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[Paula Jones Pleadings File] [4]



**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**PAULA CORBIN JONES,**  
Plaintiff-Appellee/Cross-Appellant

v.

**WILLIAM JEFFERSON CLINTON,**  
Defendant-Appellant/Cross-Appellee

and

**DANNY FERGUSON,**  
Defendant

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)  
) **Nos. 95-1050 &**  
) **95-1167**  
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**BRIEF AMICUS CURIAE OF LAW PROFESSORS  
IN SUPPORT OF APPELLANT WILLIAM JEFFERSON CLINTON**

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**BRIEF AMICUS CURIAE OF LAW PROFESSORS  
IN SUPPORT OF APPELLANT WILLIAM JEFFERSON CLINTON**

**STATEMENT OF INTEREST OF AMICI CURIAE**

The law professors named below all have considerable experience in teaching and scholarship about constitutional law. This brief sets forth their considered view from a scholarly perspective on the issue central to this appeal: whether the office of the Presidency should be presumptively protected from the distraction and diversion of energy caused by the pursuit of civil litigation against the President during his term of office. This brief does not speak to any other issue in this case, nor in any way to its merits. Amici sign this brief solely on their own behalf and not as representatives of the universities at which they teach.

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**Laurence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School.**

#### **PRELIMINARY STATEMENT**

This appeal arises in a private civil suit for damages against the President for conduct alleged to have taken place well before he took office and outside the scope of his official duties as President. The district court stayed the trial of the case, reasoning that the President was entitled to "temporary or limited immunity from trial" under the structural and separation-of-powers principles set forth in the reasoning of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark.

1994). The district court also held, however, that, notwithstanding this temporary litigation immunity, "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." *Id.*

The President appeals from the district court order insofar as it denies his motion to dismiss for the duration of his term of office and insofar as it fails to stay the proceedings in their entirety. The plaintiff cross-appeals from the district court order insofar as it stays the trial.

### SUMMARY OF ARGUMENT

The issue in this appeal is a narrow one: whether "our constitutional heritage and structure," *Nixon v. Fitzgerald*, 457 U.S. at 748, calls for a *temporary* delay of civil litigation against a sitting President for actions allegedly undertaken in his *non-presidential* capacity, well before he ever took office, absent any showing of compelling exigency by the plaintiff. For the following reasons, amici respectfully submit that in this case, such a delay is clearly consistent with and appropriately derived from relevant constitutional principles and precedent. Such a limited and temporary immunity is fairly implied in the structure of the executive branch set forth in Article II of the Constitution and in well-established structural principles inherent in our Constitution's separation of powers.

This case does *not* raise the difficult question of the President's immunity for actions in his official capacity. And this case does *not* raise any question of permanent immunity. The only question here is whether the proceedings should temporarily be delayed.

Both constitutional structure and tradition strongly counsel such temporary immunity in a case such as this one. The solitary nature of the Presidency necessitates that the person occupying that office be free from the diversion of energy and distract-

tion from duty that defending such a private damages action would present. *See Fitzgerald*, 457 U.S. at 753. Furthermore, such temporary immunity is consistent with a long tradition of judicial avoidance of incursions upon the Presidency. Where, as here, the actions alleged long predated the presidency, and where, as here, there has been no showing of exigent need for immediate relief, there is no reason to override the structural considerations warranting temporary immunity.

The district court order correctly granted such temporary immunity by staying the trial, but undercut it by allowing discovery to proceed. The justifications for temporary immunity are structural and categorical, and thus are defeated by such a piecemeal approach. Discovery in particular is designed to be a far-reaching search for all relevant evidence, and for any information that might lead to relevant evidence. Permitting discovery here would encumber the energy and independence of the Presidency as seriously as the conduct of trial itself, if not more so.

Thus, the district court order should be affirmed insofar as it stayed the trial of this case until the President has left office, but reversed insofar as it permitted discovery and other pretrial matters to proceed.

## ARGUMENT

### *Introduction*

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

At the outset, it is important to make clear what this case is *not* about. *First*, the issue here is *not* whether the President is immune, either absolutely or temporarily, from litigation brought against him for actions undertaken in his *official* capacity as

President. Even as to actions of the President in his official capacity -- where there might be concern about potential abuse of executive power -- the Supreme Court has inferred from the Constitution broad privileges and immunities. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court recognized a "presumptive privilege" of confidentiality in Presidential communications, which it described as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. And in *Nixon v. Fitzgerald*, the Court reasoned similarly from Article II and the separation of powers that the President is entitled to "absolute immunity from damages liability predicated on his official acts." 457 U.S. at 749.

To be sure, the appropriate scope of the President's immunity for *official* actions raises difficult questions, as the close division of the Court in *Nixon v. Fitzgerald* illustrates. But whatever the scope of presidential immunity for *official* acts undertaken while in office, this case poses a far easier constitutional question. For there can be no danger that actions the President allegedly undertook in his non-presidential capacity -- indeed, in this case, before he ever took office -- could have constituted in any way an abuse of presidential authority.

*Second*, the issue here is *not* whether the President is *permanently* immune, even after he leaves office, from civil litigation concerning acts allegedly undertaken by him outside his capacity as President. The President is not above the law, *see, e.g., United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."), and no one claims here that he is. The only issue here is whether constitutional structure and separation-of-powers principles call for a *temporary* postponement of civil litigation until after the President's term of office is concluded. The issue in this case does not go to ultimate liability; it goes strictly to the timing of the prosecution of this case. In this respect as well, this case poses an easier question than did *Nixon v. Fitzgerald*, which held the President permanently immune

from civil damages liability for his official actions. Here, by contrast, once the President leaves office, the suit may resume.

**I. TEMPORARY PRESIDENTIAL IMMUNITY FROM PRIVATE CIVIL LITIGATION IS FAIRLY IMPLIED IN ARTICLE II AND THE SEPARATION OF POWERS.**

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

The decision of the Court in *Nixon v. Fitzgerald* best illustrates the Court's constitutional method in deriving such presidential privileges and immunities. In *Fitzgerald*, the Court looked to "history and policy" as well as to constitutional structure and text. 457 U.S. at 748. In concluding that the President was entitled to absolute immunity from civil damages for official acts, the Court stated that "[w]e consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749. The Court reasoned in part from the functional necessities of the President's execution of duties under Article II, and in part from the principle that no branch should be subject to crippling incursions by another branch. This sort of structural reasoning has a venerable pedigree in our constitutional law. *See McCulloch v.*

*Maryland*, 17 U.S. (4 Wheat.) 316 (1819); Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969). Such structural reasoning is equally relevant to the temporary immunity issue here.

#### A. Presidential Duties Under Article II.

"The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. at 749. Article II, §1 of the Constitution uniquely vests the entire "executive power" in the President. No other branch of government is entrusted to a single person. "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. The President alone is Commander in Chief, and he is charged with the appointment power, the treaty power, and the duty to "take Care that the Laws be faithfully executed." Article II, §§ 2 & 3. The President is the only officer in the government so vital that the mechanism for his succession is constitutionally prescribed, even in the event of his temporary incapacity. U.S. Constitution, Amend. XXV, §§ 3-4.

As two commentators recently described this unique presidential position:

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

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

It has been well established at least since *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.'" *United States v. Nixon*, 418 U.S. at 706

n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)). In other words, "[c]ertain powers and privileges flow from the nature of enumerated powers . . . ." *Id.* at 705. Accordingly, Justice Joseph Story, one of our foremost constitutional commentators, long ago concluded that the grant of executive power in Article II "necessarily" carried with it some privileges and immunities essential to make the office function:

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

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

Following Justice Story, the Court in *Fitzgerald* sought to fashion an immunity sufficient to enable the President to "discharge the duties of his office." The Court identified three different ways in which civil damages actions against a President for his official actions might interfere with those duties. First, the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. Second, the threat of such damage remedies would impair his ability to "'deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). And third, the President's highly visible and prominent status would make him "an easily identifiable target for suits for civil damages," and his "[c]ognizance 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." *Id.* at 753.

The first and third of these concerns -- diversion of energy and distraction from duty -- are as applicable in this case as they were in *Fitzgerald*. Here, as in *Fitzgerald*, permitting the lawsuit to go forward during the President's term of office would divert his attention from his Article II duties. "We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time . . . ." Amar & Katyal, *supra*, 108 Harv. L. Rev. at 713. And here, as in *Fitzgerald*, permitting the lawsuit to go forward would turn the President into a litigation magnet for an ever-proliferating variety of civil suits.

