

NLWJC- Kagan

Counsel - Box 015 - Folder 004

[Paula Jones Pleadings File] [2]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FILED

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No. 95-1050

MICHAEL J. ...
CLERK OF COURT

PAULA JONES

Appellee,

vs.

WILLIAM JEFFERSON CLINTON

Appellant,

and

DANNY FERGUSON

Defendant.

Appeal from the United States District Court
for the Eastern District of Arkansas
Civil No. LR-C-94-290

**OPENING BRIEF OF APPELLANT
PRESIDENT WILLIAM JEFFERSON CLINTON**

Robert S. Bennett
Carl S. Rauh
Alan Kriegel
Amy R. Sabrin
Stephen P. Vaughn
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

Kathlyn Graves
Wright, Lindsey & Jennings
220 Worthen Bank Building
200 West Capitol Avenue
Little Rock, Arkansas 72201

Stephen Engstrom
Wilson, Engstrom, Corum, Dudley &
Coulter
809 West Third Street
Little Rock, Arkansas 72202

Attorneys for the Appellant
President William Jefferson Clinton

4-5-95

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

On May 6, 1994, Paula Jones filed a complaint alleging that three years earlier, William Jefferson Clinton subjected her to sexual harassment in violation of her civil rights.* The complaint, filed two days before the expiration of the statute of limitations, sought \$700,000 in compensatory and punitive damages. At the time suit was filed, the defendant had been President of the United States for 15 months.

President Clinton moved to dismiss the complaint on grounds of presidential immunity, without prejudice to its reinstatement when he no longer was President. Thus, there was no question that the plaintiff's claims would be heard. The only issue was whether they could be litigated during President Clinton's term in office.

The District Court denied the Motion to Dismiss and retained jurisdiction. Although the court determined, based on Nixon v. Fitzgerald, 457 U.S. 731 (1982), that the trial could not take place during President Clinton's tenure as Chief Executive, it held that presidential immunity did not preclude discovery from proceeding, including discovery against the President.

President Clinton timely appealed. Counsel for the President respectfully request oral argument not to exceed 30 minutes per side.

* Mr. Clinton was Governor of Arkansas at the time of the alleged harassment. Named as co-defendant was Arkansas State Trooper Danny Ferguson.

TABLE OF CONTENTS

| | |
|--|------|
| TABLE OF AUTHORITIES | iii |
| PRELIMINARY STATEMENT | vii |
| A. Court Rendering The Opinion Under Appeal | vii |
| B. Applicable Standard Of Review | vii |
| C. Statement Of Subject Matter And Appellate Jurisdiction | vii |
| STATEMENT OF ISSUES | viii |
| STATEMENT OF THE CASE | 1 |
| A. The Allegations | 1 |
| B. Procedural History | 3 |
| C. The Order Under Appeal | 6 |
| SUMMARY OF ARGUMENT | 8 |
| ARGUMENT | 11 |
| I. THE DISTRICT COURT ERRED IN DECLINING TO DISMISS THE COMPLAINT WITHOUT PREJUDICE TO ITS REINSTATEMENT WHEN PRESIDENT CLINTON LEAVES OFFICE | 11 |
| A. Due To The Unique Position Occupied By The Nation's Chief Executive In Our Constitutional Scheme, The Supreme Court Has Recognized That Presidents Are To Be Accorded Certain Privileges And Immunities From Litigation | 11 |
| B. Civil Suits For Damages Based On Private Conduct Represent An Impermissible Intrusion Upon The Office Of The President, And Thus Mandate Immunity | 17 |
| C. There Is No Broad-based Public Interest In This Case To Justify The Exercise Of Jurisdiction Over A Sitting President | 25 |
| D. Immunity From Civil Damages Claims During A President's Tenure Is Necessary To Preserve The Separation Of Powers | 30 |
| E. Immunity From Civil Damage Actions While In Office Does Not Place This Or Any Other President "Above The Law." | 34 |

F. Dismissal Without Prejudice, Coupled With Tolling, Is Appropriate Here 38

II. AT A MINIMUM, THE DISTRICT COURT SHOULD HAVE STAYED THE LITIGATION IN ITS ENTIRETY DURING PRESIDENT CLINTON'S TENURE AS CHIEF EXECUTIVE 39

A. The Lower Court's Decision To Stay Trial But Not Discovery Is Counter To Law 40

B. The Lower Court's Refusal To Stay The Entire Litigation Was An Abuse Of Discretion 41

C. Due To The Specific Allegations Here, The Claims Against Trooper Ferguson Must Also Be Held In Abeyance 46

CONCLUSION 49

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE(S)</u> |
|---|----------------|
| <u>Atlee v. Nixon</u> , 336 F. Supp. 790 (E.D. Pa. 1972), <u>aff'd sub nom. Atlee v. Richardson</u> , 411 U.S. 911 (1973) | 33 |
| <u>Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah</u> , 113 S. Ct. 2217 (1993) | 13 |
| <u>Conroy v. Aniskoff</u> , 113 S. Ct. 1562 (1993) | 35 |
| <u>Dellums v. Bush</u> , 752 F. Supp. 1141 (D.D.C. 1990) | 33 |
| <u>DeVault v. Truman</u> , 194 S.W.2d 29 (1946) | 22 |
| <u>Duty v. City of Springdale</u> , 42 F.3d 460 (8th Cir. 1994) | vii |
| <u>Franklin v. Massachusetts</u> , 112 S. Ct. 2767 (1992) | 30, 31, 32, 33 |
| <u>General Motors Corp. v. Romein</u> , 503 U.S. 181 (1992) | 13 |
| <u>Helstoski v. Meanor</u> , 442 U.S. 500 (1979) | 41 |
| <u>Imbler v. Pachtman</u> , 424 U.S. 409 (1976) | 36 |
| <u>Johnson-El v. Schoemehl</u> , 878 F.2d 1043 (8th Cir. 1989) | 41 |
| <u>Landis v. North American Co.</u> , 299 U.S. 248 (1936) | 43 |
| <u>Livingston v. Jefferson</u> , 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411) | 31, 35 |
| <u>Mississippi v. Johnson</u> , 71 U.S. (4 Wall.) 475 (1866) | 32 |
| <u>Mitchell v. Forsyth</u> , 472 U.S. 511 (1985) | viii, 40, 41 |
| <u>Murphy v. Morris</u> , 849 F.2d 1101 (8th Cir. 1988) | viii, 41 |
| <u>National Treasury Employees Union v. Nixon</u> , 492 F.2d 587 (D.C. Cir. 1974) | 33 |
| <u>New York ex rel. Hurley v. Roosevelt</u> , 179 N.Y. 544 (1904) | 22 |
| <u>Nixon v. Fitzgerald</u> , 457 U.S. 731 (1982) | passim |

| | |
|--|--------------------|
| <u>Nixon v. Sirica</u> , 487 F.2d 700 (D.C. Cir. 1973) | 14, 16, 20 |
| <u>Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.</u> , 113 S. Ct. 684 (1993) | viii, 41 |
| <u>Romer v. Carlucci</u> , 847 F.2d 445 (8th Cir. 1988) | 33 |
| <u>Seattle Times Co. v. Rhinehart</u> , 467 U.S. 20 (1984) | 44 |
| <u>Siegert v. Gilley</u> , 500 U.S. 226 (1991) | 41 |
| <u>Stump v. Sparkman</u> , 435 U.S. 349 (1978) | 36 |
| <u>United States v. Burr</u> , 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694) | 32, 42 |
| <u>United States v. Moats</u> , 961 F.2d 1198 (5th Cir. 1992) | 41 |
| <u>United States v. Nixon</u> , 418 U.S. 683 (1974) | 13, 14, 27, 32, 42 |
| <u>United States v. North</u> , 713 F. Supp. 1448 (D.D.C. 1989), <u>aff'd</u> , 910 F.2d 843 (D.C. Cir. 1990), <u>cert. denied</u> , 500 U.S. 941 (1991) | 42 |
| <u>United States v. Poindexter</u> , 732 F. Supp. 142 (D.D.C. 1990) | 42 |
| <u>Winpisinger v. Watson</u> , 628 F.2d 133 (D.C. Cir.), <u>cert. denied</u> , 446 U.S. 929 (1980) | 34 |
| <u>Youngstown Sheet & Tube Co. v. Sawyer</u> , 343 U.S. 579 (1952) | 27, 30, 33 |

CONSTITUTIONAL PROVISIONS AND STATUTES

| | |
|-----------------------------|------------|
| U.S. Const. art. II, §§ 1-3 | 11, 17, 25 |
| U.S. Const. amend. XXV | 12 |
| 28 U.S.C. § 1291 | viii |
| 28 U.S.C. § 1331 | vii |
| 28 U.S.C. § 1332 | vii |
| 28 U.S.C. § 1343 | vii |

| | |
|---|----------------|
| 42 U.S.C. § 1983 | 2 |
| 42 U.S.C. § 1985 | 2 |
| Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. 1994) | 35, 36, 48, 49 |
| 50 U.S.C. app. § 510 | 36 |
| 50 U.S.C. app. § 521 | 35 |
| 50 U.S.C. app. § 525 | 35, 49 |

PLEADINGS FROM MISCELLANEOUS CASES

| | |
|---|------------|
| Complaint and Various Other Pleadings, <u>Bailey v. Kennedy</u> , No. 757200 (Los Angeles County Superior Court filed Oct. 27, 1960 and various other dates) | 22, 24, 25 |
| Complaint, <u>Hills v. Kennedy</u> , No. 757201 (Los Angeles County Superior Court filed Oct. 27, 1960) | 22 |
| Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, <u>In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972</u> , No. 73-965 (D. Md. filed Oct. 5, 1973) | 16 |
| Brief for Respondent, <u>Nixon v. Fitzgerald</u> , Nos. 79-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) (available on LEXIS) | 20 |

OTHER AUTHORITIES

| | |
|--|--------|
| Amar, Akhil R. and Katyal, Neal K., <u>Executive Privileges and Immunities: The Nixon And Clinton Cases</u> , 108 Harv. L. Rev. 701, 713 (Jan. 1995) | 12, 39 |
| Amar, Akhil R., <u>Law Story</u> , 102 Harv. L. Rev. 688, 709 (1989) | 13 |
| Bell, Griffin B. et al, <u>Automatic Disclosure in Discovery -- The Rush to Reform</u> , 27 Ga. L. Rev. 1, 8 (1992) | 44 |

| | |
|---|--------|
| Carter, Stephen L., <u>The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision</u> , 131 U. Pa. L. Rev. 1341 (1983) | 16 |
| Farrand, Max, 2 <u>The Records of the Federal Convention of 1787</u> , at 500, 626 (rev. ed. 1937) | 16 |
| Joyce, Craig, <u>Statesman of the Old Republic</u> , 84 Mich. L. Rev. 846, 847 (1986) | 13 |
| Kurland, Philip B., <u>Watergate and the Constitution</u> 135 (1978) | 12 |
| Story, Joseph, 3 <u>Commentaries on the Constitution of the United States</u> , § 1563, pp. 418-19 (1st ed. 1833) | 13 |
| Wright, Charles A. et al, 8 <u>Federal Practice and Procedure</u> § 2001 at 46-51 | 44 |
| <u>The Diary of William Maclay and Other Notes on Senate Debates</u> , 68 (Kenneth R. Bowling and Helen E. Veit eds., 1988) | 15 |
| <u>The Federalist</u> Nos. 65, 69, 77, at 446 (Alexander Hamilton) (Modern Library ed., 1937) | 16 |
| 10 <u>The Works of Thomas Jefferson</u> 404 n. (Paul L. Ford ed., 1905) | 15, 31 |

PRELIMINARY STATEMENT

A. Court Rendering The Opinion Under Appeal.

Defendant/appellant President Clinton ("defendant") appeals from an order issued by the Honorable Susan Webber Wright of the United States District Court of the Eastern District of Arkansas. Jones v. Clinton, No. LR-C-94-290 (Memorandum Opinion & Order, Dec. 28, 1994), published at 869 F. Supp. 690 (E.D. Ark. 1994) (Addendum ("Add.") 1).

B. Applicable Standard Of Review.

This appeal raises a question of law as to whether a President is immune from having to defend a private claim for civil damages while in office. Pursuant to the law of this Circuit, a claim of immunity is subject to de novo review. See, e.g., Duty v. City of Springdale, 42 F.3d 460, 462 (8th Cir. 1994).

C. Statement Of Subject Matter And Appellate Jurisdiction.

In the court below, plaintiff/appellee Paula Jones ("plaintiff") contended that the court had subject matter jurisdiction over her federal claims pursuant to (a) 28 U.S.C. § 1331, on the ground that the case arises under the Constitution and laws of the United States; (b) 28 U.S.C. § 1343, on the ground that the case seeks redress and damages for violation of civil rights laws; and (c) 28 U.S.C. § 1332, on the ground that the case involves diversity of citizenship and is a civil action involving, exclusive of interest and costs, a sum in excess of \$50,000. Plaintiff also maintained that the District Court had pendent jurisdiction over her claims based on Arkansas tort law.

Appellate jurisdiction is founded on 28 U.S.C. § 1291. This appeal challenges the District Court's denial of President Clinton's Motion to Dismiss on the Grounds of Presidential Immunity. Denials of immunity are subject to appeal as of right under section 1291, because they "fall in that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1989)). See also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (order denying qualified immunity subject to immediate appeal as of right under section 1291); Murphy v. Morris, 849 F.2d 1101, 1104 (8th Cir. 1988) (denials of absolute and qualified immunity subject to immediate appeal). In particular, denials of presidential immunity are subject to appeal under the collateral order doctrine. Nixon v. Fitzgerald, 457 U.S. 731, 741-43 (1982).

This appeal is timely. The Order appealed from was entered on December 28, 1994. The President's appeal was noticed on December 30, 1994.

STATEMENT OF ISSUES

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);

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

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992);

Nixon v. Sirica, 487 F.2d 700, 750-58 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part);

U.S. Const. art. II §§ 1-3.

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);

Mitchell v. Forsyth, 472 U.S. 511 (1985).

