *Nixon v. Fitzgerald, supra*); accord Pet. Br. 4 n.3 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Mrs. Jones cross-appealed, arguing (as she does here) precisely the converse of what Mr. Clinton was arguing—namely, that *Nixon v. Fitzgerald* justified *neither* the postponement of discovery nor the postponement of trial—and argued that jurisdiction over her cross-appeal was proper under principles of pendent appellate jurisdiction.

The Eighth Circuit correctly held that the cross-appeal could properly be entertained as an exercise of pendent appel-

late jurisdiction. As this Court has recognized, pendent appellate jurisdiction is a concept that has been “endorsed” by all the federal courts of appeals, *Swint v. Chambers County Comm’n*, 115 S. Ct. 1203, 1209 n.2 (1995) (citing cases from each Circuit); it is typically held to apply when the pendent issue is “inextricably intertwined with” the primary issue on review, *id.* at 1212. And if ever there were a case where such jurisdiction was justified, this is it. For the question whether Mr. Clinton is entitled to a postponement of just a trial, far from being “very distinct” (Pet. Br. 44) from the question whether he is entitled to a postponement of the litigation entirely, is part and parcel of it. Indeed, as Mr. Clinton’s own questions presented below show, the questions were in his view one and the same. In both the district court and the court of appeals, *he* argued that he was entitled, *as a matter of law*, to an immunity or stay as to *all* proceedings, *including* the trial, for *one* reason, and one reason *alone*—the fact that he is President of the United States. Mrs. Jones’ cross-appeal argued a point that indisputably was inextricably intertwined with, indeed subsumed within, Mr. Clinton’s claim—namely, to borrow the district court’s words, whether he was entitled to “a temporary or limited immunity from trial [under] *Fitzgerald*.” Pet. App. 70. The court of appeals reached the obvious conclusion that both appeals

are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency from civil suit for his unofficial acts? It is difficult to imagine issues more “intertwined” than these, where answering one question of law resolves them all.

Pet. App. 5 n.4.

Finally, nothing in this Court’s decision in *Swint v. Chambers County Commission*, *supra*, casts doubt upon the exercise of pendent jurisdiction in this case. At issue in *Swint* was a purported exercise of “‘pendent party’” appellate jurisdiction, *Swint*, 115 S. Ct. at 1206; there were “parties who were not involved in the appealable order but were parties to

the pendent order,” *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996) (per curiam). One group of defendants appealed the denial of their summary judgment motion, which was based upon a claim of qualified immunity; that appeal was plainly proper under *Mitchell v. Forsyth, supra*. See 115 S. Ct. at 1207. Another defendant, the Chambers County Commission, appealed the denial of its separate summary judgment motion, which did not involve the immunity issue and was not independently appealable. *Id.* at 1207-08. This Court, noting that “[w]e need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable,” held that pendent appellate jurisdiction was not proper because the parties did not, and could not, “contend that the District Court’s decision to deny the Chambers County Commission’s summary judgment motion was inextricably intertwined with that court’s decision to deny the individual defendants’ qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter.” *Id.* at 1212.

As noted in *Swint*, this Court “ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal.” *Id.* at 1211 (citing cases). And since *Swint*, the courts of appeals have continued to recognize the validity of pendent appellate jurisdiction, and have carefully confined the exercise of that jurisdiction to questions that are “inextricably intertwined” with those as to which independent bases of jurisdiction exist.²¹ There is no

²¹ See, e.g., *Martin v. Memorial Hospital*, 86 F.3d 1391, 1401 (5th Cir. 1996) (noting that *Swint* implied that pendent appellate jurisdiction was proper where “inextricably intertwined” standard was met); *Eagle v. Morgan*, 88 F.3d 620, 628 (8th Cir. 1996) (applying “inextricably intertwined” standard, and exercising pendent appellate jurisdiction); *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678-79 (D.C. Cir. 1996) (per curiam) (recognizing continued validity of pendent appellate jurisdiction under “inextricably intertwined” standard); *Cooper v. Town*

reason to depart from that course here. No pendent party was involved. And the pendent appellate question, whether there existed a "temporary immunity from trial," was bound up in the question that Mr. Clinton presented, which was whether there was a "temporary immunity" from all proceedings; the pendent issue was an integral part of the decision that Mr. Clinton appealed. There was thus no danger here of turning a "collateral order[] into [a] multi-issue interlocutory appeal ticket." *Swint*, 115 S. Ct. at 1211. Indeed, it would have been wasteful and illogical for the Eighth Circuit to have held that Mr. Clinton was not entitled to the full immunity from litigation that he claimed, but to have held itself powerless to correct the district court's erroneous holding that there existed a "temporary immunity from trial." This Court's cases "indicate that [the courts of appeals] should give the jurisdictional statutes a 'practical construction,'" *Gilda Marx v. Wildwood Exercise, supra*, 85 F.3d at 678 (quoting *Swint*, 115 S. Ct. at 1207-08 (citation omitted)), and such a construction surely requires, at a minimum, the exercise of pendent jurisdiction here.

of East Hampton, 83 F.3d 31, 36 (2d Cir. 1996) (same); *Brennan v. Township of Northville*, 78 F.3d 1152, 1157 (6th Cir. 1996) (same); *Dolihite v. Maughon*, 74 F.3d 1027, 1035 (11th Cir. 1996) (same), *petition for cert. filed* (June 19, 1996); *Sevier v. City of Lawrence*, 60 F.3d 695, 701 (10th Cir. 1995) (same).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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