The sole difference between this case and *Fitzgerald* is that, because the actions allegedly at issue were pre-presidential, immunity is not needed here in order to prevent inhibition of the President's "fearless and impartial" performance of his job. But this difference does not defeat the argument for temporary immunity. The additional concern with inhibition of executive performance was arguably crucial in *Fitzgerald* to warrant the more extreme grant of *permanent* immunity to the President even after he leaves office. Diversion and distraction alone are sufficiently weighty threats to warrant the *temporary* immunity sought here. As Justice Story correctly put the point, it is the President's "*person*" and not merely his job that must be "deemed, in civil cases at least, to possess an official inviolability." Only if the President's "*person*" is undistracted and undiverted can he carry out the duties uniquely imposed upon him by Article II. Thus the structural reasoning of *Nixon* clearly suggests that temporary immunity ought to extend to civil litigation even if based on a President's alleged private conduct.

## **B. Separation of Powers.**

The Court in *Nixon v. Fitzgerald* also reasoned that the balance of power between the Executive and the Judiciary would be significantly upset by enabling the President to be targeted for civil damages:

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

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

*Nixon v. Fitzgerald* relied in part on historical evidence suggesting that "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31. President John Adams and Senator Oliver Ellsworth were reported by Senator Maclay to have said that "the President, personally, was not subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Journal of William Maclay* 167 (E. Maclay ed. 1890), quoted in *Fitzgerald*, 457 U.S. at 751 n. 31.

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

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

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

The constitutional impasse that might have come about had a court sought to hold the President in contempt was avoided in *Burr* itself, of course, when President Jefferson voluntarily turned over the papers. And, indeed, the courts have continued to avoid that impasse in the years since through a variety of devices. When injunctive relief must issue against the executive branch, it has typically run against an executive official other than the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)(enjoining the Secretary of Commerce); *Atlee v. Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972)(dismissing the President as party to suit in which the Secretary of Defense was also named as a party). Rather, the courts have an "apparently unbroken historical tradition" of declining to grant injunctive relief against the President himself. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2789 (1992)(Scalia J., concurring in part and concurring in the judgment); *see id.* at 2776 (plurality opinion). Courts that do maintain jurisdiction over the President as a party have resorted to declaratory rather than injunctive relief. *See, e.g., National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974)("We so restrict ourselves at this time in order to show the utmost respect to the office of the Presidency and to avoid, if at all possible, direct involvement by the Courts in the President's constitutional duty faithfully to execute the laws and any clash between the judicial and executive branches of

the Government."); *but see Franklin v. Massachusetts*, 112 S. Ct. at 2789 (Scalia, J., concurring in part and concurring in judgment)("I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.").

If such encroachment of the judiciary upon the Presidency is to be avoided in matters of public affairs, then *a fortiori* it is to be avoided with respect to non-exigent private lawsuits against the President as a private citizen. This tradition of judicial restraint and deference not only avoids intrusion of the judiciary upon the independence of the Presidency, but also avoids the friction of "needless head-on confrontations between district judges and the Chief Executive." *Franklin v. Massachusetts*, 112 S. Ct. at 2790 (Scalia, J., concurring in part and concurring in the judgment). That friction is similarly threatened in private lawsuits against the President, as the Chief Executive is inseparable from the person occupying the presidency.

### **C. Absence of Compelling Countervailing Interest.**

Article II and the separation of powers thus give rise to a powerful inference that temporary presidential immunity against lawsuits unconnected to official acts is required. But a presumption of such immunity might, of course, be overridden for compelling reasons. Indeed, Chief Justice Marshall held that Burr's constitutional right to compulsory process overrode any executive privilege President Jefferson might have had, *United States v. Burr*, 25 Cas. 30, 33-34 (C.C.D. Va. 1807) (No. 14, 692D), and the Court in *United States v. Nixon* held that the presumptive privilege of presidential confidentiality was overridden by a "demonstrated, specific need for evidence in a pending criminal trial." 418 U.S. at 713.

No such compelling need has been demonstrated for immediate proceedings here. A civil damage suit such as this one, by definition, involves only discrete, past harms that are reparable, if any merit should later be found, by money damages.

Delay in payment generally can be compensated by prejudgment interest. A plaintiff might in some case be able to demonstrate an urgent need for injunctive relief against the President, in his personal capacity, to end an ongoing harm. Were a President to fail to abate a nuisance on his private property, for example, neighbors seeking injunctive relief might be able to show that the continuing nature of the nuisance would justify an immediate injunction. But the burden of demonstrating exigency should, consistent with the constitutional analysis above, rest squarely on the plaintiff. Because the interest in an unencumbered Chief Executive is structural and categorical, the President should have no obligation to demonstrate his own need for immunity case by case.

**II. THE TEMPORARY PRESIDENTIAL IMMUNITY HERE SHOULD  
EXTEND TO THE LAWSUIT IN ITS ENTIRETY, INCLUDING  
DISCOVERY AND OTHER PRE-TRIAL MATTERS.**

The district court's decision correctly granted temporary immunity with one hand, but then effectively rescinded it with the other by permitting discovery to proceed. This approach defeats the very purpose of granting temporary immunity to begin with.

The reasons for temporary immunity are structural and categorical. The burden rests with the plaintiff to show some compelling reason to override them. If that burden has not been met, as it has not been here, then no burden should shift to the President to defend himself from pretrial motions piecemeal on the ground that they present barriers to the effective exercise of his office. If the interests at stake in the suit as a whole are not sufficiently urgent to outweigh the structural constraints of Article II and the separation of powers, then the interests at stake in the pretrial proceedings should be even less likely to do so. The same functional and separation-of-powers

concerns that counsel that the President not be subjected to the burden of trial likewise counsel that he should not be subjected to the burden of repeated discovery or other pretrial motions.

The district court's decision to allow discovery to go forward illustrates the dangers of a piecemeal approach. The order allows the extraordinary step of subjecting a sitting President to interrogatories and the deposition process. The problem is not simply that discovery can be as burdensome as trial itself; it is that discovery, by design, can be considerably *more* invasive, and can give the plaintiff considerable control over the time and energies of his opponent.

Discovery under the Federal Rules of Civil Procedure is designed to be substantially more far-reaching than evidence admissible at trial. The Rules governing discovery are "widely recognized [to be] liberal in scope and interpretation." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). Discovery is not limited to issues raised by the pleadings or by the merits of the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Nor need the information sought through discovery be admissible at trial. Fed. R. Civ. P. 26(b)(1). Discovery is intended to be far-ranging "to allow a broad search for . . . any . . . matters which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26 advisory committee's note, 1946.

The intentionally broad nature of the discovery process conflicts severely with the interest in an unencumbered Executive. This reasoning is confirmed by history. To our knowledge, only three private suits have been pursued against sitting Presidents -- although each, unlike this one, was filed before the relevant President took office. President Theodore Roosevelt, in his former role as a member of the Board of Police of the City of New York, was one of the named defendants in a suit brought well before his assumption of the Presidency. *People ex rel. Hurley v. Roosevelt*, 179 N.Y. 544

(1904). President Harry S. Truman, in his former role as state court judge in 1931, was the subject of a suit that was initiated before he became President. *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946). Neither Roosevelt nor Truman was subjected to discovery while in office. In 1962, two cases against President John F. Kennedy, involving injuries sustained by delegates to the 1960 Democratic Convention in a car rented by the Kennedy campaign, were briefly allowed to go forward, and were then settled. *Hills v. Kennedy*, No. 757201, and *Bailey v. Kennedy*, No. 757200 (Los Angeles County Superior Court, both filed Oct. 27, 1960 and subsequently consolidated).

The interrogatories served on then-Attorney General Robert Kennedy in 1962 suggest some of the difficulties that discovery might pose. See Cross-Interrogatories to Robert F. Kennedy, filed in *Bailey v. Kennedy & Hills v. Kennedy*, *supra*, September 20, 1962, reprinted in Attachment 7 to Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity, filed in *Jones v. Clinton*, Civ. No. LR-C-94-290 (E.D. Ark.), Aug. 10, 1994. The interrogatories ranged extremely widely. All documents related to Kennedy's presidential campaign were requested. See *id.*, nos. 32-35, 61. Many were pointedly political in nature:

"24. In regard to the extent of any obligation to the defendant John F. Kennedy, did the defendant John F. Kennedy assist you in any way to obtain a job with any Congressional Committee while he was a United States Senator? . . .

"41. Did the plan to obtain the Presidency of the United States for the defendant John F. Kennedy, whether in writing or not, include the eventual occupation of the State of Mississippi by some branch or arm of a Federal Police Force? . . .

"69. Are you prejudiced against the plaintiffs in this case simply because they are residents of the state of Mississippi?"

The questions also display a marked interest in the relations of the Kennedy family, *see id.*, nos. 20, 43-52 -- all for a simple auto accident case in which neither Kennedy was involved.

These interrogatories, not even directed at the President himself, demonstrate how readily discovery might become a vehicle for disruption and political maneuvering against a sitting President. The potential for disruption, distraction and diversion of the President's energies is considerably greater if he is subject personally to deposition. Related proceedings that would require the President's personal involvement pose the same problems, as the district court recognized below in staying the proceedings against Defendant Ferguson.