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, including discovery, until such time as the President leaves office.

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

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

United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807)
(No. 14,694);

United States v. Poindexter, 732 F. Supp. 142 (D.D.C.
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United States v. North, 713 F. Supp. 1448 (D.D.C.
1989), aff'd, 910 F.2d 843 (D.C. Cir. 1990), cert.
denied, 500 U.S. 941 (1991).

STATEMENT OF THE CASE

A. The Allegations.

In January, 1994, a lawyer representing Paula Jones attempted to contact the White House through intermediaries, and threatened to disclose embarrassing allegations about the President unless he agreed to pay Ms. Jones a sum of money.¹ This approach was rejected out of hand. A few weeks later, Ms. Jones held a news conference at a partisan political gathering, in which she alleged that approximately three years earlier, President Clinton had purportedly made a crude sexual overture to her.² These allegations subsequently were included in a complaint against the President and Arkansas State Trooper Danny Ferguson, filed on May 6, 1994. (App. 7).

The complaint alleges that on May 8, 1991, when President Clinton was Governor of Arkansas and Ms. Jones was an employee of that state's economic development agency, the President purportedly "sexually harass[ed] and assault[ed]" the plaintiff, and that thereafter, he "personally, and through agents" imposed upon her a hostile work environment, thereby violating her rights to equal protection and due process of law under the Fourteenth and Fifth Amendments. Complaint ¶¶ 58-65 (App. 20-22). All but one

¹ Affidavit of George L. Cook, May 3, 1994 (Appendix ("App." 59)).

² Press Release of Cliff Jackson, P.A., "Troopergate Whistle-Blowers Press Conference," Feb. 11, 1994 (App. 60); Lloyd Grove, It Isn't Easy Being Right, The Washington Post, Feb. 14, 1994, at D1 (App. 67).

of the plaintiff's claims accrued well before the defendant became President of the United States.

Count I alleges that, as a result of the alleged incident of sexual harassment, the President deprived the plaintiff of her constitutional rights under color of state law, in violation of 42 U.S.C. § 1983. Count II alleges that, in connection with this same purported event, the President conspired with others to deprive the plaintiff of her constitutional rights, in violation of 42 U.S.C. § 1985. Id. at ¶¶ 66-69 (App. 22). Count III alleges a claim against the President under Arkansas law for intentional infliction of emotional distress, arising from the same alleged incident. Id. at ¶¶ 70-74 (App. 23). In Count IV, the plaintiff seeks to hold the President liable in defamation for statements made by his press officer and lawyer, denying her allegations. These purportedly defamatory statements were made in response to inquiries following the plaintiff's own media events publicizing the charges embodied in the complaint. Id. ¶¶ 47-50, 75-79 (App. 17-18, 23-24).

The complaint also includes two claims against Trooper Ferguson. In Count II, he is alleged to have conspired with the President to deprive the plaintiff of her constitutional rights, by purportedly approaching Ms. Jones on behalf of the President. Id. at ¶¶ 67-68 (App. 16). In Count IV, he is alleged to have defamed the plaintiff in statements attributed to an unidentified state trooper in an article pertaining to the President's alleged sexual improprieties, published in The American Spectator maga-

zine. According to the complaint, that article falsely implied that a woman it identified only as "Paula" had engaged in a consensual sexual act with the then-Governor. Id. at ¶¶ 43-47, 78-79 (App. 16-18, 24). The plaintiff did not sue the publication or the author of the article.

The plaintiff sought \$400,000 in compensatory damages and \$300,000 in punitive damages. Id. at ¶¶ a-d (App. 24-25). Shortly after filing the complaint, she publicly asserted that she intends to give any damages recovered to charity. She did not, however, disclaim any interest in income she might receive as a result of publicity related to this matter.³

B. Procedural History.

Promptly after suit was filed, counsel for President Clinton requested the District Court to resolve the preliminary issue of presidential immunity before requiring the President to undertake any other burdens of this litigation.⁴ The motion was granted by Memorandum and Order dated July 21, 1994. (Add. 23). The District Court found that the issue of presidential immunity deserved "threshold consideration"

because of the "singular importance of the President's duties," and because suits for civil damages "frequently

³ See Transcript, Prime Time Live (ABC television broadcast, June 16, 1994) at 7 (App. 10); Transcript, CNN: Paula Jones Interview (CNN television broadcast, June 17, 1994) at 6 (App. 80); Bill Nichols, Paula Jones Says She's No Pawn, USA TODAY, June 17, 1994, at 2A (App. 89).

⁴ See President Clinton's Motion to Set Briefing Schedule, (June 27, 1994) (App. 48). Trooper Ferguson, meanwhile, answered the complaint and denied the claims against him. (App. 41).

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."

Id. at 4 (Add. 26), quoting Nixon v. Fitzgerald, 457 U.S. 731, 751, 753 (1982). In reaching this conclusion, the court relied on numerous Supreme Court precedents recognizing that immunity constitutes a right to be free from all rigors of litigation, and exhorting lower courts to determine immunity issues "at the earliest possible stage in litigation." Id. at 5, citing Hunter v. Bryant, 502 U.S. 224 (1991) (Add. 27).⁵

On August 10, 1994, President Clinton filed a Motion to Dismiss the Complaint On the Grounds of Presidential Immunity, and to toll the statute of limitations until he left office. (App. 51). In the alternative, the President contended that the litigation should be stayed in its entirety during the pendency of his service as Chief Executive. Because the allegations involving Trooper Ferguson were inextricably intertwined with those against the President, moreover, the President also asserted that any proceedings against Trooper Ferguson must be held in abeyance. The Solicitor General filed a Statement of Interest on behalf of the United States, supporting the President's position that an incumbent Chief Executive should not be required to liti-

⁵ On January 17, 1995, Ms. Jones noticed an appeal of the District Court's procedural ruling of July 21, 1994. (No. 95-1167). In response, President Clinton will argue that appeal of that order is untimely and without jurisdiction, and that in any event, the District Court's decision to grant the President's Motion to Set Briefing Schedule was correct on the merits and well within the court's discretion.

gate private civil damages suits such as this. In representing the interests of the Presidency, the Solicitor General asserted that the case should be stayed in its entirety, as to both the President and Trooper Ferguson.

Meanwhile, on October 25, 1994, the plaintiff invited reporters to a media event in Washington, D.C. During this event, she held aloft an envelope purporting to contain an affidavit executed by her, describing what she alleged were distinguishing characteristics of the President's genitalia, but refused to disclose its contents to the press.⁶ A few days thereafter, her counsel moved the District Court for leave to file this affidavit under seal, without making its contents known either to the court or the defendants. President Clinton opposed this motion, which was denied by the District Court by Order dated November 23, 1994. (App. 54).

The court on December 28, 1994, denied the President's Motion to Dismiss on Grounds of Presidential Immunity. Memorandum Opinion and Order (Dec. 28, 1994) ("Mem. Op.") (Add. 1). On December 30, 1994, President Clinton noticed an appeal of this Order, and promptly moved to stay all proceedings below pending appeal. While this motion was pending, on January 17, 1995, the plaintiff noticed a cross-appeal. (No. 95-1167). The District Court granted the President's Motion To Stay Pending Appeal, by Order dated February 24, 1995. (Add. 32).

⁶ Thomas Galvin, Paula: I'll Put Prez's Privates On Parade, New York Post, Oct. 26, 1995, at 18 (App. 91).

C. The Order Under Appeal.

In the Order that is the subject of this appeal, the District Court denied President Clinton's Motion to Dismiss and retained jurisdiction over the complaint. Despite ruling that trial in this matter could not take place during President Clinton's tenure in office, the court permitted discovery to go forward on all aspects of the case, including discovery against the President.

At the outset of the opinion, the court incorrectly characterized the relief sought by President Clinton as "absolute immunity," even though the President nowhere sought to be excused from potential liability in this matter. Mem. Op. at 2 (Add. 2). The court reviewed at length English law, the intent of the Framers of the United States Constitution and cases seeking to enjoin Presidents from performing official duties, but determined that none of those sources was directly relevant here. The court then concluded that there was no "credible support" for the proposition "that a President has absolute immunity from civil causes of action arising prior to assuming office," and thus denied the President's Motion to Dismiss the complaint. Id. at 16 (Add. 16).

The District Court did recognize immunity for a President during his tenure in office, but found that it extended only to the trial itself. Id. at 19 (Add. 19), citing Nixon v. Fitzgerald, 457 U.S. 731 (1982). The Court's reasoning was as follows:

The language of the majority opinion [in Fitzgerald] is sweeping and quite firm in the view that to disturb the

President with defending civil litigation that does not demand immediate attention under the circumstances would be to interfere with the conduct of the duties of the office.

* * * *

. . . [T]he concerns expressed by a majority of the Supreme Court are not lessened by the fact that [the actions alleged against President Clinton] preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same -- the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situation . . . could have harmful effects in connection not only with the President but also with the nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

Id. at 16-18 (Add. 16-18). "For want of better phraseology," the court concluded, "this amounts to the granting of temporary or limited immunity from trial as Fitzgerald seems to require due to the fact that the primary defendant is the President." Id. at 19 (Add. 19).

The court further found that "[t]his is not a case in which any necessity exists to rush to trial. . . . Neither is this a case that would likely be tried with few demands on Presidential time." Id. at 18 (Add. 18).

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated . . . that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. . . . Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of [an] urgent nature for her, and a delay in trial of the case

will not harm her right to recover or cause her undue inconvenience.

Id. at 18-19 (Add. 18-19).

The court also found that the allegations against Trooper Ferguson were "integrally related to the allegations against the President," whom it characterized as the "primary defendant," and that there was "too much interdependency" between the claims against the two defendants "to proceed piecemeal." Id. at 19-20 (Add. 19-20). It therefore extended the stay of trial to Trooper Ferguson as well. Id. at 20 (Add. 20).

Notwithstanding its recognition that permitting this litigation to go forward would significantly burden the Presidency, the court declined to stay any other aspect of the litigation:

"There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Id. at 19 (Add. 19).⁷

SUMMARY OF ARGUMENT

The court below erred in refusing to dismiss this complaint on the basis of presidential immunity, without prejudice to its reinstatement when the defendant is no longer President of the United States. Alternatively, the District Court, having stayed trial on the ground that it is not in the national interest to distract a sitting President unnecessarily with litigation,

⁷ The court subsequently stayed discovery pending this appeal. In so doing, it found that pretrial proceedings and discovery in this matter could not go forward even as to Trooper Ferguson, "without the heavy involvement of the President through his attorneys." Order of Feb. 24, 1995 at 4 (Add. 32).

should have extended that principle to stay discovery and other pretrial proceedings as well. Either course would preserve the plaintiff's potential remedies while minimizing the intrusions caused by civil lawsuits into the functioning of the Presidency.

Presidential immunity exists to protect the significant public interest in the undistracted and independent execution of duties assigned uniquely to the President under the Constitution. In its broadest form, this interest led the Supreme Court to hold that Presidents are absolutely immune from civil damages claims based on the performance of official duties. Nixon v. Fitzgerald, 457 U.S. 731 (1982). The instant case is different from Fitzgerald in that it largely does not touch upon official actions, and thus does not warrant absolute immunity. In one significant way, however, it presents a stronger case for immunity than Fitzgerald, because the defendant is a sitting President.

Lawsuits against incumbent Presidents implicate many of the same compelling constitutional considerations underlying Fitzgerald, regardless of whether they are based on official or unofficial conduct. Immunity from private claims for civil damages during a President's tenure in office is necessary to safeguard the Chief Executive's ability to effectively and independently execute his Article II responsibilities. Having to defend against such claims, by contrast, inevitably would enmesh a President in the judicial process, and the courts in the political arena, "to the detriment of not only the President . . . but

also the Nation that the Presidency was designed to serve." Id.
at 753.

In denying the President's Motion To Dismiss and permitting discovery to go forward here, the District Court's ruling was inherently inconsistent, and failed to give the constitutional concerns and principles articulated in Fitzgerald their proper weight. Id. at 753-54. The broad public interests that would be placed at risk by litigation against an incumbent President far outweigh the asserted private interests of a plaintiff who belatedly seeks money damages for an alleged past injury. In these circumstances, proper deference to the paramount public interests at stake mandates that this action be held in abeyance in its entirety until the defendant is no longer President.

Relieving a President temporarily of the requirement to defend litigation under these circumstances does not mean a President is "above the law." It means only that a particular remedy -- money damages -- is not immediately available to a plaintiff. See id. at 758 n.41. The President remains amenable to suit upon leaving office. Immunity of this limited character is the constitutionally appropriate method of prioritizing the public and private interests here.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DECLINING TO DISMISS THE COMPLAINT WITHOUT PREJUDICE TO ITS REINSTATEMENT WHEN PRESIDENT CLINTON LEAVES OFFICE.

A. Due To The Unique Position Occupied By The Nation's Chief Executive In Our Constitutional Scheme, The Supreme Court Has Recognized That Presidents Are To Be Accorded Certain Privileges And Immunities From Litigation.

Presidential immunity is necessary to effectuate the unique, non-delegable responsibilities assigned to the President under our Constitution. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). Under Article II, § 1, the entire "executive Power" is vested in "a President," who is indispensable to the execution of that power. The President alone is Commander in Chief of the armed forces and director of all the executive departments. U.S. Const. art. II, § 2. Only the President has the power and authority to execute the laws, grant pardons, receive foreign ambassadors and report to Congress. Id., §§ 2-3. He alone is empowered to make treaties and nominate judicial, executive and diplomatic officers. Id., § 2.

