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[Paula Jones Pleadings File] [5]



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

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**NOS. 95-1050/95-1167**

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

**v.**

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

**and**

**DANNY FERGUSON  
Defendant.**

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**CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
CIVIL NO. LR-C-94-290**

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**OPENING BRIEF OF APPELLEE/CROSS-APPELLANT  
PAULA CORBIN JONES**

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Appellee/Cross-Appellant**

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**SUMMARY OF THE CASE  
AND REQUEST FOR ORAL ARGUMENT**

Plaintiff below, and appellee and cross-appellant here, adopts President Clinton's "Summary of the Case and Request For Oral Argument." Since this case presents novel and important questions concerning the privilege of a President of the United States to stop litigation against himself, and against others, when such litigation relates entirely to the President's non-official acts, plaintiff suggests oral argument, and she joins President Clinton in that request and in his suggestion of 30 minutes per side.

Paula Jones appeals the portion of the District Court's decision, the Honorable Susan Webber Wright presiding, which postpones commencement of trial of both the President and Danny Ferguson until after President Clinton no longer holds his office. She also appeals the stay of discovery granted as against Mr. Ferguson pending final resolution of Mr. Clinton's interlocutory immunity appeal.

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### PRELIMINARY STATEMENT

Plaintiff adopts Defendant's Preliminary Statement. She agrees with defendant that the issue of presidential immunity is a question of law and therefore subject to de novo review on appeal.

When Judge Wright denied President Clinton's motion to dismiss on grounds of presidential immunity, she authorized the parties to proceed with discovery, including the deposition of the President, but she postponed the commencement of trial until Mr. Clinton is no longer President. She later stayed discovery pending resolution of this interlocutory appeal. (Add. 32-36)

Judge Wright grounded postponement on the novel holding of limited or temporary presidential immunity from trial. (Defendant's Addendum to brief; hereafter "Add.," 16-20). She wrote that postponement of trial "amounts to the granting of temporary or limited immunity from trial as Fitzgerald seems to require due to the fact that the primary defendant is the President." (Add. 19).

The court extended the President's immunity to co-defendant Trooper Ferguson since the cases are "integrally related" and "arise out of the same incident," even though "the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident...." (Add. 19-20).

The creation of this new category of immunity was acknowledged to be a case "in which new law is being made." (Add. 21). Immunity is created despite the trial court's seemingly inconsistent holding that "in situations which the President was

not the holder of his office when the action arose, there would seem to be no immunity against civil litigation." (Add. 20).

The court held that limited, temporary immunity from trial, which requires its deferral until the end of the Clinton Presidency, is supported by (1) separation of powers doctrine and the cases of United States v. Nixon, 418 U.S. 683, 708 (1974) and Nixon v. Fitzgerald 457 U.S. 731 (1982) (Add. 19 - 20); (2) Rule 40 of the Federal Rules of Civil Procedure (Add. 19); and (3) "the equity powers of the Court." (Add. 19).

Plaintiff cross-appealed the District Court's finding of limited, temporary immunity from trial. Plaintiff suggests that the standard of review is de novo since the issue is a question of law, even to the extent Judge Wright's ruling is said to be based on Rule 40 and equity since those grounds are bound up entirely in her opinion on the immunity doctrine and its rationale of burdens to the President. Therefore, if the President has no such immunity from trial, the case should be remanded and the trial judge could, at some appropriate stage, consider de novo whether to invoke Rule 40 and equity without the immunity buttress.

If this Court believes that postponement of trial is adequately grounded on an independent discretionary basis (i.e. Rule 40 and equity), then the standard of review is whether Judge Wright abused her discretion in postponing trial before Mrs. Jones and Mr. Clinton are "at issue," and in the absence of actual facts, at this stage, that the President would be otherwise paralyzed in the discharge of his office.

Plaintiff also appeals the trial court's stay of discovery vis-a-vis defendant Ferguson pending the resolution of this interlocutory appeal. Since this ruling involves defendant Ferguson who answered the complaint and who is therefore "at issue", the appeal is governed by an abuse of discretion standard.