The delay of discovery until after the close of the President's term may appear to impose some hardship on the plaintiff. But there is no other meaningful way to achieve the benefits of temporary immunity for the Presidency and the nation. In any event, a plaintiff has many options for minimizing these hardships. There is nothing in the rule sought here to stop a plaintiff from collecting and preserving all the evidence she can short of personal discovery against the President. Nothing in this case suggests there is any imminent danger of any permanent loss of evidence, as would be the case, for example, with an ill or dying witness. Were such exigency to arise, the district court could deal with it as necessary. But the dimming of memory alone is not enough to override the constitutional reasons for postponement. In any event, the plaintiff here had eighteen months after alleged actions of which she allegedly was fully aware to file suit before President Clinton ever took office, but instead waited nearly three years. In a case such as this one concerning alleged pre-presidential conduct, a presumption of temporary presidential immunity would have the salutary effect of encouraging

plaintiffs to file lawsuits *before* the President assumes office, sparing the nation the deprivation of the President's attention.

Thus, the interests of the Executive, and of the nation, are best served by a categorical presumption that non-exigent private civil suits be stayed *in their entirety* for the President's incumbency, to be overcome only in cases where a plaintiff demonstrates some compelling exigency of a kind not present here.

### CONCLUSION

For these reasons, the judgment of the district court should be affirmed insofar as it stayed the trial until after the President leaves office, and reversed insofar as it permitted discovery to proceed.

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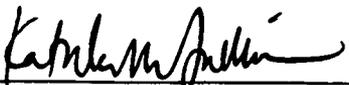
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\_\_\_\_\_  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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PAULA CORBIN JONES,

Plaintiff-Appellee/Cross-Appellant

v.

WILLIAM JEFFERSON CLINTON,

Defendant-Appellant/Cross-Appellee,

and

DANNY FERGUSON,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

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## STATEMENT OF JURISDICTION

1. This is a suit for compensatory and punitive damages under 42 U.S.C. §§ 1983 and 1985 and pendent Arkansas common law claims. The jurisdiction of the district court was asserted under 28 U.S.C. §§ 1331, 1332, and 1343.

2. On December 28, 1994, the district court entered an order (i) denying a motion to dismiss on grounds of Presidential immunity and (ii) partially staying proceedings. The President is appealing from the denial of the dismissal motion and the denial of a complete stay; the plaintiff is appealing from the granting of a partial stay. An order denying a motion to dismiss on grounds of official immunity is immediately appealable. Mitchell v. Forsyth, 472 U.S. 511 (1985). An order granting a stay ordinarily is not immediately appealable. Boushel v. Toro Co., 985 F.2d 406, 408 (8th Cir. 1993). It is unclear whether the stay in this case may be appealed on the basis of pendent appellate jurisdiction. Compare Swint v. Chambers County Commission, 115 S. Ct. 1203, 1208-1212 (1995), with, e.g., Intermedics Infusaid, Inc. v. Regents of Univ. of Minnesota, 804 F.2d 129, 134 (Fed. Cir. 1986), and Barrett v. United States, 798 F.2d 565, 570-71 (2d Cir. 1986). Both appeals were timely filed under Fed. R. App. P. 4.

## STATEMENT OF ISSUES

Whether a private action for damages against the President of the United States, based on events occurring before the President took office, should be stayed in its entirety until the completion of the President's term.

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

Landis v. North American Co., 299 U.S. 248 (1936)

## STATEMENT OF THE CASE

On May 6, 1994, Paula Corbin Jones filed a suit in the Eastern District of Arkansas against William Clinton, President of the United States and former Governor of Arkansas, and Danny Ferguson, an Arkansas state trooper. Jones, a former Arkansas state employee, alleged that she had been sexually harassed by then-Governor Clinton three years earlier, on May 8, 1991. Jones further alleged that after rejecting the governor's alleged advances, she suffered work-related retaliation, and was later libeled by a magazine article that described the episode. Based on these allegations, Jones asserted federal claims under 42 U.S.C. §§ 1983 and 1985 and state common law claims for outrage and libel. With respect to each claim, Jones sought \$75,000 in compensatory damages and \$100,000 in punitive damages.

On August 11, 1994, President Clinton filed a motion to dismiss the suit without prejudice. The President, represented by private counsel, contended that he was immune from suit during his term of office for claims arising before he took office. The immunity claimed by the President was temporary in nature, not permanent: the President asserted that Jones was barred from proceeding while he remained in office, but could reinstate her suit (absent some other legal bar) thereafter. The President asked the district court to dismiss the suit, but suggested in the alternative that the suit be stayed until the end of the President's term.

On August 18, 1994, the United States filed a statement of interest pursuant to 28 U.S.C. § 517.<sup>1</sup> The United States entered the case because it has a fundamental interest in protecting the office of the Presidency and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, the President may be required to submit to judicial processes.<sup>2</sup>

The United States took the position in the district court that, except in unusual circumstances, the President should not be compelled to defend himself during his term of office against private suits based upon alleged pre-Presidential conduct. The United States further informed the court that this case presents

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<sup>1</sup> In relevant part, 28 U.S.C. § 517 provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States \* \* \* ."

<sup>2</sup> The United States has participated as amicus curiae in a number of cases raising issues related to those in this case. The United States participated in In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.); our memorandum argued that the Vice President is subject to criminal indictment and trial during his tenure in office but that the President is not. The United States also participated in Nixon v. Fitzgerald, 457 U.S. 731 (1982), which involved the immunity of former President Nixon from civil actions for damages based on his conduct in office. See pp. 11-12 infra. The United States also participated in United States v. Poindexter, 732 F. Supp. 142 (D.D.C. 1990), which involved the amenability of former President Reagan to a criminal subpoena relating to the Iran-Contra affair. The United States has also participated in federal and state courts in cases involving the immunity of foreign heads of state. See, e.g., LaFontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994); Anonymous v. Anonymous, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

no unusual circumstances that would warrant allowing the litigation to proceed before President Clinton leaves office. The United States recommended that the court stay the proceedings, rather than dismiss the suit, in order to avoid potential statute-of-limitations problems.

On December 28, 1994, the district court issued a memorandum order denying the President's motion to dismiss and partially staying the litigation. After reviewing British and American constitutional history, and analyzing Supreme Court precedents, the court concluded that the President does not enjoy "absolute immunity from civil causes of action arising prior to assuming the [Presidential] office." Memorandum Opinion and Order, December 28, 1994 ("Opinion"), at 16. However, the court held that the President does enjoy a "limited or temporary immunity from trial" while he remains in office. Ibid. The court concluded that this temporary immunity was necessary because the alternative (requiring the President to defend himself during his term of office) could "hamper [him] in conducting the duties of his office," to the potential detriment of the Nation as well as the President. Id. at 17.

The district court therefore stayed trial proceedings until after the President leaves office. The court applied the stay not only to the claims against the President, but also to those against trooper Ferguson, "[b]ecause there is too much interdependency of events and testimony to proceed piecemeal." Opinion at 19. However, while staying the trial itself, the court

declined to stay pretrial discovery, seeing "no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Ibid. The court thereafter granted a motion by the President for a stay of discovery pending appeal.

#### **SUMMARY OF ARGUMENT**

In a number of respects, the district court's decision in this case accords with the views of the United States. The district court recognized that the burden of defending against private lawsuits poses an unacceptable threat to the President's conduct of his office; that the litigation process should be delayed to provide relief from this threat; that the appropriate form of relief is a stay, rather than a dismissal; that a stay in this case will not jeopardize Jones's legitimate interests; and that the stay should encompass both the claims against the President and those against Ferguson. The United States agrees with each of these propositions.

The district court erred, however, in limiting its stay to the trial itself, while permitting pretrial discovery to go forward. In terms of the demands placed on the President's time and attention, the discovery process is likely to be at least as burdensome as the eventual trial, if not more so. Allowing discovery to proceed while the President remains in office will thus jeopardize the very interests that the district court itself sought to protect by staying the trial. The district court therefore should have stayed this case in its entirety until the

end of the President's service. If an unusual and substantial risk develops that evidence will be lost in the meantime, the parties can make informal arrangements to preserve the evidence, as the district court itself recognized when it granted the President's motion for a stay of discovery pending appeal.

#### **ARGUMENT**

#### **ABSENT UNUSUAL CIRCUMSTANCES, PRIVATE SUITS AGAINST THE PRESIDENT BASED ON PRE-PRESIDENTIAL CONDUCT SHOULD BE STAYED IN THEIR ENTIRETY DURING THE PRESIDENT'S TERM OF OFFICE**

##### **Introduction**

In reviewing the decision below, it is important to begin with a clear understanding of what is, and what is not, at issue. The issue in this case is not whether the President may be called to account in a court of law for tortious or unlawful conduct predating his Presidency. He may. The President does not enjoy immunity from liability, by virtue of his office, for torts that precede his discharge of his Presidential powers and duties. Neither President Clinton nor the United States has claimed otherwise. In short, no one is suggesting that the President is "above the law" with respect to liability for pre-Presidential actions.