That the entire power of the Executive is conferred upon one individual is a characteristic that distinguishes that branch from the other two branches of government. No single member of Congress or judge is essential to the continued functioning of the legislative or judicial branches, as is the President to the Executive. The range of powers and duties of the President further distinguish that officer from all other officers of the federal government, and from governors of states as well. Fitzgerald, 457 U.S. at 749-50. Indeed, the President is so

vital to the performance of the duties lodged in the Executive Branch that this is the only office of government for which the Constitution provides a substitute in the event of temporary or permanent disability. U.S. Const. amend. XXV, §§ 3-4.⁸

Presidential immunity is essential to the discharge of these enumerated duties. Fitzgerald, 457 U.S. at 749. The idea that certain privileges and immunities running to the Presidency are implicit in the nature of the constitutional functions of the Office is a long-standing principle of our jurisprudence. Justice Story, in a passage quoted with approval in Fitzgerald, concluded long ago that a President could not be subject to civil liability because

[t]here are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among

⁸ See also Akhil R. Amar & Neal K. Katyal, Executive Privileges and Immunities: The Nixon And Clinton Cases, 108 Harv. L. Rev. 701, 713 (Jan. 1995) ("Amar & Katyal") ("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. 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. We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."); Philip B. Kurland, Watergate and the Constitution 135 (1978) ("The President is, by reason of the fact that the executive power of the United States is vested in him, a unique official. He is the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government.").

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 Joseph Story, Commentaries on the Constitution of the United States § 1563, pp. 418-19 (1st ed. 1833) (quoted in Fitzgerald, 457 U.S. at 749) (emphasis added).⁹

More recently, a presumptive privilege for presidential communications was held to "flow from the nature of [the President's] enumerated powers," because such a privilege is necessary for a President to discharge his duties effectively. United States v. Nixon, 418 U.S. 683, 705 (1974). In particular, the Supreme Court rejected the contention that the privilege did not exist because it was not explicit in the Constitution. Id. at 705 n.16. Similarly, in Fitzgerald, the Court held that presidential immunity is a "functionally mandated incident of the

⁹ Notwithstanding the Supreme Court's reliance on Justice Story's views with respect to immunity, the court below discounted Justice Story because he wrote "from the perspective of someone who was a boy at the time of the [Constitutional] Convention." Mem. Op. at 11 (Add. 11). However, Justice Story's Commentaries on the Constitution of the United States is regarded by the Supreme Court and others as one of the most authoritative sources on the Constitution. See, e.g., Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (citing Story with regard to the Free Exercise Clause); General Motors Corp. v. Romein, 505 U.S. 181, 190 (1992) (citing Story with regard to the Contract Clause); Akhil R. Amar, Law Story, 102 Harv. L. Rev. 688, 709 (1989) (book review) (Story was "undoubtedly one of the most important Associate Justices ever to sit on the Supreme Court -- many would argue the most important."); Craig Joyce, Statesman of the Old Republic, 84 Mich. L. Rev. 846, 848 (1986) (book review) ("No figure of Story's era even roughly compares with him in terms of impact on the American legal system.").

President's unique office," even though such immunity is not expressed in the Constitution. 457 U.S. at 749. "[A] specific textual basis has not been considered a prerequisite to the recognition of immunity," the Court noted. Id. at 750 n.31.

In the instant case, the court below rejected the President's Motion to Dismiss in part because it found no textual reference in the Constitution to presidential immunity. See Mem. Op. at 8, 15 (Add. 8, 15). However, the Supreme Court has on many occasions and in many contexts rejected the proposition that a privilege or immunity must be in that document before it is accorded constitutional status. See, e.g., Fitzgerald, 457 U.S. at 750 n.31.

[T]he silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in McCulloch v. Maryland that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it." Marshall v. Gordon, 243 U.S. 521, 537 (1917).

Nixon, 418 U.S. at 705 n.16 (citation omitted). In reaching this result, the Court adopted the rationale of Judge MacKinnon in his separate opinion in the Court of Appeals:

It would be meaningless to commit to the President a constitutional duty and then fail to protect and preserve that which is essential to its effective discharge. . . . The duty and the means of its discharge coalesce and each, the one explicit and the other implicit, finds its source in the Constitution.

Nixon v. Sirica, 487 F.2d 700, 750 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part).

The Supreme Court's conclusion that immunity is implicit in the Constitution is consistent with the intent of the Framers. The Fitzgerald majority found "historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability," and concluded that "nothing in their 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. Moreover, the second and third Presidents of the United States, John Adams and Thomas Jefferson, both maintained that Presidents were immune from civil process. Id. Mr. Adams reportedly asserted that the President personally was not subject to any process whatever, for to permit otherwise would "put it in the power of a common Justice to exercise any [a]uthority over him and Stop the Whole Machine of Government."¹⁰ Indeed, presidential immunity "has never been seriously questioned until very recently." Id. at 758 n.1 (Burger, C.J., concurring).

The District Court inappropriately rejected the Fitzgerald majority's analysis of constitutional history with respect to immunity, and substituted its own. See Mem. Op. at 10-12 (Add. 10-12). While there are several statements by contemporaries of

¹⁰ The Diary of William Maclay and Other Notes on Senate Debates 168 (recording a discussion between then-Vice President Adams and Senator Oliver Ellsworth during the first Congress) (Kenneth R. Bowling and Helen E. Veit eds., 1988). President Jefferson also doubted the President's amenability to the jurisdiction of the courts. See 10 The Works of Thomas Jefferson 404 n. (Paul L. Ford ed., 1905), quoted infra p. 31.

the Framers that question the notion of presidential immunity in civil suits, the majority in Fitzgerald expressly declined to credit these statements, which for the most part consist of comments made by opponents to the Constitution at state ratifying conventions. The Supreme Court noted that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

That the Framers did not envision subjecting sitting Presidents to civil litigation is also fortified by their belief that a President must be impeached and removed from office before he could be indicted.¹¹ If the Framers intended that the criminal prosecution of a President must await the Chief Executive's departure from office to protect the functioning of the Executive Branch, it follows that private civil damages claims, in which there is much less of a public interest, also must await a President's departure from office.

¹¹ See The Federalist No. 69, at 446 (Alexander Hamilton) (Modern Library ed., 1937); id. No. 77, at 502 (Alexander Hamilton); id. No. 65, at 426 (Alexander Hamilton); 2 Max Farrand, The Records of the Federal Convention of 1787, at 500 (rev. ed. 1937) (noting the comment of Gouvenour Morris); id. at 626 (comment of James Wilson). See also Nixon v. Sirica, 487 F.2d 700, 757-58 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part); Stephen L. Carter, The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision, 131 U. Pa. L. Rev. 1341, 1370 (1983); Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 17-18, In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. filed Oct. 5, 1973) (App. 92).

B. Civil Suits For Damages Based On Private Conduct Represent An Impermissible Intrusion Upon The Office Of The President, And Thus Mandate Immunity.

Just as executive privilege and absolute immunity are to be inferred from the structure of the Constitution and the scope of duties assigned uniquely to the President, so too is immunity from private, non-exigent civil damages claims during a President's tenure a functionally-mandated incident of the Office. Such immunity is necessary to preserve a President's ability to execute his Article II duties fully and independently.

In Fitzgerald, the Supreme Court held that Presidents enjoy absolute immunity from damages liability for acts within the "outer perimeter" of a President's official duties. 457 U.S. at 756. In reaching this conclusion, the Court relied upon three significant grounds. One was the Court's concern that subjecting Presidents to liability for the performance of official duties would inhibit them in carrying out those duties fearlessly and impartially. Fitzgerald, 457 U.S. at 752 & n.32. To prevent this undesirable outcome, the Court extended absolute immunity to official conduct. Because most of the claims in the instant complaint did not involve official duties, absolute immunity was not here asserted with respect to those claims.¹²

¹² President Clinton reserved the right below to assert at the appropriate time, along with certain common law immunities, the defense of absolute immunity to the defamation claim in Count IV of the complaint. That claim seeks to hold the President liable for statements allegedly made to the media by his press officer and lawyer, denying the charges that are the subject of this lawsuit. Complaint ¶¶ 47-50 (App. 11-12). Responding to press
(continued...)

However, "[b]ecause of the singular importance of the President's duties," the Fitzgerald Court also was extremely concerned that "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Id. at 751. The Court was further concerned that sitting Presidents are especially attractive marks for civil suits. Id. at 753. In this regard, the Court recognized that the "sheer prominence of the President's office" makes a President

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 752-53 (footnote omitted).

Indeed, Chief Justice Burger recognized that such lawsuits could be used as instruments of extortion against a sitting President:

The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. This very case graphically illustrates the point. When litigation processes are not tightly controlled -- and often they are not -- they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.

Id. at 763 (Burger, C.J., concurring) (emphasis added).

¹²(...continued)

inquiries about publicly-made allegations against a President is within the "outer perimeter" of presidential duties as broadly defined in Fitzgerald. 457 U.S. at 756.

The instant litigation implicates these facets of Fitzgerald. The same constitutional concerns -- the President's acute vulnerability to civil claims, and the impermissible diversion of the President's time and attention if subject to litigation of such claims while in office -- are present equally whether a suit for civil damages against a President personally is based on private conduct or official conduct. The unofficial nature of the alleged events would not make defending a private suit for civil damages any less of an imposition on the President's constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." Id. at 751. To protect this interest, therefore, it is necessary to hold Presidents immune from private claims for damages for the period during which they are charged with the execution of their Article II responsibilities.

In this regard, much has been made of certain dicta in Chief Justice Burger's concurrence in Fitzgerald, to suggest that Presidents were not immune from private civil damages claims. Id. at 759. That comment, however, was made in the context of a suit against a former President, who was seeking to be excused from all liability. It cannot properly be construed as an endorsement of the notion that a sitting President may be dragged from official duties to defend civil damage claims, when those claims could be deferred and the President would ultimately be subject to liability. Indeed, even Fitzgerald's lawyers in that

case agreed that such suits against incumbent Presidents would have to be stayed.¹³

The practical reality is that defending any civil suit could require a President to spend months in deposition and pre-trial preparation with lawyers, and weeks at trial, while the urgent business of the nation -- foreign and domestic, civilian and military -- awaited the Chief Executive's attention. Such a result would be contrary to the fundamental premise that "[a] President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties," and that "a President must possess the continuous and undiminished capacity to fulfill his constitutional obligations."¹⁴

This case in particular promises to be especially burdensome, personally intrusive, and time-consuming. This is not a simple negligence case or a dispute over an unpaid bill. The allegations here seek to impugn the President's character and conduct over a lengthy period. Plaintiff's counsel have announced their intention "to fully pursue, and exhaustively pursue" allegations that go far beyond the President's alleged limited contact with the plaintiff, including his alleged "rela-

¹³ See Brief for Respondent at 28, Nixon v. Fitzgerald, Nos. 79-1738 and 80-945, (Sup. Ct. filed Oct. 24, 1981) (available on LEXIS).

¹⁴ Nixon v. Sirica, 487 F.2d 700, 757-58 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (emphasis added).

tionships with other women" and his purported use of state troopers to approach women, a line of inquiry which plaintiff's counsel assert is germane to establish an alleged "pattern of conduct" of sex discrimination and misuse of government resources.¹⁵ Participating in and defending against such litigation clearly would require the extensive involvement of the President, in consultation with his counsel.

If it were now held that a sitting President could be subject without limitation to litigation such as this, moreover, many more complaints undoubtedly would be filed against incumbent Presidents. See Fitzgerald, 457 U.S. at 753. It is not only this President, therefore, who would have to contend with the demands of this lawsuit, but his successors who would fall prey to a multiplicity of such suits that would drain their energy and time.¹⁶

¹⁵ See Transcript, Daybreak (CNN television broadcast, Dec. 29, 1994) at 3-4 (comments of Joseph Cammarata) (App. 117-18). They told another national television audience that they intend to conduct "wide-ranging" discovery into, among other things, whether President Clinton engaged in a "pattern of conduct that involved the use of police for private functions that would not be thought to be part of their duty? Are there other women involved? Who are they?" Transcript, Nightline (ABC television broadcast, Dec. 28, 1994) at 3-4 (comments of Gilbert Davis) (App. 122-23).

¹⁶ We know of no other private claim for civil damages that was filed when the defendant was serving as President of the United States. There are recorded civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all of which were underway before the defendant assumed office, and two of which were effectively complete by the time the defendants became President. Understandably then, presidential immunity was not invoked in any of these cases, each of which occurred decades before the court
(continued...)

It is a sad fact, moreover, that many suits against sitting Presidents would be pursued more with an eye to achieving publicity, financial gain or political disruption rather than to

¹⁶(...continued)
expressly acknowledged such immunity in Fitzgerald.

In the first, New York ex rel. Hurley v. Roosevelt, 179 N.Y. 544 (1904), the only activity during Mr. Roosevelt's Presidency was the final appeal. Mr. Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. Although the exact date of suit could not be determined, it had to be significantly prior to Mr. Roosevelt's service as President, because an intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, nine months before he assumed that Office. 179 N.Y. 544. The New York Court of Appeals affirmed the dismissal without opinion in 1904. Id.

In the second case, DeVault v. Truman, 194 S.W.2d 29 (1946), the plaintiff alleged that Harry Truman and other judges in Jackson County, Missouri, had improperly committed him to a mental institution in 1931. The action was initiated in November 1944 (id. at 31), the month that Mr. Truman was elected Vice President. The trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945, and one year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. 194 S.W.2d at 32.

The third case involved John F. Kennedy. In 1960, when Senator Kennedy was a candidate for the Presidency, certain delegates to the Democratic convention who were hostile to his candidacy sought to hold him liable for injuries incurred while they were riding in a car that had been rented by his campaign. See Complaint, Bailey v. Kennedy, No. 757200, and Hills v. Kennedy, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960 and subsequently consolidated) (App. 128, 135) (hereinafter "Bailey"). After he was inaugurated, President Kennedy argued that he was entitled to a stay as Commander in Chief of the Armed Forces, pursuant to the Soldiers' and Sailors' Civil Relief Act (discussed infra, at Part I(E)). A Los Angeles Superior Court judge denied this motion without written opinion. See Bailey, Motion to Vacate Pre-Trial Date and Stay Further Proceedings (July 5, 1962) (App. 145) and Notice of Denial of same (July 31, 1962) (App. 153). The court did not permit the plaintiffs to take the President's deposition, however, requiring only that he submit to written interrogatories. See Bailey, Order denying motion for deposition (Aug. 27, 1962) (App. 155). The case was settled before the President was required to respond. See infra, pp. 24-25.

rectify any legal wrongs, because instant celebrity status is conferred simply by including allegations against a President, however baseless, in a complaint filed in court. The mechanisms that normally discourage such meritless claims, such as Federal Rule of Civil Procedure 11, do not operate effectively if the defendant is the President. This is because the notoriety that accompanies such a suit may be the claimant's only ambition, or may be lucrative in and of itself, for both client and lawyer; or because a President is perceived as a vulnerable target for those seeking a quick settlement. This is especially so when, as here, the allegations are titillating or degrading.

The illogical result that the District Court arrived at here -- deferring trial but not discovery -- is especially ill-advised, because it would maximize presidential exposure to frivolous or extortionate lawsuits. It would permit plaintiffs to file unsubstantiated complaints and obtain wide-ranging and intrusive discovery against a President, secure in the knowledge that they will not be put to their proof for several years.

A President similarly could be subjected to numerous politically motivated "strike suits" stimulated by partisan or ideological opponents hoping to neutralize, cripple or divert a President from formulating and implementing policy objectives. Indeed, any number of potential private claims could be concocted to entangle a President in embarrassing or protracted litigation, alleging unwitnessed one-on-one encounters that are exceedingly difficult to dispose of by way of pre-trial motion. Such suits

could become vehicles for deflecting the popular will as expressed through presidential elections, by putting in the hands of private litigants the power to deprive the public of the full attention and services of the individual they elected to discharge the constitutional duties of the Presidency.

The subsequent history of the Kennedy suit amply illustrates the ease with which plaintiffs can devise claims to create opportunities for political mischief and potential extortion. See supra, n.16. The plaintiffs were convention delegates from Mississippi who believed Mr. Kennedy's policies were inimical to the interests of their state.¹⁷ Although Mr. Kennedy was neither the lessee of the campaign car in which they were riding when injured, nor in the vehicle or a witness to the accident, the delegates sought to hold him liable on the novel theory that he offered them use of the car in the hope of obtaining their votes at the convention. Following his election, the plaintiffs attempted to propound politically embarrassing interrogatories to both the President and his brother Robert F. Kennedy, who had managed the campaign and who was, by then, the Attorney General of the United States.¹⁸ They also threatened to add the President's other brother and father as defendants on the theory

¹⁷ Bailey, Reply to Objections to Cross-Interrogatories at 4-5 (Sept. 28, 1962) (App. 156).

¹⁸ See Bailey, Cross-Interrogatories to Robert F. Kennedy (Sept. 20, 1962) (App. 162).

that the Kennedy "Family Dynasty" had financed the campaign.¹⁹ President Kennedy agreed to settle the claims for \$17,750, a significant sum in 1963.²⁰ Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency. For a President without a personal fortune, moreover, a plethora of such suits could result in financially ruinous personal legal expenses.

In sum, private civil damages suits such as the one at bar would distract from and intrude upon the performance of the President's Article II duties. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas, at the expense of the public's interest in unimpeded constitutional governance.

C. There Is No Broad-based Public Interest In This Case To Justify The Exercise Of Jurisdiction Over A Sitting President.

Courts are not to exercise jurisdiction over a President unless there is a constitutionally-based public interest that justifies doing so. Fitzgerald, 457 U.S. at 753-54. The lower court erred in failing to consider whether such a compelling, constitutional interest was presented by a suit seeking civil damages. We submit that no such interest is presented here.

¹⁹ See Bailey, Reply To Objections To Cross-Interrogatories at 3-4 (Sept. 28, 1962) (App. 156).

²⁰ Two Suits Against Kennedy Settled, Los Angeles Herald Examiner, April 2, 1963 (App. 181).

In view of the encroachment upon presidential duties and independence that would necessarily accompany litigation, the Supreme Court in Fitzgerald admonished that before asserting jurisdiction over a President, a court "must balance the constitu-
tional weight of the interest to be served [by the litigation] against the dangers of intrusion on the authority and functions of the Executive Branch." Fitzgerald, 457 U.S. at 754 (emphasis added). The Court there held that private civil damage actions for official acts simply do not rise to a level of public interest, much less constitutional imperative, that warrants the exercise of jurisdiction over a President. 457 U.S. at 754 & n.37.

As in Fitzgerald, when the proper interests are balanced here, the weight falls overwhelmingly on the side of declining jurisdiction until President Clinton leaves office. In this respect, the relevant passage from Fitzgerald is highly instructive:

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, 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. When judicial action is needed to serve broad public interests -- as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. Youngstown Sheet & Tube Co. v. Sawyer, supra, or to vindicate the public interest in an ongoing criminal prosecution, see United States v. Nixon, supra -- the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.

Id. at 753-54 (emphasis added) (citations and footnotes omitted).

The instant "merely private suit for damages" does not warrant the uncommon step of exercising jurisdiction over a President, anymore than did Mr. Fitzgerald's. This litigation does not further a broad, constitutional interest such as curbing an abuse of presidential authority. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Nor, in view of its civil nature, does it seek to further the public's rights and interests in a criminal prosecution, as was at stake in United States v. Nixon. 418 U.S. 683 (1974). Indeed, the public's interest in civil damages actions is far weaker than its interest in criminal law enforcement proceedings. Fitzgerald, 457 U.S. at 754 & n.37. The "constitutional weight of the interest to be served" by this litigation is thus negligible at best. Id. at 754.

On the other side of the scale is the public's overriding, constitutionally-based interest in the active, effective and independent functioning of the Presidency. As discussed at length above, subjecting a President to litigation severely impairs that interest. Accordingly, jurisdiction should have been declined and the complaint dismissed.²¹

This result is not changed by any personal interests the plaintiff might here assert, even if they were deemed relevant to

²¹ Even in the rare cases where a broad, constitutionally-based public interest may justify asserting jurisdiction over a President, moreover, courts proceed in a manner that is extremely deferential to the unique status of that Office. See infra, n.25 and pp. 42-43.

the equation. The plaintiff offered no credible or sufficient argument that dismissal of the complaint subject to future reinstatement would be unduly prejudicial to her. Her asserted concern that evidence may disappear or memories fade applies with equal force to both parties. Indeed, if anyone is prejudiced by delay with respect to preservation of evidence, it is President Clinton. The fact that the plaintiff waited three years to pursue her claims, during which time the President was unaware that he may be called to account for his whereabouts or conduct on one day in May 1991, already placed him at serious disadvantage from the day suit was filed. Ms. Jones and her counsel, by contrast, had ample opportunity to collect evidentiary materials, and did so. Moreover, nothing prevents the plaintiff from continuing efforts to obtain evidence while the litigation is deferred, and President Clinton has offered to cooperate in these efforts where there is an actual threat that testimony or evidence may be lost.²²

The plaintiff further asserts that she is suffering an ongoing, irreparable injury to her reputation that can be redressed only by a prompt trial. Notwithstanding this concern, however, we note that she chose not to sue the publication or the author of the article which allegedly defamed her, and did not

²² The plaintiff has also suggested that she would be prejudiced by delay because the defendant may die or become judgment-proof before he leaves office. While a defendant's potential death or poverty are risks that accompany any civil litigation, these risks seem particularly remote in this instance.

allege in her complaint any ongoing irreparable harm to reputation or seek injunctive relief. The plaintiff, moreover, has had numerous occasions to publicize her version of the facts and to defend her reputation in the media, and thus needs no immediate trial as a forum to do so.

Finally, the plaintiff seeks only monetary damages, and purports not even to desire them for herself. Interest on any damages -- and there are none -- would compensate her for any delay that might result from postponing this matter.

The District Court considered some of these factors, and indeed, found the plaintiff's interest in the immediate pursuit of her claims insufficient to justify taking the President away from his duties to attend trial in this matter. Mem. Op. at 18 (Add. 18). The court, however, failed to consider whether the plaintiff's suit served any broad-based constitutional end, such that it was appropriate to assert jurisdiction over the President at all until his term of office is over, and instead, permitted all pretrial proceedings and discovery to go forward. Had the proper factors been correctly weighed, the balance should have been struck in favor of the overwhelming constitutional and public interest in the effective and unimpeded performance of presidential duties and against asserting jurisdiction here.²³

²³ This is not to say that the balance might be struck differently in a case where a claimant seeks injunctive relief to put an end to an on-going, irreparable harm occasioned by the private conduct of a President. Such factors are not presented here, however, and the Court therefore need not address them.

(continued...)

D. Immunity From Civil Damages Claims During A President's Tenure Is Necessary To Preserve The Separation Of Powers.

The District Court did not sufficiently address the President's concerns that private civil damages claims, if permitted to go forward during a President's tenure, also implicate the separation of powers. Such suits create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes. Where there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office.

President Jefferson, addressing these same concerns in 1807, posed the following rhetorical question:

²³(...continued)

Nor would any ruling in this case impact on whether injunctive relief may be sought against a President in his capacity as head of the Executive Branch. Such official capacity suits may fall into the category of Youngstown Sheet & Tube, cited above, in that they seek to restore the balance of powers and thus do serve a constitutional purpose. On the other side of the scale, with respect to the demands on a President's time, suits seeking injunctive relief against a President in his official capacity differ markedly from private civil damages claims. Such suits do not involve the President's personal conduct, but rather, challenge governmental action or policies, and a President is not required personally to defend such suits. See infra, n.25. Other administration officials, moreover, are typically named as co-defendants. Such suits therefore arguably could survive the Fitzgerald balancing test. Cf. 457 U.S. at 754. But see Franklin v. Massachusetts, 112 S. Ct. 2767, 2776 (1992).

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?²⁴

This passage, quoted with approval by the majority in Fitzgerald, underscores the Supreme Court's concern that exercising jurisdiction over a President would create the opportunity for judicial intrusions upon Executive authority. 457 U.S. at 751 & n.31.

If, for example, a President moved for continuance of some scheduled aspect of a civil proceeding, premised on the executive judgment that an urgent matter of national interest commanded the President's attention at that time, and a court denied that motion, would not the court be substituting its judgment for the President's with respect to matters committed to the Executive Branch? And if a President refused to comply, could the President be held in contempt? This is a question no court has yet had to resolve. See Franklin v. Massachusetts, 112 S. Ct. 2767, 2776, and 2789 (1992) (Scalia, J., concurring).

We know of no civil case in which an incumbent President has been compelled to furnish evidence. Nor are we aware of any case, criminal or civil, where an incumbent Chief Executive has

²⁴ 10 The Works of Thomas Jefferson 404 n. (Paul L. Ford ed., 1905), (quoted in Fitzgerald, 457 U.S. at 751 n.31). Jefferson also asserted immunity in an early civil case for damages brought in Virginia by a landowner in Louisiana who complained about federal seizure of his land. Livingston v. Jefferson, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411). Chief Justice Marshall dismissed the case for want of venue without addressing the immunity issue.

been compelled to testify at trial. Moreover, "no court has ever issued an injunction against the President himself or held him in contempt of court." Id. at 2789 (quoting C. Pyle and R. Pious, The President, Congress and the Constitution 170 (1984)). Thus, although courts have not hesitated to interpret the limits and prerogatives of presidential power, injunctive relief against a sitting President would be extraordinary. Id. at 2776. While we do not mean to suggest that President Clinton would not comply with a court order, or that the instant case has or ever would reach such a constitutional impasse, it cannot be denied that the potential for such a conflict is inherent in subjecting any President personally to a court's jurisdiction.²⁵

²⁵ Courts and Presidents alike have diligently avoided such constitutional confrontations. See, e.g., United States v. Burr, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (No. 14,694) (Chief Justice Marshall held that the court had authority to issue a subpoena duces tecum to President Jefferson, but avoided deciding whether it could enforce it); United States v. Nixon, 418 U.S. at 713-14 (President produced White House tape recordings for in camera inspection voluntarily to avoid a constitutional confrontation). In other criminal investigations since that case, Presidents have voluntarily given testimony or provided documents, but only under very restricted conditions. See cases cited infra, Part II(B).

Similarly, in civil cases seeking to compel or enjoin official executive action, courts have used a number of devices to skirt this constitutional issue. In Mississippi v. Johnson, the attorney general questioned whether the courts had the authority to compel President Andrew Johnson to take the action sought by the plaintiffs, inasmuch as they had no power to enforce a contempt order against a President. 71 U.S. (4 Wall.) 475, 485-86, 498 (1866). The case was dismissed on another ground, however, namely, that discretionary presidential decisionmaking was unreviewable by the courts. Id. at 500-01. Modern suits aimed at a President acting in his official capacity as head of the Executive Branch typically are dismissed on

(continued...)

In a private suit for civil damages, where the President is the pivotal named defendant, there are few if any devices available to minimize presidential involvement and avert the potential for constitutional clashes. A court frequently could find it necessary to pass judgment on the validity of a President's asserted basis for requesting a continuance or relief from a specified requirement of litigation, based on the demands of the Office. It is not in the interest of the judiciary, let alone the Presidency, to place a court in a position where its own motives in such rulings would be subject to public suspicion. It is far better to avoid these potential entanglements and constitutional confrontations by simply deferring non-exigent, private civil damages litigation until a President leaves office. See Franklin, 112 S. Ct. at 2790 ("needless head-on confrontations" between district courts and the President are to be avoided).

These separation of powers concerns, moreover, are what distinguish the litigation setting from situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the

²⁵(...continued)
grounds such as standing, ripeness or non-justiciability. See, e.g., Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990); Atlee v. Nixon, 336 F. Supp. 790 (E.D. Pa. 1972), aff'd sub nom. Atlee v. Richardson, 411 U.S. 911 (1973). In the few cases which cannot be disposed of on these grounds, courts will resort to declaratory rather than injunctive relief. See, e.g., Romer v. Carlucci, 847 F.2d 445, 464 (8th Cir. 1988); National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974). Many such cases also include defendants other than the President, against whom any relief would run. See, e.g., Franklin, 112 S. Ct. at 2776; Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

latter circumstances, the President -- not the judiciary or a civil plaintiff -- decides what the priorities are for the Chief Executive's time, and the President remains available to perform the duties of the Office continuously, irrespective of such other activities. A President may be (and often is) interrupted at any time, and is free to change plans without seeking permission of anyone, to deal with pressing national or international affairs. However, in litigation that a President personally must defend, the Chief Executive would be subject to the jurisdiction of a federal or state court, and the schedule of official Executive Branch functions could be controlled by court order (or even, to some extent, by the demands of a plaintiff) for depositions, documents or responses to motions.