The issue here is not whether the President may be required to answer claims based on pre-Presidential conduct, but when. For reasons set forth in Part I below, the United States believes that the President ordinarily should not be required to defend himself against such claims until after the completion of his service in office. This rule should prevail unless (1) the plaintiff will

suffer irreparable injury without immediate relief and (2) the trial court can determine, with a high degree of confidence, that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Unless both of these preconditions are met, private suits against a sitting President should be stayed in their entirety until the completion of the President's service in office. Staying the litigation will protect the important public and constitutional interests in the President's unimpaired performance of his duties, while preserving a plaintiff's ability to obtain a resolution of his or her claims on the merits.

As explained in Part II below, the United States sees no unusual circumstances in this case that would justify permitting Jones's suit to go forward at the present time. To the contrary, this litigation would impose substantial demands on the President's time and energy, and a stay for the duration of the President's service in office would not prevent Jones from ultimately obtaining an adjudication of her claims. This case should therefore be stayed until the President leaves office. The stay should include pretrial discovery, as well as the trial itself, because discovery is likely to pose even more intrusive and burdensome demands on the President's time and attention than the eventual trial itself.

**I. Requiring A Sitting President To Defend Himself In Private Litigation Conflicts With The Requirements Of The President's Office**

A. Whenever a litigant seeks to invoke the processes of the courts against the President, "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." Fitzgerald, 457 U.S. at 753; cf. Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992) ("[o]ut of respect for the separation of powers and the unique constitutional position of the President," Administrative Procedure Act should be construed not to authorize judicial review of Presidential actions). To be sure, the separation-of-powers doctrine "does not bar every exercise of jurisdiction over the President of the United States. But \* \* \* 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." Fitzgerald, 457 U.S. at 753-54.

When the President is called on to defend himself in his personal capacity during his term of office, "the dangers of intrusion on the authority and functions of the Executive Branch" are both real and obvious. The burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office, by forcing him to divert his energy and attention to the task of protecting himself against personal liability.

The substantial burdens borne by individual defendants in civil litigation, especially litigation seeking to impose personal financial liability, require little elaboration. Where the claims focus on a defendant's own acts and omissions, the defendant must devote considerable time and energy to the factual disputes underlying the claims. Among other things, the defendant must prepare for and give deposition testimony; provide the information needed to pursue and answer other forms of discovery demands; and assist his own counsel in developing the factual record. In addition, the defendant must consult with his attorney on an ongoing basis about choices relating to pretrial and trial strategy.

These burdens on a defendant are ordinarily a matter of purely private concern. When they are imposed on the President of the United States during his term of office, however, they implicate interests that are both public and constitutional in nature. As the Supreme Court has explained, "[t]he President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." Nixon v. Fitzgerald, 457 U.S. at 749, 750. The President is the sole repository of the "executive Power" created by Article II of the Constitution. Id. at 749-50. Under Article II, the President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "the enforcement of federal law \* \* \* ; the conduct of foreign affairs \* \* \* ; and the management of the Executive Branch." Id. at 750.

Both constitutionally and practically speaking, the demands of the President's office are unceasing. See Amar & Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701, 713 (1995). As a constitutional matter, the President must attend to his duties as Chief Executive and Commander-in-Chief continuously throughout his tenure, in contrast to the Congress, which is required to assemble only "once in every Year" (Const. Art. I, § 4) and which may adjourn on a regular basis (*id.* § 5). As a practical matter, the issues of domestic and foreign policy that call for the President's attention fully occupy, if they do not indeed outstrip, the time available for the President to respond. The adoption of the Twenty-Fifth Amendment to the Constitution, with its elaborate machinery for carrying out the President's functions when he "is unable to discharge the powers and duties of his office," testifies to the unique nature of the Presidency and the incessant nature of the demands on its occupants.

Accordingly, a sitting President could defend himself in an action for damages, and assume all of the burdens that such an undertaking entails, only by diverting his time and attention from the demands of his office. That result would disserve the substantial public interest in the President's unhindered execution of his duties. It would also impair the integrity of the role assigned to the President by Article II of the Constitution.

B. The question here is whether, despite these concerns, a private plaintiff may compel the President to defend himself

during his term of office against claims of pre-Presidential misconduct. Before this case, no court had been called on to decide that question.<sup>3</sup> In Fitzgerald the Supreme Court addressed a related issue, that of the President's immunity from private damage actions based on the President's official acts. The Supreme Court's decision in Fitzgerald is not directly controlling where, as here, the plaintiff's claims center on events that preceded the President's term of office. Nonetheless, as the district court recognized, the Court's reasoning in Fitzgerald is highly instructive, for it demonstrates the importance of insulating the President from the disruptive effects of private suits against him.

In Fitzgerald, the Supreme Court held that, at least "in the absence of explicit affirmative action by Congress" (457 U.S. at 749 n.27), the President is entitled to absolute immunity from claims for damages "for acts within the 'outer perimeter' of his official responsibility." Id. at 756. The Court characterized this immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of

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<sup>3</sup> The United States is aware of only three previous instances in which private suits based on pre-Presidential conduct have been heard during the President's term of office. The instances are noted in the district court's opinion. See Opinion at 13-14. Each of these cases was commenced before the President took office, and as far as the United States has been able to determine, none of the courts was asked to dismiss or stay the litigation on the basis of constitutionally grounded immunity after the President took office.

the separation of powers and supported by our history." Id. at 749.<sup>4</sup>

The Supreme Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages based on his official conduct. 457 U.S. at 751-54. The Court reasoned that exposing the President to suits for damages based on his official actions could deprive him of "'the maximum ability to deal fearlessly and impartially with' the duties of his office." Id. at 752. The Court further stated that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Id. at 751. In his concurring opinion, Chief Justice Burger also noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. Id. at 762, 763 (Burger, C.J., concurring).

When the President is sued for actions wholly unrelated to his official responsibilities, Fitzgerald's concern for ensuring "fearless[] and impartial[]" Presidential decisionmaking is not directly implicated. However, the more general concerns upon

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<sup>4</sup> The Court in Fitzgerald discussed in some detail historical precedents regarding the susceptibility of sitting Presidents to judicial process. See 457 U.S. at 751-752 n.31. The Court noted, inter alia, that such early Americans as John Adams, Oliver Ellsworth, Joseph Story, and Thomas Jefferson believed the President not to be subject to judicial process. Id. at 751 n.31. The Court concluded that "[t]he best historical evidence clearly supports" a rule of absolute immunity for a President's official actions. Id. at 752 n.31.

which the Court's holding was based apply with equal force in that context. The Court in Fitzgerald recognized that "[t]he President occupies a unique position in the constitutional scheme" (457 U.S. at 749); that the President should not be diverted from attending to the national welfare by "concern with private lawsuits" (id. at 751); and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs. Id. at 754 n.37. As our earlier discussion (see pp. 9-10 supra) demonstrates, the President would be faced with a "diversion of his energies by concern with private lawsuits" (Fitzgerald, 457 U.S. at 751) if he were compelled to defend himself against a private damage action during his term in office. That diversion would "raise unique risks to the effective functioning of government" (id. at 751). The teaching of Fitzgerald is that the judicial system should not lend itself to such risks.<sup>5</sup>

C. When a sitting President is sued for conduct that pre-dates his term of office, the demands of the Presidency do not

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<sup>5</sup> A similar lesson can be drawn from the evident immunity of a sitting President from criminal prosecution. The available evidence strongly indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting President. See, e.g., 2 Farrand, Records of the Federal Convention of 1787 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction \* \* \* removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law"). As the Court in Fitzgerald noted, "there is a lesser public interest in actions for civil damages than \* \* \* in criminal prosecutions." 457 U.S. at 754 n.37.

require the kind of absolute immunity from liability recognized in Fitzgerald. Instead, those demands may be served by a more limited alternative -- that of postponing the litigation until the President leaves office.

Deferring a private suit for damages until after the President's term of office forestalls the "intrusion on the authority and functions of the Executive Branch" (Fitzgerald, 457 U.S. at 754) that would result if the President were required to divert his attentions to the task of defending himself against personal liability. At the same time, deferring the suit preserves the plaintiff's right to seek relief for a meritorious claim. It affects only when, not whether, the President must answer the allegations; it merely delays, rather than defeats, the vindication of the plaintiff's private legal interests. It is thus far less burdensome for plaintiffs than the absolute immunity recognized in Fitzgerald.

Somewhat different concerns may be raised by private actions for equitable relief, such as suits to enjoin ongoing unlawful conduct wholly unrelated to the President's official duties. Because equitable remedies are available only when money damages will not provide adequate relief, there may be less assurance in this context that a plaintiff's interests will be adequately protected if resolution of the lawsuit is deferred until the President leaves office. But when a plaintiff seeks only damages for alleged past misconduct, delay is unlikely to vitiate the

relief.<sup>6</sup> And there is no reason to expect, at least as a general matter, that postponing litigation will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims.<sup>7</sup> As we discuss further below, if the circumstances of a particular case suggest an unusual risk that specific evidence will be lost -- for example, if the case will require the testimony of an extremely ill witness -- arrangements can be made to preserve that evidence without allowing a more general commencement or resumption of the litigation. See pp. 26-27 infra.