Additionally, federal courts have a constitutional interest of their own that requires them to avoid unnecessarily entertaining suits that would thrust them into political imbroglios, as many suits against a President necessarily would do. See Winpisinger v. Watson, 628 F.2d 133, 139-41 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980). The prospect that the civil justice system could be manipulated for partisan advantage further leads to the conclusion that Presidents must be held immune from private civil damages claims while in office.

E. Immunity From Civil Damage Actions While In Office Does Not Place This Or Any Other President "Above The Law."

Immunity from private civil damages claims while a President is in office would not place this or any other President "above the law." "It is simply error to characterize an official as

'above the law' because a particular remedy is not available" Fitzgerald, 457 U.S. at 758 n.41. Here, where the President would be subject to suit after leaving office, he hardly could be said to be above the law.²⁶

Deferring this litigation, moreover, will not impose any greater hardship on this plaintiff than is borne routinely by those who have civil claims against active duty military personnel, but who have litigation of their claims deferred by statute. Specifically, the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. app. §§ 501-25 (1988 & Supp. 1994) ("SSCRA"), provides that civil suits involving military personnel are to be tolled or stayed while they are on active duty.²⁷ The

²⁶ Indeed, while we seek here only to defer the plaintiff's opportunity to pursue redress, we note that courts have, with few qualms, denied remedies altogether in other cases. "It never has been denied that . . . immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." Fitzgerald, 457 U.S. at 754 n.37. See also Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8,411), in which Chief Justice Marshall dismissed a case against former President Jefferson for want of venue, even though the result "produce[d] the inconvenience of a clear right without a remedy."

²⁷ The Act provides that the statute of limitations for actions by or against military personnel is tolled unconditionally during their period of service. 50 U.S.C. app. § 525; Conroy v. Aniskoff, 113 S. Ct. 1562, 1564-65 (1993). It further provides that any suit brought against a service member on active duty is to be stayed unless it can be shown that his or her interests would not be materially affected by reason of military service. 50 U.S.C. app. § 521. It may be said that the Act expressly applies to the President as Commander in Chief, but we do not press that argument here. Our motion rested on constitutional grounds, not on any asserted power or intent of Congress to grant or deny some form of litigation immunity to the President.

purpose of the SSCRA is not to accord military personnel exalted status under the law. Rather, that statute was deemed necessary "to enable such persons to devote their entire energy to the defense needs of the Nation." 50 U.S.C. app. § 510. The public interest surely demands the "entire energy" of the President more than it demands the "entire energy" of a single soldier or sailor. Acknowledgement of this fact does not place the President "above the law," any more than the SSCRA places military personnel "above the law."

The law similarly recognizes some form of immunity for tens of thousands of other public officials, in order to protect the public's interest in the performance of their duties. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutors held absolutely immune with respect to exercise of prosecutorial discretion); Stump v. Sparkman, 435 U.S. 349 (1978) (judges absolutely immune for judicial acts). This does not mean that those officials are "above the law," but only that the law treats them differently due to the potent public interests at stake. So too here, immunity seeks to regulate the process by which damage claims are pursued, in a manner consistent with the unique status and responsibilities of the defendant.

This President, moreover, was amenable to suit for some one-and-one-half years prior to taking office. It was the plaintiff's choice not to pursue her claims at that time. She could have filed this complaint well before President Clinton was elected, or she could have sought relief under Title VII of the

Civil Rights Act within 180 days of the alleged wrongdoing. She could have availed herself of remedies under Arkansas' civil service laws before President Clinton assumed his constitutional duties. She took none of these steps. In view of these circumstances, any assertion that the President has placed himself "above the law" is without substance.

Nor can it be said that immunity while in office shields Presidents from accountability for alleged personal misconduct. The Supreme Court has observed that there are formal and informal checks quite apart from civil damages that will deter unlawful, tortious or unconstitutional behavior by Presidents. These include the prospect of impeachment in egregious cases, as well as "constant scrutiny by the press." Fitzgerald, 457 U.S. at 757. Plaintiffs can take their charges to the newspapers and broadcast media, as has been done here. "Other incentives to avoid misconduct . . . include a desire to earn reelection," Fitzgerald, 457 U.S. at 757, or in the case of those who seek the Presidency, the desire to be elected in the first instance. Further deterrence may be found in the concern of a President or politician "for his historical stature." Id. And of course, the prospect of being held liable for damages after leaving office remains an effective regulator of private conduct on the part of a President or candidate for that office.

The existence of deferred or alternative deterrents establishes that immunity does not place a President "above the law." Rather, it simply precludes "a particular private remedy for al-

leged misconduct in order to advance compelling public ends." Fitzgerald, 457 U.S. at 758. Immunity such as is asserted here does not even preclude such remedies, but merely defers them until after a President leaves office, in order to protect an overriding constitutional interest.

F. Dismissal Without Prejudice, Coupled With Tolling, Is Appropriate Here.

As demonstrated above, the principles underlying Fitzgerald lead to the conclusion that Presidents are to be held immune from non-exigent civil damages suits. The question remains as to how that immunity should be effectuated. We submit that the appropriate resolution here is to dismiss the complaint without prejudice, and to toll the statute of limitations on any claims therein, for the duration of President Clinton's tenure in office.

The complaint should have been dismissed in the first instance because under the balancing test outlined in Fitzgerald, the District Court should have declined jurisdiction, and the logical result of declining jurisdiction is, of course, dismissal. The Fitzgerald Court also observed, however, "that the sphere of protected action must be related closely to the immunity's justifying purposes." 457 U.S. at 755. Here, the complaint is based substantially on alleged private conduct, and thus implicates Fitzgerald's concerns that litigation could distract the President and hinder the performance of presidential duties. Immunity therefore need last only so long as the defendant is Chief Executive. It need not preclude the possibility

that a President may be found liable at the end of that time. Accordingly, although the complaint should be dismissed, it should be dismissed without prejudice to its reinstatement when the President leaves office. To preserve Ms. Jones' ability to pursue her claims at that time, any applicable statutes of limitation must be tolled during the pendency of Mr. Clinton's Presidency.

We respectfully submit that the court below had the authority and the duty to do this, in order to give effect to the constitutional mandate of presidential immunity.²⁸ Even if tolling were not a constitutional imperative, President Clinton would consider himself estopped to object to the refiling of this complaint based on any statute of limitations that expired while he was President.²⁹

II. AT A MINIMUM, THE DISTRICT COURT SHOULD HAVE STAYED THE LITIGATION IN ITS ENTIRETY DURING PRESIDENT CLINTON'S TENURE AS CHIEF EXECUTIVE.

In the alternative, the District Court was required to stay this litigation in its entirety pending President Clinton's departure from office. Any discretion it had to do otherwise, we respectfully submit, was severely constrained by the unique

²⁸ See also, Amar & Katyal, *supra* n.8 (suggesting that equitable tolling or even equitable dismissal is available in suits against incumbent Presidents).

²⁹ See Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity (Aug. 10, 1994) at 44 n.27; Mem. Op. at 19 (Add. 19).

demands of the Presidency and the separation of powers at the heart of our constitutional scheme.

A. The Lower Court's Decision To Stay Trial But Not Discovery Is Counter To Law.

The District Court appropriately concluded that a trial would exact a toll on the President's ability to perform his official duties, which "could have harmful effects in connection not only with the President but also with the nation in general." Mem. Op. at 17-18 (Add. 17-18). Therefore, "[t]o protect the Office of President . . . from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office." Id. at 20 (Add. 20). Accordingly, the court granted President Clinton "temporary or limited immunity from trial." Id. at 19 (Add. 19). With little if any analysis, however, the court inconsistently found "no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Id. at 19 (Add. 19).

The court's failure to extend immunity to preclude discovery and other pretrial proceedings is wrong as a matter of law. In seeking to stay pretrial proceedings, President Clinton seeks no greater right than that belonging to any party to whom immunity is extended. It is a firmly established tenet that immunity is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis added). This principle is universally applied in

immunity cases, including those recognizing sovereign immunity,³⁰ absolute immunity³¹ and qualified immunity.³² Ironically, in screening President Clinton only from trial, but not from the balance of the litigation, the court accorded the President fewer safeguards than are accorded to lesser officials entitled to immunity.

B. The Lower Court's Refusal To Stay The Entire Litigation Was An Abuse Of Discretion.

To the extent that the District Court had any discretion with respect to issuing a stay of discovery here, that discretion was severely restricted by the defendant's unique position as President. Rather than diminishing the protections available to the Presidency, courts are to show special regard for that

³⁰ See, e.g., Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993) (central benefit of sovereign immunity is "avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial") (emphasis added); United States v. Moats, 961 F.2d 1198, 1203 (5th Cir. 1992) (foreign sovereign immunity is "immunity from the burdens of becoming involved in any part of the litigation process, from pretrial wrangling to trial itself") (emphasis added).

³¹ Helstoski v. Meanor, 442 U.S. 500, 508 (1979) ("the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'") (quoting Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)); Murphy v. Morris, 849 F.2d 1101, 1104 (8th Cir. 1988) ("Absolute immunity operates to protect appropriate defendants from exposure to the litigation process. Like qualified immunity, absolute immunity entitles its possessor to be free from suit, not simply from liability.").

³² Siegert v. Gilley, 500 U.S. 226, 232 (1991) (purpose of qualified immunity is to spare defendant "unwarranted demands . . . of a long drawn out lawsuit"); Mitchell, 472 U.S. at 526 (same); Johnson-El v. Schoemehl, 878 F.2d 1043, 1046 (8th Cir. 1989) (qualified immunity protects officials not only from liability "but also from the rigors of litigation").

Office: "Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." Fitzgerald, 457 U.S. at 753. They are not, as Chief Justice Marshall observed, "required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them." United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). With respect to "claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers" in particular, "special solicitude [is] due." Fitzgerald, 457 U.S. at 743.

The deference owed the Presidency is such that even in criminal cases, the President is not required to submit as other witnesses do. Instead, courts scrutinize meticulously whether the evidence is relevant and absolutely necessary, and then permit it to be gathered only in a manner that does not interfere with presidential functions. See United States v. Nixon, 418 U.S. 683, 711-15 (1974) (requiring in camera inspection of presumptively privileged presidential tapes to determine whether they contain relevant admissible material, before turning them over to prosecutor); Burr, 25 F. Cas. at 191-92 (court would not compel President to produce a document if he gave sufficient reasons for declining to produce it); United States v. Poindexter, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (permitting testimony from a former President to be obtained only by videotaped deposition); United States v. North, 713 F. Supp. 1448,

1449 (D.D.C. 1989) (refusing to enforce a subpoena ad testificandum against former President until after defendant put on his case at trial, and then quashing the subpoena because defendant failed to show testimony would support his defense), aff'd, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

Here, the President is a named defendant, not merely a third-party witness. A civil plaintiff has no rights on par with that of a criminal defendant under the Sixth Amendment, moreover, and the public's interest in a civil case is significantly less than its interest in effective law enforcement. Fitzgerald, 457 U.S. at 754 n.37. In such a case, even more deference is due the Presidency, not less. Thus, while in the ordinary case a party seeking to defer litigation has a substantial burden to justify a stay, Landis v. North American Co., 299 U.S. 248, 254-55 (1936), when that party is the President, there are unique and weighty factors that tip the balance in favor of the Presidency and the public interest therein. Accordingly, even if it could somehow be said that the decision to stay these proceedings was a matter left to the discretion of the court, the court's failure to stay this litigation was an abuse of that discretion.

As a practical matter, the implicit distinction the District Court made between burdensome trials and purportedly unobtrusive discovery, simply does not exist. Discovery "has become the focal point of litigation instead of a means to an end. No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage

to survive that ordeal, once again at trial." Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, Automatic Disclosure in Discovery -- The Rush to Reform, 27 Ga. L. Rev. 1, 8 (1992). The Supreme Court itself has recognized that "pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-35 (1984) (footnote omitted). In ignoring the burdens of discovery, the lower court here failed to recognize the realities of current litigation practice. See generally 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2001 at 46-51.

In this case in particular, discovery would intrude upon the President's abilities to perform his duties, and would tread upon separation of powers, no less than would trial. Discovery will be especially onerous in view of the plaintiff's stated intention to "exhaustively pursue" inquiries into the President's alleged misuse of State Troopers and purported relationships with other women. See supra, p. 21. Motions challenging the relevance and propriety of such discovery -- which appears to be designed not so much to obtain probative evidence as to harass the President and distract from his policy objectives -- would be frequent and hard fought. Plaintiff's counsel also have stated that they may seek to compel a physical examination of the President. Transcript, Daybreak (CNN television broadcast, Dec. 29, 1994) at 4

(App. 118). Such a request, unprecedented in any case involving the Chief Executive, would invoke immediately all the concerns outlined above about a court's authority to exercise jurisdiction over the person of the President. Given the titillating nature of the allegations and the political implications of this litigation, moreover, there can be no doubt that the media would seek access to discovery materials and to attend depositions. The court and the parties would be required to expend considerable time and resources resolving all these disputes.

It has been suggested that President Clinton may alleviate the burdens of litigation simply by letting his lawyers handle discovery without involving him. This solution would be impractical and unfair. Given the nature of the allegations here, he could not avoid involvement and could not prepare an adequate defense without being personally involved in discovery. In any event, a President, no less than any other defendant, has the right and necessity to be a full participant in any discovery that could affect his rights. Those who serve their country by assuming the burdens of the Presidency should not be asked also to give up their civil justice rights, even as they become more attractive targets for civil suit by virtue of the prominence of the position they hold. Nor should a President be required to choose between preparing an effective defense and fully performing the duties of the Office. If faced with such a choice, a President will necessarily attend to his official duties to the

detriment of his personal defense, which would make Presidents even more vulnerable to suit.

In sum, by staying non-exigent civil damages litigation in its entirety while a President serves, all potential and actual incursions on the time and authority of the Chief Executive are eliminated. In view of the public interest in averting such problems, a stay is the appropriate -- indeed, the only -- method of prioritizing the rights and interests at stake here. A stay eliminates the possibility that separation of powers issues will ripen into constitutional confrontations, and prevents the civil justice system from being abused for pecuniary or partisan ends. Once the President has left office, plaintiffs who assert legitimate claims of injury can move forward with their suits.

C. Due To The Specific Allegations Here, The Claims Against Trooper Ferguson Must Also Be Held In Abeyance.

In view of the public's interest in the unimpeded performance of the singular constitutional duties assigned to the President, and the courts' interest in conserving judicial resources, the litigation against defendant Danny Ferguson also should be deferred in its entirety until the President is no longer in office. The allegations in this particular case are such that if the litigation against Trooper Ferguson were permitted to go forward, the President still would have to devote substantial time and attention to the proceedings, both as a witness and to protect his own interests in any future proceedings against him involving the same events. This makes it impossible for the claims against the State Trooper to proceed without

obliterating the benefits of any immunity accorded to the President.

The District Court correctly concluded that the true target of this suit is President Clinton, and that the allegations against Trooper Ferguson were "integrally related" to those against the President. Mem. Op. at 19 (Add. 19). "Trooper Ferguson is a defendant, but the case revolves around the alleged actions of then-Governor Clinton" Order of February 24, 1995 at 4 (Add. 35). An examination of the complaint reveals the basis for these findings.

The plaintiff alleges that Trooper Ferguson conspired with President Clinton, and also that Trooper Ferguson defamed her in statements concerning not the Trooper's purported conduct, but the President's purported conduct. The President, therefore, would be a critical witness in any case against Trooper Ferguson. Even if temporarily absented as a defendant from this case, President Clinton still would face potential liability upon his departure from office. He therefore would have rights and interests that could be determined by testimony or evidence that emerged during litigation of the Ferguson claims, and would have to participate in and prepare not only for his own deposition and testimony, but also for the depositions and testimony of numerous other witnesses the plaintiff or Trooper Ferguson might call to give evidence concerning the President's alleged conduct. The President would thus have the right and necessity to be involved in the Ferguson matter as much as he would be if his own interests were at stake -- because they are.

Due to these case-specific factors, the District Court properly concluded that trial could not go forward against Trooper Ferguson without diverting the President's time and energies. Mem. Op. at 19-20 (Add. 19-20). In a subsequent opinion, the court also found that discovery on the Ferguson claims alone would require "the heavy involvement of the President through his attorneys." Order of February 24, 1995 at 4 (Add. 35). However, despite the obvious conclusion to be drawn from these findings -- that moving forward with discovery on the Ferguson claims would be as burdensome for the President as going forward in his own case -- the court in the Order under appeal refused to stay discovery on the Ferguson claims, just as it did with those against the President.

The plain fact is that in this particular case, litigating the claims against the President's co-defendant would eviscerate the very constitutional interests that presidential immunity exists to protect. It would also invite the naming of co-defendants in suits against Presidents, precisely in order to undercut this vital constitutional safeguard. Finally, we note that litigating the same case twice -- once against Trooper Ferguson, and later against the President -- would be wasteful of the court's resources, as well. Accordingly, the claims against Trooper Ferguson must be dismissed without prejudice or stayed until such time as the President is amenable to suit as Trooper Ferguson's co-defendant.³³

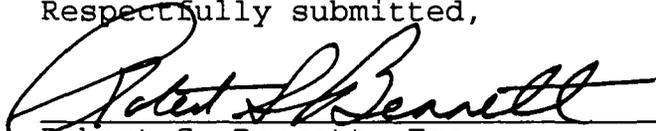
³³ Although a request to defer litigation against a private co-defendant is unusual, it is not unprecedented. The Soldiers' and (continued...)

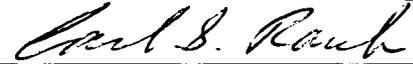
CONCLUSION

For all the foregoing reasons, we respectfully submit that this case should be remanded to the District Court with orders to dismiss the complaint without prejudice, and to toll any statutes of limitation applicable thereto, until such time as President Clinton leaves office. In the alternative, the case should be remanded to the District Court with directions to stay the litigation in its entirety for the pendency of the defendant's tenure as President.

Respectfully submitted,

By:


Robert S. Bennett, Esq.


Carl S. Rauh, Esq.

Alan Kriegel, Esq.
Amy R. Sabrin, Esq.
Stephen P. Vaughn, Esq.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Kathlyn Graves, Esq.

Stephen Engstrom, Esq.

WRIGHT, LINDSEY & JENNINGS
220 Worthen Bank Building
200 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 371-0808

WILSON, ENGSTROM, CORUM,
DUDLEY & COULTER
809 West Third Street
Little Rock, Arkansas 72202
(501) 375-6453

Counsel to President William J. Clinton

³³(...continued)

Sailors' Civil Relief Act, discussed supra, Part I(E), provides for litigation to be stayed against the co-defendants of active-duty military personnel where the rights and interests of the absent service member could be affected by proceedings against the co-defendant. 50 U.S.C. app. § 525 (1988).

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 1995, I caused copies of the Opening Brief of Appellant William Jefferson Clinton to be served by first-class mail on:

Daniel M. Traylor, Esq.
First Commercial Building
400 West Capitol Avenue, Suite 1700
Little Rock, Arkansas 72201

Bill W. Bristow, Esq.
216 East Washington
Jonesboro, Arkansas 72401

and by hand on:

Gilbert K. Davis, Esq.
Joseph Cammarata, Esq.
9516-C Lee Highway
Fairfax, Virginia 22031

Scott R. McIntosh, Esq.
Room 3127, Civil Division
Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001


Amy R. Sabrin

ADDENDUM

1. Memorandum Opinion & Order, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed Dec. 28, 1994). 869 F. Supp. 690 (E.D. Ark. 1994). (Add. 1-22).
2. Memorandum and Order, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed July 21, 1994). 858 F. Supp. 902 (E.D. Ark. 1994). (Add. 23-31).
3. Order, Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed Feb. 24, 1995). (Add. 32-36).

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DEC 28 1994

PAULA CORBIN JONES,

Plaintiff,

vs.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

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No. LR-C-94-290

MEMORANDUM OPINION AND ORDER

The Plaintiff, Paula Corbin Jones, filed a damage suit against the Defendants William Jefferson Clinton and Danny Ferguson to recover for acts which were alleged to have taken place primarily while Defendant Clinton was Governor of Arkansas and Defendant Ferguson was a Trooper with the Arkansas State Police assigned to the Governor. Subsequently, in the General Election of November, 1992, Mr. Clinton was elected President of the United States and assumed that office on January 20, 1993.

The complaint was filed on May 6, 1994, and was predicated on an alleged incident which was said to have occurred on May 8, 1991. The action alleged sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, which are provisions included in civil rights legislation of the reconstruction era. It also alleged state law claims of defamation and outrage.

Defendant Ferguson responded to these allegations by, in essence, denying any which might involve questionable activities on his part. Defendant Clinton responded with a motion to bifurcate

the briefing schedule so as to permit the question of Presidential immunity to be argued on a motion to dismiss before any other questions were presented. On July 21, 1994, the Court entered a Memorandum and Order allowing President Clinton to file a motion to dismiss on the basis of Presidential immunity and deferring and preserving the filing of any other motions or pleadings until the issue of Presidential immunity had been resolved. *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994). The Court noted that this order was purely procedural in nature and addressed only the question of whether Presidential immunity would be considered as a threshold issue. *Id.* at 907 n.6.

The basic issue, therefore, which this Memorandum Opinion and Order addresses is whether a civil action may be asserted against the President of the United States while he is in office when the fact situation alleged in the complaint arose before his election and assumption of office.

I.

Absolute Immunity of the President from Civil Suit

The President has asserted 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. This, of course, is a claim of absolute immunity. The President would have the Court dismiss the complaint while preserving through some equitable tolling of the statute of limitations the right of Ms. Jones to sue him civilly as soon as he

left office. The Justice Department in its Statement of Interest of the United States also argued for immunity, but urged the Court in the alternative simply to stay the proceedings until the President had left office. Ms. Jones argued against immunity, but also argued alternatively for dismissal with an automatic reinstatement on the Court's docket on the last day of his Presidency and against a stay. All briefs discussed at some length the intent of the framers of the Constitution and interpretations of various scholars and judges relating to this subject, and all were thorough and well researched.

A. The English Legacy

The Court believes that the place to begin this discussion, before coming to the vital question of constitutional interpretation, is in English law and the development of the rights and liberties of the English people. The rights and liberties of England became our inheritance. The Constitution of the United States and the constitutions of the states contain provisions that come directly from that source.

Almost all of the states adopted "reception statutes" receiving into state law the English common law and acts of Parliament as they existed as of a certain date -- which was usually 1607, 1620, or 1776 -- except to the extent that they were contrary to our federal or state constitutions or statutes or were contrary to our form of government. Arkansas adopted such a statute shortly after becoming a state. Ark. Code Ann. § 1-2-119 (Michie 1987); Ark. Stat. Ann. § 1-101 (1976 Repl.); discussed in

Moore v. Sharpe, 121 S.W. 341 (1909). The statute adopted the English common law, subject to the stated limitations, as it existed prior to the fourth year of James I. Various English statutes or common law rules passed into Arkansas law as a result. E.g. *Biscoe v. Thweatt*, 74 Ark. 545, 86 S.W. 432 (1905) (Statute of Charitable Uses); *Horsley v. Hilburn*, 45 Ark. 458 (1884) (Rule in Shelley's Case implicitly recognized but not applied to fee tail pursuant to superseding Arkansas statute); *Moody v. Walker*, 3 Ark. 140 (1840) (Rule Against Perpetuities). Also received were those portions of the Magna Carta relating to due process of law, equal protection, trial by jury, and rights unrelated to the feudal system.

The Magna Carta was largely a restatement of feudal law pertaining to land tenures and their incidents, and thus most of it has no application here. However, in addition to enshrining in English law some of our basic rights and liberties, it constituted a series of limitations placed upon the King and his authority. There would follow in English history a long and bloody struggle to define the rights of the monarchy as opposed to Parliament and the citizenry and also to the common law itself.

The tension between the King and Parliament, on the one hand, and the King and the common law, on the other, reached its heights with the ascension to the throne of the Stuart monarchy in the person of King James the First (who was James the Sixth of Scotland). Friction soon arose between the King and the House of Commons. At the root of the disagreement, once again, was the

Magna Carta. See generally William Swindler, *Magna Carta: Legend and Legacy* 169-176 (1965).

An important participant in all of this was Sir Edward Coke, whose writings had an enormous influence on English and American law, and who had served as Solicitor General and later Attorney General under Queen Elizabeth I and also as Chief Justice of the Court of Common Pleas. He subsequently would become Chief Justice of the King's Bench under King James I. See 3 Roscoe Pound, *Jurisprudence* 428 (1959). Under Elizabeth, as her attorney, Coke had been a staunch defender of the Crown, but as a judge, he would quote Bracton to King James: "The King ought to be under no man, but under God and the law." Swindler, *supra*, at 172. He also stated in *Dr. Bonham's Case*, 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (1610): "And it appears in our bodies, that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void" if they are "against common right and reason." William B. Lockhart et al., *The American Constitution* 251 (5th ed. 1981). That was unlikely to be a true statement of the law in the early 17th Century, but to the extent that it was precedent, it may be said to be an early expression of judicial review.

None of this and other frictions set well with the King, and Coke was dismissed from the bench, turning his efforts to Parliament. The continuing friction between Parliament and James' successor, King Charles I, ultimately led to the adoption of the Petition of Right, which in essence ratified and extended the Magna

Carta, and in effect further limited the prerogatives of the Crown. A defining moment came when the House of Commons rejected a proposal of the House of Lords that would add a clause recognizing the sovereignty of the King. Coke gave this fulmination:

I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto -- Magna Carta is such a Fellow, he will have no Sovereign.

Swindler, *supra*, at 185.

The Petition of Right was one of the foundation stones of the English Constitution. It enlarged upon the Magna Carta as a constitutional limitation upon the power of the monarchy. It made it apparent that the King's prerogative was limited. *Sub Deo et Lege*¹ was the law of the land.

¹In *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1343, 12 Co.Rep. 64, 65 (K.B. 1608), Lord Coke wrote:

[B]ut His Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et lege*. [That the King ought not to be under any man, but under God and the law.]

quoted in DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 203 (1963).

In Catherine Drinker Bowen's book, *The Lion and the Throne*, the situation which led to this opinion is discussed in some detail. The events of this period in English legal and political history were conclusive in determining the end of "the divine right of Kings" and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside of the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution. It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century.

Despite these statements by Lord Coke that the King was subject to the law, there existed contemporaneously in England the rule that "the King can do no wrong," a relic presumably rooted in the divine right of Kings. Blackstone expressed

B. The American Experience

In the formulation of Article II of the Constitution, there were varying viewpoints as to the office of the President.² Some, such as Roger Sherman of Connecticut, believed that the President should be "nothing more than an instrument for carrying the will of the Legislature into effect," while others, such as Gouverneur

it this way:

Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong: which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Chitty ed. 1855) (emphasis in the original).

Of course, when Blackstone published his *Commentaries*, this idea was already ludicrous in the light of the history of the English monarchy. A litany of the wrongs, weaknesses and sins of English kings would establish that they were not only capable of "doing wrong" but also of "thinking wrong" and were replete with folly and weakness.

The English concept of kingship never entered into the law of the United States, although in England it apparently "exists today to give the Queen an absolute immunity from being sued for personal torts in the civil courts." R. J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 307 (1959). See also Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U. L. REV. 526 (1977).

States did not adopt through the reception statutes those aspects of English law relating to the monarchy since kings and queens are contrary to our form of government. Thus what remains of our English heritage on this point are the basic documents of English liberties – the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights.