For these reasons, postponing adjudication of private damage actions will rarely defeat a plaintiff's ability ultimately to obtain meaningful relief. But even if it could be shown that deferral of a particular lawsuit would severely prejudice the plaintiff's interests, it would not necessarily follow that the litigation should be allowed to proceed while the President is in office. Where the public and constitutional interest in the President's unimpaired attention to his duties conflicts with the purely private interest of a plaintiff in obtaining immediate

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<sup>6</sup> In some cases, prevailing plaintiffs are entitled to pre-judgment interest on their awards, thereby eliminating any financial "cost" of delay. In other cases, prejudgment interest may not be available. But even in those cases, delay affects the plaintiff's relief only at the margins; even a delay of several years will not deprive the plaintiff of the essence of the monetary relief he or she is seeking.

<sup>7</sup> The risk that delay will jeopardize the marshalling of evidence, it should be noted, cuts both ways: although the plaintiff may lose evidence supporting her claims, it is also possible that the President will lose evidence supporting his defense.

relief, the private interest must yield. Cf. Fitzgerald, 457 U.S. at 754 n. 37 (President has absolute immunity for claims relating to official actions even though "absolute immunity may impose a regrettable cost on individuals whose rights have been violated.").<sup>8</sup> To rebut the presumption that private suits against a sitting President should not go forward during the President's service in office, the plaintiff should have to demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Absent such a showing, the litigation should be deferred.

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<sup>8</sup> The Soldiers' and Sailors' Civil Relief Act ("SSCRA"), 50 U.S.C. App. §§ 501 et seq., is instructive. That Act serves "to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation." 50 U.S.C. App. § 510. Section 201 of the SSCRA requires federal and state courts to grant a stay in any suit involving "a person in military service," if the court determines that "the ability of the plaintiff to prosecute the action or the defendant to conduct his defense [would be] materially affected by reason of his military service." 50 U.S.C. App. § 521. If the court makes the necessary finding regarding the impact of military service on the litigation, Section 201 mandates a stay of proceedings, regardless of the effect of the stay on other litigants. See, e.g., Semler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943); Coburn v. Coburn, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982). The public interest considerations that underlie the SSCRA apply with far greater force to a civil action that threatens to impair the attention to duty of the President, who is the Commander in Chief. U.S. Const., Art. II, § 2. Cf. Fitzgerald, 457 U.S. at 750 (qualified immunity available to other state and federal officers is insufficient to protect the President because "[t]he President's unique status under the Constitution distinguishes him from other executive officials.").

D. In the proceedings below, the President identified two alternative mechanisms for deferring the litigation: dismissing the complaint with leave to refile after the President leaves office, or staying the suit for the remainder of the President's term. The President urged dismissal as the appropriate remedy, but the United States believes that a stay ordinarily is the better course.

The power to stay civil proceedings is a basic and long-settled judicial power, one that may be employed, in appropriate circumstances, on behalf of any litigant. Over a half-century ago, in Landis v. North American Co., 299 U.S. 248, 254 (1936), the Supreme Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." The Supreme Court recognized in Landis that "[o]ccasions may arise when it would be a 'scandal to the administration of justice' \* \* \* if power to coordinate the business of the court efficiently and sensibly [by staying proceedings] was lacking altogether." Id. at 255. Accordingly, on many occasions since then, federal courts have stayed proceedings where public and private interests would have been disserved by premature litigation. See, e.g., Lunde v. Helms, 898 F.2d 1343, 1345 (8th Cir. 1990); White v. Mapco Gas Products, Inc., 116 F.R.D. 498, 501-503 (E.D. Ark. 1987).

From the standpoint of protecting the Presidency against the burdens of civil litigation, there appears to be no material

difference between staying a suit during the President's service in office and dismissing the complaint with leave to refile at the end of the President's tenure. The two options may well differ, however, in their impact on the plaintiff and the judicial management of the litigation. In at least some cases, a dismissal may give rise to practical problems that could be avoided by a stay.

The most obvious problem, and one that may be present in this case, is the potential running of the statute of limitations.<sup>9</sup> Staying the suit without dismissing the complaint eliminates this risk. For that reason, this Court has indicated that "suspension of proceedings pending the satisfaction of a jurisdictional prerequisite is preferable to dismissal with leave to refile \* \* \* ." Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 290 (8th Cir. 1988); Dalessandro v. Monk, 864 F.2d 6 (2d Cir. 1988) (same); see also Deakins v. Monaghan, 484 U.S. 193, 202-203 & n.7 (1988). In some cases, it might be possible to avoid statute-of-limitations problems by applying equitable tolling principles. But there may be a question whether the district court could fashion a federal rule of equitable tolling in a case like this one, where the plaintiff's claims are subject to state rather than

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<sup>9</sup> For limitations purposes, "[d]ismissal without prejudice operates to leave the parties as if no action had been brought at all." Moore v. St. Louis Music Supply Co., 539 F.2d 1191, 1194 (8th Cir. 1976). As a result, dismissal without prejudice may create a risk that the limitations period will run before the suit is refiled. See, e.g., Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 290 (8th Cir. 1988).

federal tolling principles.<sup>10</sup> Unless the court has adequate assurances that a dismissal would not prejudice the plaintiff or otherwise compromise the interests of justice, the better course of action is to stay the proceedings without dismissing the complaint. Cf. United States v. BLH, Inc., 773 F.2d 232, 234 (8th Cir. 1985) (per curiam) ("We express no view on the[] statute of limitations questions, but agree that there is sufficient controversy surrounding the issue that the district court should have stayed further proceedings in the dispute rather than dismissing it" on jurisdictional grounds).

## **II. This Suit Should Be Stayed In Its Entirety Until The President Leaves Office**

For the reasons set forth above, private suits against the President during his service in office, particularly those seeking monetary relief, should ordinarily be postponed until the completion of the President's tenure. This case presents no unusual circumstances that would override the strong presumption in favor of that disposition. The litigation should therefore be

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<sup>10</sup> Suits under 42 U.S.C. § 1983 are governed by state tolling provisions. See Board of Regents v. Tomanio, 446 U.S. 478 (1980); Hardin v. Straub, 490 U.S. 536 (1989); see also Heck v. Humphrey, 114 S. Ct. 2364, 2373-74 (1994). State tolling rules also govern common law claims arising under state law. The United States is not aware of any tolling rule under Arkansas law that would toll the limitations period if this suit were dismissed. See generally Ark. Code Ann. §§ 16-56-116 to -124 (tolling provisions). An Arkansas statute allows the refileing of a timely complaint following a nonsuit or dismissal, but the suit must be refiled within one year of the dismissal. Id. § 16-56-126; see Dillaha v. Yamaha Motor Corp., 23 F.3d 1376 (8th Cir. 1994); Forrest City Machine Works, Inc. v. Lyons, 866 S.W.2d 372 (Ark. 1993); Carton v. Missouri Pac. R.R., 747 S.W.2d 93 (Ark. 1988). The nonsuit statute therefore would not necessarily assist Jones.

stayed until the President leaves office. The district court's partial stay, which defers trial proceedings but permits apparently unrestricted pretrial discovery, is insufficient to protect the constitutional and public interest in the President's conduct of his duties.

A. This case provides a classic example of the potential burdens of private litigation on the President's discharge of his official duties. The President is the principal defendant in this case, and the suit seeks to subject him to potentially hundreds of thousands of dollars in personal financial liability.<sup>11</sup> Jones's claims focus overwhelmingly on his actions, and her complaint acknowledges that the facts surrounding those claims are hotly contested. The President's testimony presumably would be central to the resolution of the underlying factual controversy. The case therefore threatens to place highly burdensome demands on his time and energy. If the President were required to defend himself against Jones's claims during his term of office, he would necessarily be forced to divert his attention from the pressing demands of the Presidency.

In contrast, this does not appear to be a case in which immediate resolution of Jones's claims is necessary to protect her interests. The complaint does not disclose any need for immediate relief. As the district court noted, Jones seeks damages for past

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<sup>11</sup> Each of the four counts in the plaintiff's complaint requests \$75,000 in compensatory damages and \$100,000 in punitive damages. It is unclear whether the damage figures are meant to be cumulative.

actions, not an injunction or some other form of relief against ongoing or future harms. Delaying an award of damages until after the President's term of office (if any award were determined to be due) would not appreciably affect the value of that relief.<sup>12</sup> Moreover, as the district court pointed out, Jones waited three years from the time of the President's alleged actions before filing suit. Having voluntarily postponed seeking relief in this fashion, she cannot seriously assert that time is now of the essence. In sum, the specific circumstances of this case strongly reinforce, rather than call into question, the general rationale for postponing civil suits against sitting Presidents.