Moreover, as Chief Justice John Marshall pointed out in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), the King is subject to being "sued" in the form of a petition "and he never fails to comply with the judgment of his court."

²Russell Kirk cites Sir Henry Maine for the proposition that "the office of the President really is the office of a King - the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." He adds: "Maine even suggests that the framers of the Constitution may have had in mind the powers of George III, when they established the powers of the American presidency." He continues in that vein discussing how powerful an office it is. He adds, however, that the restraint exercised by the first six presidents prevented the reduction of the legislative and judicial branches "to insignificance." RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 427-428 (1974). This seems to be an exaggeration, however, since during that period of time, the opinions of Chief Justice John Marshall sufficed to prevent the Executive Branch from subverting the Judicial Branch, although the first six presidents did exercise substantial restraint, particularly Washington and Adams. It seems much more likely that in providing for the Executive Branch, the founders did not have George III in mind at all, except in an unfavorable sense. The "George" that they likely had in mind was George Washington. The Executive Branch was probably modeled for the first man to occupy it – which may explain why even the insertion of an impeachment provision for criminal offenses was a matter of debate.

Morris of Pennsylvania, thought the President should be "the guardian of the people, even of the lower classes, against Legislative tyranny." Arthur Schlesinger, Jr., *The Constitution: Article II, in An American Primer* 121-22 (Daniel J. Boorstin ed., 1968). What resulted was the compromise that we have today, amended only slightly from the original. It sets out the powers and duties of the Executive Branch (*i.e.*, the President and the administrators he appoints), but it does not address the immunity question.

A large part of the problem, aside from the silence of the Constitution, is that for all practical purposes, the Executive Branch, unlike the Congress and the Supreme Court, consists of only one person. His administrative appointees serve at his pleasure. Thus, a large part of the President's assertion may be summarized in the proposition that, without immunity, to cripple the Presidency in one way or another in civil litigation is to deliver a blow to and weaken the effectiveness of the entire Executive Branch of government which in effect is only one person, the President.

The importance of unimpeded, independent branches of government is discussed by Alexander Hamilton³ in *The Federalist* No. 51:

Were the executive, magistrate, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal. . .

³Some attribute this paper to James Madison. In *THE PEOPLE SHALL JUDGE* 312 (University of Chicago Social Science Staff 1949), its author is listed "Hamilton or Madison."

[We must give] to those who administer every department the necessary constitutional means and personal motives to resist encroachments of the others. . . . The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I *The People Shall Judge* 312, 313 (University of Chicago Social Science Staff 1949). He is speaking of independence from other branches, but also of the responsibility that goes along with it.

The President and his lawyers, in arguing the immunity issue, seem to place substantial reliance on the intention of the framers of the Constitution. Much of what they argue relates to the impeachment process. For example, they seize in their brief upon this commentary by Hamilton from *The Federalist No. 69*: "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." Of course, Hamilton was talking about impeachment under Article II, Section 4, under which the President may be "removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." That has nothing to do with immunity from civil suit. Article II, and Hamilton, were addressing criminal conduct on the part of the President.

This is not to say, however, that the question of Presidential immunity from suit was not discussed at the Constitutional Convention or during the years immediately following. Justice Lewis Powell addresses this in speaking for the majority of the Court in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982):

[T]here is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, *Records of the Federal Convention of 1787*, p. 64 (1911) (remarks of Gouverneur Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams -- both delegates to the Convention -- that 'the President, personally, was not the 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).

457 U.S. at 751-52 n.31.

Justice Powell also quoted from Justice Joseph Story's *Commentaries on the Constitution of the United States* to this effect:

'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* Sec. 1563, pp. 418-419 (1st ed. 1833).

457 U.S. at 750.

But just as the English law moved from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law, the situation in American law prior to *Fitzgerald* had proceeded essentially in the same direction with regard to the office of President. For example, it has been pointed out that when Hamilton made the statement quoted previously from *The Federalist No. 69*, "he was referring to his own plan" rather than reciting faithfully what had been proposed. Raoul Berger, *Selected Writings on the Constitution* 46-47 n.94 (1987). Moreover, the discussion at the Constitutional Convention revolved around the impeachment process, the basis for which was the commission of "high crimes and misdemeanors." Although Justice Story, writing several decades later, discusses civil cases, as previously quoted, he is writing from the perspective of someone who was a boy at the time of the Convention -- although admittedly he was rather close in time to those proceedings. He was successful in that what he wrote was embodied in *Fitzgerald*. There was much opposition even to the impeachment provision; some thought that the Supreme Court should conduct the trial rather than the Senate. James Madison was an advocate of that view, although Gouverneur Morris thought that "no other tribunal than the Senate could be trusted" and believed that the Supreme Court "were too few in number and might be warped or corrupted." 2 *Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 535 (reported by James Madison) (Gaillard Hunt & James Brown Scott, eds., 1987).

The disagreement over Presidential immunity at the Constitutional Convention carried over into the years that followed. In *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), Chief Justice John Marshall ruled that a *subpoena duces tecum* could be issued to President Thomas Jefferson. Jefferson protested strongly, arguing that the three branches of government had to be independent of each other, including independence by the executive from the judiciary. (Discussed in *Nixon v. Fitzgerald*, 457 U.S. at 751 n.31.) In *Livingston v. Jefferson*, 15 F.Cas. 660 (C.C.D. Va. 1811) (No. 8,411), damages were sought for alleged trespass committed by a federal officer at the direction of Jefferson, but a federal court dismissed it for having been brought improperly in Virginia. The immunity issue was not reached. Of course, even before these cases, the argument of total independence of the Executive Branch from judicial action had been settled in large part by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This case is remembered for the recognition and use of judicial review by the Supreme Court of an Act of Congress, but it also directed by mandamus that Secretary of State James Madison deliver Marbury's justice of the peace commission to him contrary to the desires of President Jefferson. While not bearing upon the immunity question directly, it was apparent that the Executive Branch was not immune from action by the Judicial Branch in enforcing mandates of the Constitution. In fact, Chief Justice Marshall said of Marbury's rights and remedies: "The 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." 5 U.S. (1 Cranch) at 163.

However, in *Mississippi v. Johnson*, 71 U.S. 475 (1867), the Supreme Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Chief Justice Salmon P. Chase, writing for a unanimous Court, declined to enjoin enforcement of the legislation even though it was allegedly unconstitutional. He distinguished *Marbury* by stating that it only related to ministerial duties involving no discretion while these Acts related to "executive and political" duties involving broad discretion. To enjoin the President would be to restrain him from carrying out his constitutional responsibility to execute the laws. Enjoining him would threaten the separation of powers between the branches and the independence of the President. See similarly, *Kendall v. United States*, 37 U.S. 524, 610 (1838), and *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 608-612 (D.C. Cir. 1974).

Of course, the complaint of Paula Corbin Jones in this civil case relates neither to the ministerial nor the executive duties of the President. The allegations relate to alleged conduct of the President while he was Governor of Arkansas. (The allegations, it might be noted, also do not relate to any ministerial or executive duty of the Office of Governor.) The Justice Department, in its brief, stated that it knew of only three private suits based on pre-presidential conduct which had been adjudicated during the President's term in office. These three were (1) an action against Theodore Roosevelt and the Board of Police in New York City, which

was resolved in the Board's favor in 1904, *People ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904); (2) A damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim from an automobile accident occurring during the 1960 campaign, which was ultimately settled, *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962).

However, the case most applicable to this one is *Nixon v. Fitzgerald*, cited previously. In a 5-4 decision, the Supreme Court decided that President Nixon had absolute immunity from a suit brought by A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, whom the President ordered fired because he had given congressional testimony on cost overruns which embarrassed his superiors in the Department of Defense (and presumably embarrassed the President also). Fitzgerald sued for damages. The district court rejected President Nixon's assertion of Presidential immunity. The court of appeals affirmed, but the Supreme Court reversed, holding that the President had absolute immunity from a civil suit for damages resulting from official actions taken by the President while in office. The majority opinion of Justice Lewis Powell was hotly disputed in a dissent by Justice Byron White, in which Justices Blackmun, Brennan and Marshall joined. The majority opinion was in accord with the view of the scholar, Edward S. Corwin, in discussing the President's immunity from judicial process. Edward S. Corwin, *The President:*

Office and Powers 138 (3d ed. 1948).

But the facts of *Fitzgerald*, as stated previously, are not the same as those in this case. Mr. Nixon was President when he fired Mr. Fitzgerald and was acting in his capacity as the head of the Executive Branch. Mr. Clinton was not President and was not even the President-elect when the alleged cause of action arose in this case.

The Constitution, of course, is silent on all of this. The framers debated even the subject of whether the President should be subject to impeachment for criminal acts and, if so, who should conduct the trial. There is nothing in the document relating to civil actions. Justice Story, *supra*, was of the mind that the President possessed immunity from civil suit, and the Supreme Court in *Fitzgerald* agreed in a severely divided opinion that the President was civilly immune from suits brought for official actions taken while in office.

Thus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judicial Branch, particularly the Supreme Court. This District Court is not activist in nature and is not inclined to "make law" where none exists. As stated by Chief Justice John Marshall in *Marbury v. Madison*, however: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

This Court recognizes the reasoning of Justice Powell and his thin majority in *Nixon v. Fitzgerald* that the President has

absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Therefore, the President's Motion to Dismiss on Grounds of Presidential Immunity is denied.

II.

Limited or Temporary Immunity from Trial

The question does not end here, however, because the intent of the Supreme Court in *Nixon v. Fitzgerald* would seem to carry this case beyond the question of absolute immunity from civil suit. The language of the majority opinion by Justice Powell is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention under the circumstances would be to interfere with the conduct of the duties of the office.

Justice Powell states unequivocally the following: "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." 457 U.S. at

751. He adds:

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 754.

Chief Justice Burger expressed the same theme in his concurring opinion: "Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment." 457 U.S. at 762.

Of course, in the preceding part of this opinion, this Court has pointed out that President Clinton's alleged acts took place before he was President and that he was not acting in the scope of Executive authority. Nonetheless, the concerns expressed by a majority of the Supreme Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same -- the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situation, as stated by Justice Powell in one of the preceding quotations from *Nixon v. Fitzgerald*, could have harmful effects in connection not only with the President but also with the

nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident through the alleged negligence of the President and desperately needs to recover such damages as may be awarded by a jury. It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. Her complaint, in ¶¶ 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in *The American Spectator*, in which the author purportedly obtained his information from state troopers, including Defendant Ferguson. Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to

be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience. For want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require due to the fact that the primary defendant is the President. The Court believes that such ruling is also permitted under Rule 40 of the Federal Rules of Civil Procedure allowing district courts to place matters upon the trial calendar "as the courts deem expedient." Further, such limited immunity from trial would seem to be justified under the equity powers of the Court.

By putting the case on hold, as far as trial is concerned, the Court avoids any tolling of the statute of limitations problems which might otherwise be presented if the case were dismissed without prejudice. Despite the fact that the President considers himself estopped to object to a refiling, the Court believes that a delay of the trial is the better way to proceed.

This does not mean, however, that the case is put on the shelf for all purposes. There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself. This approach eliminates the problem that witnesses may die, disappear, become incapacitated, or become forgetful due to the passage of time.

Because there is too much interdependency of events and testimony to proceed piecemeal, the allegations against the trooper will be tried at the same time as those against the President. His case is integrally related to the allegations against the

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

III.

Conclusion

The Court has attempted to follow its understanding of *Nixon v. Fitzgerald* and other cases as well as to adhere to the historical framework involved. Most importantly, the Court has sought to give effect to the full meaning of the separation of powers doctrine originally enunciated by Montesquieu and implicit in the founding fathers' structure of the Constitution. Essential Presidential prerogatives are "rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

On the other hand, in situations in which the President was not the holder of his office when the action allegedly arose, there would seem to be no immunity against civil litigation. The rights of Plaintiff Jones as an American citizen must be protected. *Sub Deo et lege* is our law as well as the law of Great Britain. No one, be he King or President, is above the law.

To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is

necessary to provide that the President cannot be tried in the context presented here until he leaves office. President Clinton's term in office, if he is re-elected in 1996, would end no later than January 20, 2001. An earlier termination might come on January 20, 1997, which is only slightly over two years away. By permitting discovery as to all including the President, the Court is laying the groundwork for a trial shortly after the President leaves office.

In granting limited or temporary immunity from immediate trial to President Clinton, the Court wishes to emphasize that it holds no brief for alleged sexual harassment, a matter of important concern to many people. The importance of such issue is another reason why there should be no absolute immunity in this case, but only a temporary Presidential immunity from trial.

Finally, the Court must express its awareness that this case is one in which new law is being made. All of the references to historical events and to other cases do not change that fact. In making such a ruling, the Court is also not unmindful of the fact that to this extent the separation of powers has been breached. But it has happened before in many cases including *United States v. Nixon, supra*, and many of the landmark decisions of Chief Justice John Marshall. In the end, the decision must be made by the courts when there is doubt and only limited precedent.

As previously noted, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. *United States v. Nixon* reaffirmed that

statement: "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." 418 U.S. at 707. That is what this Court has tried to do, keeping in mind the words of Chief Justice John Marshall that "we must never forget that it is a constitution we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 407 (1819),⁴ and that it is intended to endure for generations and to be applied to the various crises of human affairs.

The President's motion seeking immunity from suit is denied. The court will issue a scheduling order in due course.

IT IS SO ORDERED this 28th day of December 1994.


UNITED STATES DISTRICT JUDGE

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ON 12/28/94 BY TS

⁴As explained by Judge Robert H. Bork, Chief Justice Marshall was pointing out that "there are differences in the way we deal with different legal materials. . . . By this [Chief Justice Marshall] meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, 'partake of the prolixity of a legal code.'" ROBERT H. BORK, *THE TEMPTING OF AMERICA* 145 (1990).



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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

JUL 21 1994

JAMES W. McCORMACK, CLERK
By: [Signature]
DEP CLERK

PAULA CORBIN JONES,

Plaintiff,

vs.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

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No. LR-C-94-290

MEMORANDUM AND ORDER

Plaintiff Paula Corbin Jones seeks civil damages from the President of the United States for actions that, with one exception, are alleged to have occurred prior to his assuming office. The matter is before the Court on motion of the President for permission to file a motion to dismiss on grounds of Presidential immunity and to defer the filing of any other motions or pleadings until such time as the issue of immunity is resolved. The plaintiff has responded in opposition to the motion.¹ For the reasons that follow, the Court finds that the President's motion should be and hereby is granted.

I.

This complaint, which was filed on May 6, 1994, arises out of an alleged incident that is said to have occurred on May 8, 1991, when President Clinton was Governor of the State of Arkansas. The

¹ During a telephone conference held on June 16, 1994, separate defendant Danny Ferguson stated that he had no position with respect to the matter now before the Court.

plaintiff was a state employee at the time, and she claims that the President sexually harassed and assaulted her during a conference being held at a hotel in Little Rock, Arkansas.

The plaintiff asserts four claims in her complaint against the President. In Counts I and II, she alleges that President Clinton conspired to and did deprive her of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution. She contends that the President discriminated against her because of her gender by sexually harassing and assaulting her, by imposing a hostile work environment on her, and by causing her to fear that she would lose her job. She further claims that she was subjected arbitrarily to the fear of losing her job or experiencing other adverse actions in relation to her job and work environment. In Count III, plaintiff asserts a claim of intentional infliction of emotional distress or outrage, and claims in Count IV that the President, through his press aides and attorney, defamed her by denying the allegations that underlie this lawsuit.²

The President informs the Court that he will file a motion to dismiss the complaint without prejudice to its reinstatement after he leaves office, on grounds that sitting Presidents are constitutionally immune from having to litigate private suits for civil damages. He states that the immunity motion will raise serious issues which go to the constitutionality of compelling a

² Plaintiff also asserts conspiracy and defamation claims against separate defendant Ferguson.

sitting President to litigate private civil damages claims, as well as to this Court's authority to proceed in this case in the first instance. The President argues the Court should allow him initially to assert the immunity issue alone, thereby permitting that question to be resolved prior to filing any other pleadings in the case.

II.

The President states that his immunity motion will be based substantially on the Supreme Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), a case decided on a narrow 5-4 margin. The plaintiff in that case, a former employee of the Department of the Air Force, had alleged that then-President Nixon abolished his position in retaliation for his testimony before a Congressional Committee. The District Court rejected President Nixon's claim of immunity, and the Court of Appeals dismissed his collateral appeal. The Supreme Court granted certiorari to decide the "important issue" of Presidential immunity. 457 U.S. 731, 741. Referring to the plaintiff's claim as "this merely private suit for damages," *id.* at 754, the Court held that "[i]n 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." *Id.* at 756. In so holding, the Court identified 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.

Fitzgerald involved official actions by a sitting President while the allegations here relate to conduct that purportedly occurred prior to President Clinton's assumption of office. The President acknowledges this distinction and states that his motion will not assert absolute immunity such as was afforded in *Fitzgerald*, but will recognize the plaintiff's right to reinstate the lawsuit after he leaves office. In asserting such a claim of immunity, the President will seek entitlement to a fundamental protection from suit previously unrecognized in any court. This claim may or may not succeed. Nevertheless, because of the "singular importance of the President's duties," *Fitzgerald*, 457 U.S. at 751, and because suits for civil damages "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," *id.* at 753, the Court concludes that the issue of Presidential immunity deserves threshold consideration, prior to the filing of any other motions or pleadings.

In allowing the President to first assert the issue of immunity, the Court is permitting a procedure that is entirely consistent with the principles underlying absolute immunity. The "essence of absolute immunity is its possessor's entitlement not to have to answer for his [alleged] conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (citing

Fitzgerald, 457 U.S. 731). "The entitlement is an immunity from suit rather than a mere defense to liability," and "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (Emphasis in original.) See also *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (noting that one 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 an extended lawsuit); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687 (1993) (same). Because the entitlement is an immunity from suit, the Supreme Court has stressed that immunity questions should be resolved at the earliest possible stage in litigation. *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991).

Moreover, the immunity that will be asserted in this case is of a unique character and does not require an analysis of the allegations of the complaint. The Court thus has no need for dispositive motions at this time. Were the President asserting a defense of qualified immunity, the Court might well agree with the plaintiff that the substantive allegations of her complaint must be addressed. In such cases, courts are required to determine whether the alleged actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To decide whether an official is protected by qualified immunity, a court must determine whether the official's action was objectively legally reasonable in the light of the legal rules that were

clearly established at the time the action occurred. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). This inquiry involves a two-step process. First, the court must determine as a threshold matter whether the plaintiff has alleged a violation of a constitutional right. *Munz v. Michael*, No. 93-1865, 1994 WL 288376, at *4 (8th Cir. July 1, 1994) (citing *Beck v. Schwartz*, 992 F.2d 870, 871 (8th Cir. 1993) (per curiam)). See also *Siegert*, 500 U.S. at 232. Second, the court must determine whether that constitutional right was clearly established at the time that the officials acted. *Munz*, 1994 WL 288376, at *4 (citing *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993)).

The immunity that will be asserted by the President, however, is premised on his status as President and does not require the Court to review the legal sufficiency of the complaint. Indeed, the allegations of the complaint are irrelevant. This Court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law." *Forsyth*, 472 U.S. at 528.³

Nevertheless, plaintiff argues that the Federal Rules of Civil Procedure require every defendant, including the President of the United States, to either answer a complaint or file a single

³ It is true that for some officials, the question of absolute immunity will depend upon the particular function the official is performing. Such an inquiry involves application of a "functional approach," which looks to "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993) (citations omitted). In such cases, it may be necessary to examine the substantive allegations of the complaint. In the case at bar, however, the immunity that will be asserted by the President is premised on his status as President and does not require application of the "functional approach."

dispositive motion raising all available grounds for dismissal, including absolute immunity. Certainly, that is one way to handle a case, but it is not the only way it can be done. Plaintiff asserts, however, that the briefing schedule sought by the President is "nothing less than a categorical suspension of the Federal Rules of Civil Procedure." To the contrary, Rule 12 specifically allows for successive motions to dismiss for failure to state a claim. *Sharma v. Skaarup Ship Management Corp.*, 699 F.Supp. 440, 444 (S.D.N.Y. 1988), *aff'd*, 916 F.2d 820 (2nd Cir. 1990), *cert. denied*, 499 U.S. 907 (1991). "Although defenses of lack of jurisdiction over the person, improper venue and insufficiency of process are waived if not raised in a party's first responsive pleading, 'A defense of failure to state a claim upon which relief can be granted ... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.'" *Id.* (citing Fed.R.Civ.P. 12(h)). See also 2A Moore's Federal Practice ¶ 12.07[3] at 12-102 (2d ed. 1994) (affirmative defenses not enumerated in Rule 12(b) may be made by motion under Rule 12(b)(6)); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 at 447-48 (1990) (Rule 12(b)(6) motions are exempted by Rule 12(g) from the consolidation requirement). The briefing schedule sought by the President is in

conformity with the Federal Rules of Civil Procedure and does not afford him privileges unavailable to other defendants.⁴

To be sure, the plaintiff's interest in seeking prompt relief for the alleged violation of her rights is certainly legitimate and not to be minimized. The Court, however, finds that plaintiff's concern that the briefing schedule proposed by the President will entail undue delay is unfounded. Should the Court deny the President's claim of immunity, such order would be immediately appealable. *Forsyth*, 472 U.S. at 525; *Puerto Rico Aqueduct & Sewer Authority*, 113 S.Ct. at 687. This would be so regardless of the Court's ruling on any other Rule 12(b) motions.

Furthermore, it must be recognized that the relief plaintiff seeks is of a purely personal nature, the delay of which will affect but a single individual who waited two days short of three years in which to file her lawsuit. The President's claim to immunity from suits for civil damages, on the other hand, is equally legitimate and may affect "not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 753.⁵ Indeed, the amenability of a sitting President to suits for civil damages raises significant

⁴ Plaintiff also argues that the cases cited by the President require that every defendant either answer a complaint or file a single dispositive motion raising all available grounds for dismissal. However, the courts in those cases did not specifically require the concurrent filing of all motions but simply addressed the particular procedure in which the litigants before them happened to proceed. Those cases do not stand for the proposition that the briefing schedule proposed by the President is inappropriate or otherwise precluded.

⁵ As was previously noted, the Supreme Court has expressed concern that suits for civil damages could distract a President from his public duties. *Fitzgerald*, 457 U.S. at 753. In this regard, the Court noted that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. *Id.* at 754 n.37.

and important constitutional issues, the resolution of which will directly impact the institution of the Presidency. That being so, and because the President's constitutional responsibilities and status require this Court to exercise judicial deference and restraint, *Fitzgerald*, 457 U.S. at 753, the Court finds that the President should be allowed to defer the filing of any other motions or pleadings until such time as the issue of immunity has been resolved by this Court.

III.

For the foregoing reasons, the Court will allow the President to file a motion to dismiss on the grounds of presidential immunity on or before August 10, 1994, and to defer and preserve the filing of any other motions or pleadings that may or must be filed under the Federal Rules of Civil Procedure until such time as the issue of presidential immunity has been resolved by this Court.⁶

IT IS SO ORDERED this 21st day of July 1994.


UNITED STATES DISTRICT JUDGE

⁶ Nothing in this Order should be construed as indicating how the Court will rule on the President's soon-to-be-filed immunity motion. This Order only addresses the procedural issue, not the substantive questions relating to immunity.



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FEB 24 1995

JAMES W. McCORMACK, CLERK
By: [Signature]
DEP. CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAULA CORBIN JONES

Plaintiff,

vs.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON

Defendants.

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No. LR-C-94-290

ORDER

On December 28, 1994, this Court entered a Memorandum Opinion and Order denying the motion of Defendant William Jefferson Clinton to dismiss on the grounds of presidential immunity. The Court found, however, that trial of the entire matter should be delayed until after President Clinton leaves office. In spite of ordering a delay in setting the case for trial, the Court found that discovery could proceed as to all persons, including the President.

Both sides have appealed the Court's Order, and President Clinton has filed a Motion for Stay Pending Appeal. Plaintiff has responded in opposition to the motion, and the President has filed a reply to Plaintiff's response. For the reasons stated below, the Court grants the motion for stay.

I.

The denial of the President's motion to dismiss on the grounds of presidential immunity constitutes a "final" order that is

immediately appealable under 28 U.S.C. § 1291. An appeal from a denial of official immunity requires a stay of all proceedings pending resolution of the appeal. As stated in *Johnson v. Hay*, 931 F.2d 456, 459 n.2 (8th Cir. 1991), upon the filing of a notice of appeal in an immunity case, "[j]urisdiction has been vested in the court of appeals and the district court should not act further." Thus, this Court no longer has jurisdiction over those aspects of the case involved in the President's appeal to the Eighth Circuit.¹

The parties agree and there is no question that the Court is required to stay discovery against the President pending appeal. There is, however, a separate defendant in this case, Arkansas State Trooper Danny Ferguson, who has filed an answer to the complaint and has nothing to appeal. The President moves the Court to stay all proceedings against Ferguson as well, arguing that the issue of whether the case should go forward against Ferguson is one of the "aspects of the case involved in the appeal." *Johnson v.*

¹The issues on appeal, as stated in the President's Certificate Regarding Transcript and Notice of Issues on Appeal, are as follows:

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;
2. Whether the District Court's Order of December 28, 1994, 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, and not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the office of the President; and
3. Whether the District Court's Order of December 28, 1994, erred in refusing to stay the proceedings in their entirety until such time as the President leaves office.

See Docket Entry # 38.

Hay, supra.

Plaintiff responds that while the effect of the President's appeal is to halt proceedings related to him, there is no reason or right to stop the case as it relates to Ferguson. Plaintiff contends that just as immune and non-immune claims arising in the same lawsuit may proceed on separate tracks, so too may immune and non-immune defendants proceed separately. Plaintiff also urges that the President has two roles in this case, one as a defendant and another as a witness. Even though all proceedings against him in his role as defendant may be stayed pending appeal, Plaintiff asserts the President may still be subject to discovery on other claims as a witness.

II.

The Court rejects the President's attempt to, in effect, claim immunity on behalf of Ferguson, who has advanced no such right. The President's argument goes beyond any authority this Court has been able to find. The Court is unwilling to extend the effects of the President's immunity to Ferguson and finds that it retains jurisdiction over the case as to the Plaintiff's claims against him.

While the Court is not convinced by the President's argument that Plaintiff's claims against Ferguson are part of the aspects of the appeal, it will, nevertheless, grant President Clinton's motion to stay all proceedings in this case pending the appeal for another reason.

The Court cannot imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys. The claims are so inextricably intertwined that in order to protect the President to the full extent that his claim of immunity would provide, the Court finds that the motion should be granted. The pragmatic fact is that if discovery were allowed to proceed against Ferguson, he could only testify to action on his part, and other deponents would have to limit their testimony to Ferguson. Trooper Ferguson's testimony is among the most important in this case, but if he could not testify as to then-Governor Clinton's instructions to him, if any, and to the Governor's involvement in this matter, if any, and to what the Governor told him, if anything, then his testimony would be a hollow shell. Trooper Ferguson is a defendant, but the case revolves around the alleged actions of then-Governor Clinton, the central figure in this action.

III.

The Court is concerned about the possibility that some discovery may be necessary to preserve documentary evidence in this case, such as business records of the Excelsior Hotel and records of state agencies. The President recognizes Plaintiff's concern that evidence may be lost, and suggests that they may be able to cooperate to obtain informal discovery or, if the need is disputed, the aggrieved party could apply to the Court of Appeals for permission to take limited discovery. (See Mem. Supp. Mot. to Stay

at 10 n.7.) This appears to be the only solution to this potential problem. Therefore, the Court encourages the parties to cooperate to preserve specific items of evidence that may be lost due to the passage of time.

IV.

IT IS THEREFORE ORDERED that the Motion for Stay Pending Appeal is hereby granted.

DATED this 24th day of February 1995.


UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN
COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP
ON 2/24/95 BY VT