B. The district court expressly recognized the force of these considerations, and indeed made them the basis for its decision to grant a partial stay. Opinion at 16-19. However, the court limited the stay to the trial itself, allowing pretrial discovery to go forward "as to all persons including the President himself." Id. at 19. The court stated that "[t]here would seem to be no reason" why discovery should not proceed immediately, and that full discovery was needed in order to eliminate the risk that evidence will be lost in the interim. Ibid. The district court

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<sup>12</sup> It is possible, although by no means certain, that Jones would not be entitled to prejudgment interest on some or all of her claims against the President. If that is so, then postponing the litigation until the completion of the President's term might arguably cost Jones the interest that would otherwise accrue on an award of damages during that period. At prevailing interest rates, however, the total amount of interest foregone would be relatively small. Moreover, to the extent that a jury calculated any noneconomic damages in "current" dollars, Jones would be compensated for the effects of inflation during the period of delay.

was wrong on both counts: there are compelling reasons why discovery should not proceed, and the district court's decision to permit unrestricted discovery is a vastly overbroad means of protecting the evidence in this case.

1. The touchstone of our analysis in this case is the conflict between the demands of the litigation process and the President's ability to attend to his official duties. Pretrial discovery is a primary source of this conflict. The discovery process often lasts far longer, and consumes far more of the parties' time and attention, than the eventual trial.

For the President, the discovery burden in this case would be most prominent with respect to his own deposition, and whatever other discovery requests might be presented to him. But the burden would hardly end there. The President presumably would have to work closely with his attorneys on other discovery matters, both in dealing with requests by Jones for discovery from other persons, and in conducting discovery on the President's own behalf. For example, if Jones were to depose former associates of the President from his days as governor, in an effort to establish a pattern of conduct, the President undoubtedly would be called on by his attorneys to discuss his dealings with the deponents and to otherwise assist his attorneys in preparing for the depositions. Similarly, the President would have to assist his attorneys in identifying persons who might be able to refute Jones's allegations of a conspiracy to retaliate against her (Complaint ¶¶ 66-69). In short, the President's interests as defendant could not

be adequately served during the discovery process without a substantial commitment of time and effort on his part -- a commitment that could only come at the expense of his official duties.

The district court's failure to take account of these burdens is directly at odds with the teaching of the courts, including this Court, on the subject of official immunity. Immunity is intended not only to insulate officials from the chilling effect of potential liability for government decisions, but also "to spare a defendant \* \* \* unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," including the demands of the discovery process. Siegert v. Gilley, 500 U.S. 226, 232 (1991); Mitchell, 472 U.S. at 526; Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982); Wicks v. Mississippi State Employment Services, 41 F.3d 991, 994-95 & n.16 (5th Cir. 1995) ("[official] immunity \* \* \* means immunity from the burdens of defending a suit, including the burdens of pretrial discovery."); Russell v. Hardin, 879 F.2d 417, 419 (8th Cir. 1989). Concern over the disruptive effects of pretrial discovery is a principal reason that courts resolve disputed questions of immunity at the earliest possible point, before discovery is allowed to take place. See Siegert, 500 U.S. at 232; Mitchell, 472 U.S. at 526; Harlow, 457 U.S. at 818 (until the "threshold immunity question is resolved, discovery should not be allowed."). It is also one of the reasons why orders denying motions to dismiss on immunity grounds, and orders refusing to stay discovery while immunity issues are

pending, are immediately appealable. See, e.g., Mitchell, 472 U.S. at 524-30 (order denying immunity); Lovelace v. Delo, 47 F.3d 286 (8th Cir. 1995) (per curiam) (order denying stay of discovery); Wicks, 41 F.3d at 994-95 & n.16 (same). And it is for precisely this reason that discovery is routinely stayed while a denial of immunity is being appealed. See, e.g., Hegarty v. Somerset County, 25 F.3d 17 (1st Cir. 1994); English v. Dyke, 23 F.3d 1086 (6th Cir. 1994).

In short, the law of official immunity rests, both substantively and procedurally, on the recognition that pretrial discovery subjects public officials to serious and intrusive burdens. The significance of those burdens, and the need to avoid them, are at their zenith when the official in question is the President of the United States. To permit general pretrial discovery in this case thus undermines the very concerns that led the district court to stay the trial.

To be sure, on several occasions sitting Presidents have given evidence in federal criminal cases by means of depositions and interrogatories, while being excused from attending court to testify in person. See generally Rotunda, Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote, 1975 U. Ill. L. Forum 1.<sup>13</sup> We know of no instance, however, in which a

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<sup>13</sup> We are not aware of any instance in which a sitting President has been compelled to testify at a trial, civil or criminal. President Jefferson was subpoenaed in United States v. Burr, 25 Fed. Cas. 30 (C.C. Va. 1807 (No. 14,692d)), but the subpoena was directed only to documents. The President insisted that he was supplying the documents voluntarily, and he redacted (continued...)

sitting President has been compelled to furnish evidence in connection with a civil proceeding.<sup>14</sup> In any event, the burden of full-scale pretrial discovery for the President as defendant would be far different, both in degree and in kind, from the burden imposed on him as a witness. See pp. 22-23 supra. As a result, the historical examples of sitting Presidents giving

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

portions of a subpoenaed letter that he determined should be kept confidential. See 11 The Writings of Thomas Jefferson 228, 363-366 (A. Lipscomb ed. 1904); United States v. Burr, 25 Fed. Cas. at 193. President Monroe was served with a subpoena to testify at a court martial. Based on the Attorney General's advice, however, he advised the court that he could not appear because his official duties were paramount. Although he stated that he would consent to a deposition, the court instead submitted interrogatories, which he answered. See Rotunda, 1975 U. Ill. L.F. at 5-6. President Grant initially volunteered to testify at a criminal trial of a former aide, but, after consulting with his staff, he chose to give a deposition instead. Id. at 3. President Nixon was ordered to produce tapes from his office in response to subpoenas duces tecum upon the government's showing of a "demonstrated, specific need for evidence in a pending criminal trial." United States v. Nixon, 418 U.S. 683, 713 (1974). President Ford was ordered to and did give a deposition for the criminal trial of Lynette (Squeaky) Fromme. See United States v. Fromme, 405 F. Supp. 578, 580-583 (E.D. Cal. 1975). Most recently, President Clinton voluntarily submitted to a brief deposition in the White House in connection with the independent counsel's investigation of the Whitewater affair. We note that criminal cases implicate the defendant's Sixth Amendment rights to compulsory process and a speedy trial, rights that obviously are not at stake in a private civil suit. Cf. Fitzgerald, 457 U.S. at 754 n.37 ("there is a lesser public interest in actions for civil damages than \* \* \* in criminal prosecutions").

<sup>14</sup> Testimony of former Presidents has been sought in several criminal and civil proceedings. Former President Nixon was deposed in Fitzgerald, supra, and in Halpern v. Kissinger, 401 F. Supp. 272 (D.D.C. 1975). Former President Reagan gave a videotaped deposition in Poindexter, supra. Former President Bush moved to quash a subpoena for testimony in a criminal proceeding in 1993, but the motion became moot when the defendant entered a guilty plea. See United States v. Drogoul, No. 1:91-CR-78-1-GET (N.D. Ga. order filed Sept. 21, 1993).

evidence as witnesses in criminal cases do not support the district court's decision to subject the President to full pretrial discovery in a civil case where the President himself is the defendant.

2. The district court suggested that discovery would be necessary to avoid the loss of evidence during the period prior to trial. Opinion at 19. As a general matter, there is little reason to think that a stay of pretrial discovery would in fact jeopardize the primary evidence in this case. At its heart, the factual controversy centers on events that Jones alleges to have occurred on May 8, 1991, at the Excelsior Hotel in Little Rock (Complaint ¶¶ 7-31). The principal testimony concerning those events presumably would come from the parties themselves: Jones, the President, and the other defendant, Danny Ferguson. To the extent that Jones's own three-year delay in filing this suit has not affected the memories of the parties, or of anyone else who may have relevant information, there is little reason to believe that a stay of discovery will do so.

If it becomes clear that concrete, identifiable evidence is in danger of being lost, there is no reason that the parties cannot cooperate informally to preserve the evidence, without the need to engage in full-blown discovery. In his application for a stay of discovery pending appeal, the President stated a willingness to engage in such informal cooperative measures, and the district court itself endorsed that option when it granted the motion. See Order, February 24, 1995 ("Stay Order"), at 4-5.

Given this alternative means of preserving evidence, the district court's original insistence on allowing full pretrial discovery "as to all persons including the President himself" (Opinion at 19) is an unduly intrusive solution that subjects the President and his office to unnecessary burdens.

C. Two of the four counts in Jones's complaint assert claims against Danny Ferguson as well as against the President. Under Count II, which invokes 42 U.S.C. § 1985, Jones claims that Ferguson assisted the President in his alleged harassment of Jones on May 5, 1991, and took part in subsequent acts of harassment. Complaint ¶¶ 9-14, 27, 35-37, 64, 67-69. Under Count IV, the defamation count, Jones claims that Ferguson defamed her by making false statements to the press regarding the events of May 5, 1991. Id. ¶¶ 42-44. The President has asked that the claims against Ferguson, as well as those against the President himself, be deferred until after he has left office.

Whether a stay of proceedings against the President should extend to proceedings against a co-defendant is not, in the view of the United States, a question that lends itself to broad generalizations or per se answers. The federal rules establish liberal standards governing joinder of issues and parties. See, e.g., Fed. R. Civ. P. 18(a) and 21(a)). Accordingly, the relationship between the President and another defendant, and the President's need to participate in litigation concerning the co-defendant, will vary substantially from case to case. What is required, therefore, is a more particularized inquiry. The ques-

tion is whether, given all the circumstances, the claims against the other defendant may proceed without materially diminishing the effectiveness of a stay of proceedings against the President.

In this case, the district court correctly concluded that a stay of the claims against Ferguson was essential if the President himself was to be fully protected. Opinion at 19-20 (trial proceedings); Stay Order at 4 (discovery). As the district court pointed out, Jones's claims against Ferguson are "inextricably intertwined" (Stay Order at 4) with her claims against the President. The claim that Ferguson conspired with the President to harass the plaintiff depends entirely on the allegations against the President himself. Likewise, resolution of the claim that Ferguson defamed Jones by misrepresenting her conduct on May 8, 1991, would turn largely on a determination of what, if anything, occurred between Jones and the President on that date.

It is therefore difficult to see how Jones and Ferguson could proceed to trial, or even conduct pretrial discovery, without effectively trying the claims against the President. The President's testimony would presumably be sought, both during discovery and at the trial itself, to resolve any factual disputes between Jones and Ferguson. Immediate adjudication of the claims against Ferguson therefore would threaten to deprive the President not only of the time required for the testimony itself, but the additional and greater time required to prepare for his testimony. As a practical matter, preparing to give testimony in this case would require considerably more attention than would testimony in

a case in which the President was merely a witness, since any testimony the President gives during a deposition or at trial is likely to be admissible in a subsequent trial of Jones's claims against the President.

Moreover, the burdens imposed on the President if the claims against Ferguson go forward would extend well beyond the immediate demands of giving testimony. Given the close relationship between the claims against the President and those against Ferguson, the President's counsel would be forced to participate actively in depositions and other aspects of the discovery process in order to protect the President's interests. The President, in turn, would be required to assist his counsel in preparing for discovery -- for example, by providing any relevant background information within the President's knowledge about witnesses and the subject matter of their testimony.

In sum, immediate adjudication of the claims against Ferguson would require the President to devote a significant amount of time, attention, and resources to this case during his tenure in of office. The result would be substantially to undermine the effectiveness of a stay of proceedings directed at the claims against the President. In our view, therefore, a stay should encompass the claims against Ferguson, as well the claims against the President, in order to protect the public and constitutional interests at stake.<sup>15</sup>

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<sup>15</sup> The Soldiers' and Sailors' Civil Relief Act (see p. 16 n.8 supra) affords trial courts discretion to determine whether  
(continued...)

## CONCLUSION

For the foregoing reasons, the judgment of the district court: (1) should be affirmed insofar as it stays the trial in this case until the completion of the President's term of office; and (2) should be reversed insofar as it fails to stay discovery and other pretrial proceedings.

Respectfully submitted,

DREW S. DAYS, III  
Solicitor General

EDWIN S. KNEEDLER  
Deputy Solicitor General

MALCOLM L. STEWART  
Assistant to the Solicitor  
General

DAVID J. ANDERSON  
Director, Federal Programs Branch  
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Department of Justice  
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---

<sup>15</sup>(...continued)

proceedings with respect to a service member's co-defendant should be stayed. See 50 U.S.C. App. § 524. Such relief is appropriate, the courts have held, where a stay of proceedings against the co-defendant is necessary to protect the interests of the defendant service member. See Heck v. Anderson, 12 N.W.2d 849, 852 (Iowa 1944); Register v. Bourquin, 14 So.2d 673, 675 (La. 1943); Hellberg v. Warner, 48 N.E.2d 972, 979 (Ill. App. 1943); Ilderton v. Charleston Consol. Ry. & Lighting Co., 101 S.E. 282, 284 (S.C. 1919) (predecessor statute). See also 50 U.S.C. App. § 510 (Act provides for "the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in [military] service").

**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 1995, I served the parties with the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE by mailing copies, first-class postage prepaid, to:

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Little Rock AR 72201

  
Scott R. McIntosh



UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

|                            |   |                               |
|----------------------------|---|-------------------------------|
| Paula Corbin Jones,        | ) |                               |
|                            | ) |                               |
| Appellee,                  | ) |                               |
|                            | ) | Appeal from the United States |
| vs.                        | ) | District Court for the        |
|                            | ) | Eastern District of Arkansas  |
| William Jefferson Clinton, | ) |                               |
|                            | ) |                               |
| Appellant.                 | ) |                               |

APPELLEE'S MOTION TO EXPEDITE BRIEFING SCHEDULE  
AND TO SET ORAL ARGUMENT FOR JUNE DOCKET

Comes now, appellee, Paula Jones, by counsel, and respectfully requests the Court to enter an Order expediting the briefing schedule previously set by the Court, and setting oral argument for this appeal on the June docket. In support of her motion appellee states:

1. On February 13, 1995, the Court granted appellant's motion for an extension of time to file his brief from March 6, 1995 to April 5, 1995. As a result of that extension, which appellee did not oppose, briefing in this matter will not be completed until June 19, 1995, with oral argument not likely to be scheduled sooner than September, 1995.

2. Despite the fact that Appellant had over sixty days to file his brief, appellee is willing to file her brief on an expedited basis (sooner than the presently scheduled deadline of May 5, 1995) in order to complete all briefing no later than May 31, 1995, (or sooner if that is required to have this matter heard on the June docket).

4. 1995

3. There is substantial likelihood that appellee's ability to marshal her evidence is being severely compromised by delay. All discovery in her case against appellant has been stayed, including discovery in her case against defendant Danny Ferguson, pending decision herein. Evidence may be lost or destroyed, and witnesses' memories can be expected to fade.

4. Plaintiff has an interest in completing this appeal and in concluding the trial and thereby re-establishing her tarnished reputation. Unless there is an expeditious appeal, she will continue to suffer harm.

5. Further in support of an expeditious appeal, the issue of a President's legal accountability while in office, for private pre-presidential conduct, is properly posed in this case. The novel concept, urged by President Clinton, of "limited, qualified temporal immunity from trial" is of great public and constitutional importance such that this Court, as well as the United States Supreme Court, may find this case worthy of review and published opinion. Any delay may moot the prospect of a United States Supreme Court opinion, should that court grant certiorari, if appellant either chooses not to seek re-election, or is defeated at the polls. In either event, the important question of temporal immunity may go unaddressed by delay since the President would have completed his term and be subject, according to his counsel, to all legal proceedings.

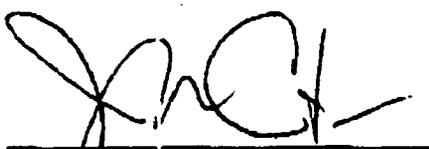
6. Counsel for appellant, William Clinton, was contacted

and he objects to the granting of this motion. He told counsel for appellee that President Clinton may file a response to this motion expressing his reasons for opposition.

Wherefore, for the foregoing reasons, appellee, Paula Jones, respectfully requests that the Court establish a revised and expedited briefing schedule and set this matter for oral argument on the June docket.

Respectfully Submitted,

  
Gilbert K. Davis, Esq.  
9516-C Lee Highway  
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(703) 352-3850

  
Joseph Cammarata, Esq.  
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(703) 352-3850

Counsel for Paula Corbin Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of April, 1995, a copy of the foregoing was served via facsimile and first-class mail, postage pre-paid, on the following:

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\_\_\_\_\_  
Joseph Cammarata



UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

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

**PRESIDENT CLINTON'S OPPOSITION  
TO APPELLEE/CROSS-APPELLANT'S MOTION  
TO EXPEDITE BRIEFING SCHEDULE AND ORAL ARGUMENT**

By motion filed April 11, 1995, appellee/cross-appellant Paula Jones ("appellee") moved the Court to expedite the briefing schedule in the above-captioned matter and to set oral argument for these cross-appeals on its June Docket. President Clinton, by and through undersigned counsel, hereby opposes this belated motion.

1. President Clinton noticed appeal of this matter on December 30, 1994, two days after the District Court issued its ruling. The appellee noticed her cross-appeal on January 17, 1995. The appellee made no mention at that time of any need to further expedite appeal beyond the prompt schedule typically set by the Eighth Circuit.

2. Appellee has been aware of the briefing schedule in this case for two months. The schedule has been set since February 13, 1995, when the Court entered an Order granting President

9-11-95

Clinton's motion to extend the deadline for filing briefs by 30 days. The appellee consented to the motion seeking to extend the briefing schedule, and did not raise any objection at the time it was filed or suggest that expedited appeal was necessary.

3. President Clinton is both an appellant and a cross-appellee here, and would be significantly prejudiced by a reduction in time in which to file his opposition to Ms. Jones' cross-appeal. Moreover, in reliance on the long-established schedule for this appeal, counsel for President Clinton have committed to obligations in other litigation that would be disrupted severely by expedited briefing and oral argument in this matter.

4. The present schedule accommodates both the parties' interests in prompt resolution of this matter and the Court's interest in having sufficient opportunity to consider the momentous issues raised by this appeal, which concerns the privileges and immunities of the Presidency. The Court would benefit from full and careful briefing of these issues, and from ample time to prepare for oral argument and consider its judgment thereafter. To further compress the schedule, therefore, would not be in the Court's interest.

5. Eighth Circuit Rule 34B(b), not cited by appellee, permits acceleration of briefing and oral argument "for good cause" shown. Appellee has not demonstrated the existence of any recently discovered "good cause" that necessitates departure from the calendar that has long been scheduled in this case.

6. Appellee suggests that there is "substantial likelihood that appellee's ability to marshall her evidence is being severely compromised by delay." (Appellee's Motion, ¶ 3). This generalized concern was not supported by any showing that particular evidence is in danger of evaporating. Counsel for President Clinton, moreover, have on several occasions in papers filed with the court below offered to cooperate with the appellee to preserve any such evidence. Notwithstanding this offer, we are unaware of any evidence in need of immediate preservation.

7. Pending appeal, President Clinton sought a stay of discovery in the District Court. In arguing against a stay in the court below, the appellee asserted the very ground asserted here -- the need to preserve evidence. On February 24, 1995, the lower court issued the stay. In so doing, it acknowledged the President's offer to cooperate in efforts to preserve evidence, and encouraged such cooperation. The appellee did not appeal this order.

8. A generalized risk that evidence may be lost accompanies any appeal that is taken prior to discovery, and is not the kind of "good cause" customarily recognized as sufficient to justify expedited appeal. The Eighth Circuit's briefing schedule already is expeditious. It is typically expedited further only where there is a substantial basis to do so, such as in a case where a temporary restraining order or preliminary injunction has issued, cf. Edudata Corp. v. Scientific Computers, Inc., 746 F.2d 429, 430 (8th Cir. 1984), or where a

party's liberty is at issue. United States v. Scharf, 551 F.2d 1124, 1127 n.7 (8th Cir.), cert. denied, 434 U.S. 824 (1977).

9. Somewhat ironically, appellee seeks to expedite appeal in order to preserve the President's immunity claim from mootness. (See Appellee's Motion at ¶ 5). The President is unconcerned about this possibility, inasmuch as it has been his position throughout that he would submit to litigation of the appellee's claims when he is no longer in office. Concern with mootness, moreover, is premature. In the event the President departs office while appeal is pending, the appropriate court may determine at that time if the issue raised by this appeal is moot, or whether it may still be resolved because it is an issue "capable of repetition yet evading review." See Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1435 (8th Cir. 1993) citing Weinstein v. Bradford, 423 U.S. 147, 148-49 (1975).

For all the foregoing reasons, the appellee's motion to expedite the briefing schedule should be denied.

Respectfully submitted,

By: Robert S. Bennett  
Robert S. Bennett, Esq.

Carl S. Rauh  
Carl S. Rauh, Esq.

Alan Kriegel, Esq.  
Amy R. Sabrin, Esq.  
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Counsel to President William J. Clinton

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 1995, I caused copies of the President Clinton's Opposition to the Appellee/Cross-Appellant's Motion To Expedite Briefing Schedule to be served by first-class mail on:

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Washington, D.C. 20530-0001

  
Amy R. Sabrin



UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

|                            |   |                               |
|----------------------------|---|-------------------------------|
| Paula Corbin Jones,        | ) |                               |
|                            | ) |                               |
| Appellee,                  | ) |                               |
|                            | ) | Appeal from the United States |
| vs.                        | ) | District Court for the        |
|                            | ) | Eastern District of Arkansas  |
| William Jefferson Clinton, | ) |                               |
|                            | ) |                               |
| Appellant.                 | ) |                               |

APPELLEE'S  
MOTION FOR LEAVE OF COURT TO PERMIT  
FILING OF REPLY TO PRESIDENT'S OPPOSITION

Appellee, Paula Jones, by counsel, hereby moves this Court for leave to permit appellee to file a reply to President Clinton's Opposition to Appellee Motion to Expedite Briefing Schedule and Set Oral Argument. In support of her motion appellee states:

1. On April 11, 1995, appellee, Paula Jones filed her Motion to Expedite Briefing Schedule and Set Oral Argument in June.
2. On April 12, 1995, appellant, President Clinton filed his opposition to the motion.
3. Mrs. Jones seeks leave to file a reply to eliminate a factual misunderstanding manifest in the President's Opposition.

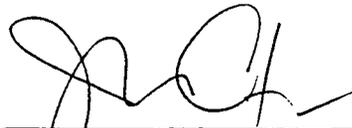
4-12-95

WHEREFORE, Appellee respectfully requests that her motion be granted.

Respectfully Submitted,



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Counsel for Paula Corbin Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of April, 1995, a copy of the foregoing was served via facsimile and first-class mail, postage pre-paid, on the following:

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Scott R. McIntosh, Esq.  
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Washington, D.C. 20530

  
\_\_\_\_\_  
Joseph Cammarata



UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

|                            |   |                               |
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| Paula Corbin Jones,        | ) |                               |
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|                            | ) | Eastern District of Arkansas  |
| William Jefferson Clinton, | ) |                               |
|                            | ) |                               |
| Appellant.                 | ) |                               |

APPELLEE'S REPLY  
TO APPELLANT'S OPPOSITION  
TO APPELLEE'S MOTION TO EXPEDITE BRIEFING  
SCHEDULE AND SET ORAL ARGUMENT

Appellee's proposal to expedite the briefing schedule and to set oral argument for a date certain in June is not a request by Mrs. Jones to reduce President Clinton's reply period. Mrs. Jones proposes that only her time to respond to President Clinton's brief, and to reply, be reduced to accommodate a June oral argument. President Clinton now has thirty days to respond to Mrs. Jones' brief. He would still have thirty days under her proposal.

Given this, President Clinton's claim of prejudice has a hollow ring. There is no plausible justification for President Clinton's extensive opposition.

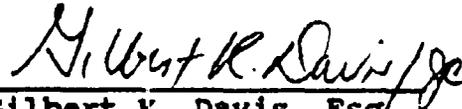
First, Paula Jones, as noted above will bear the burden of an expedited briefing schedule.

Further, President Clinton's claim that every single soldier in his army of lawyers is too busy to participate in a June oral argument must be balanced against the willingness of Mrs. Jones' two lawyers, who also each have busy practices, to proceed on an expedited basis.

It is apparent that President Clinton's goal is to delay a resolution of the immunity question for as long as possible to forestall any meaningful discovery.

WHEREFORE, based on the foregoing, appellee respectfully requests that her motion be granted.

Respectfully Submitted,



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Joseph Cammarata, Esq.  
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(703) 352-3850

Counsel for Paula Corbin Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of April, 1995, a copy of the foregoing was served via facsimile and first-class mail, postage pre-paid, on the following:

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Scott R. McIntosh, Esq.  
Attorney Appellate Staff  
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Washington, D.C. 20530

  
\_\_\_\_\_  
Joseph Cammarata



560054

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

FILED

APR 17 1995

MICHAEL GANS  
CLERK OF COURT

No. 95-1050/1167EALR

Paula Corbin Jones

Appellee/cross-appellant

vs.

William Jefferson Clinton

Appellant/cross-appellee

-----  
United States of America, et al

Amicus Curiae

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Appeal from the United States  
District Court for the  
Eastern District of Arkansas

Appellants' motion to expedite the briefing schedule and place this case on the June oral argument calendar, appellee's response in opposition and appellant's reply thereto have been referred to the Court for decision. After review, the Court hereby denies appellant's motion to expedite briefing and placement on the oral argument calendar.

This case shall proceed upon the established briefing schedule absent the filing of any parties' brief before the scheduled deadline. Counsel is reminded that any early filing will automatically advance the briefing schedule. This case shall be placed on the oral argument calendar in the ordinary course.

April 17, 1995

Order Entered at the Direction of the Court:

*Michael E. Gans*

Clerk, U.S. Court of Appeals, Eighth Circuit

4-17-95