Plaintiff timely filed her notice of cross-appeal on January 17, 1995.

## STATEMENT OF ISSUES

1. Whether the Constitution and doctrine of separation of powers clothe the President with immunity so as to avoid legal accountability, while in office, for personal, non-official conduct.

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

2. Whether the District Court:

(A) erred in holding that, under the Constitution and doctrine of separation of powers, the President of the United States enjoys limited, temporal, immunity from commencement of trial during his service as President; and

(B) erred as a matter of law or otherwise abused its discretion in postponing the trial of President Clinton, and/or Danny Ferguson, until after President Clinton leaves office, on the grounds of immunity, Rule 40 of the Federal Rules of Civil Procedure, and the equity power of the court.

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

3. Whether discovery in the Ferguson case should be stayed while the case against Mr. Clinton is on appeal, or until the end of the Clinton Presidency.

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

Landis v. North American Co., 299 U.S. 258 (1936)

Dennis v. Sparks, 449 U.S. 24 (1980)

## COUNTER STATEMENT OF THE CASE

### A. Nature of Case and Procedural History.

Plaintiff agrees with much of the President's Statement of the Case.<sup>1</sup> On May 6, 1994, Paula Jones filed a four count complaint against President William Jefferson Clinton and Arkansas State Trooper Danny Ferguson. She sued to obtain redress for the sexual depredation and civil rights violations (42 U.S.C. §§ 1983 and 1985) to which the defendants subjected her on and after May 8, 1991, and for the state common law torts of defamation and outrage.

Defendant Ferguson filed an answer. President Clinton, however, moved to dismiss on the grounds that the court lacks jurisdiction over his person during his tenure as President. He also argued that if dismissal is denied, the court should stay all proceedings during his Presidency. The Solicitor General filed a Statement of Interest on behalf of the United States.

The District Court denied Mr. Clinton's motion to dismiss, and also denied the motion to stay the entire case, ruling that discovery could begin immediately. The court also ruled, however, that no trial should commence on the plaintiff's claims against either Mr. Clinton or his co-defendant, Danny Ferguson, until after Mr. Clinton leaves office.

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<sup>1</sup> However, his first paragraph (Defendant's Opening Brief, hereafter "Br.", 1), recites an affidavit and news conference with which plaintiff disagrees in factual detail and which are irrelevant to the procedural history. Likewise, footnotes 2, 3, and 6, and the text inspiring them, are contested, irrelevant and inappropriate to this appeal. (Br. 1, 3, and 5).

Mr. Clinton appealed and plaintiff cross-appealed. On Mr. Clinton's motion, the District Court stayed discovery as to both defendants while the interlocutory appeals are pending.

**B. Statement of Facts.**

The Complaint's allegations concern an incident that occurred at the Excelsior Hotel, in Little Rock Arkansas, on May 8, 1991. Then-Governor Clinton is alleged to have directed a member of his police security detail, defendant Danny Ferguson, to inform the plaintiff (then a clerk for an Arkansas state agency) that the Governor wished to see her in a hotel room. Mr. Ferguson escorted her to a room where plaintiff and defendant Clinton were left alone. After small talk, Mr. Clinton touched plaintiff and made a crude advance to her. When she repelled it, Mr. Clinton urged her silence, and reminded that her boss -- whom Mr. Clinton appointed -- was his friend.

From this initial incident, and others following, Paula Jones suffered emotional distress, retribution and fear in her employment, and reputational damage as described below.

Plaintiff contemporaneously told several friends and family what happened, but she was publicly silent until -- without her complicity -- a magazine article reported, in January 1994, defendant Ferguson's claim that plaintiff was one of many compliant women who engaged in sexual acts with Mr. Clinton; liaisons arranged with the assistance of Governor Clinton's security police. With her privacy stolen and her reputation falsely impugned, plaintiff asked for a public acknowledgement of the truth. Her

efforts were rebuffed, and she sued on May 6, 1994.

Complaint Counts I-III charge deprivation of plaintiff's civil rights, in violation of 42 U.S.C. § 1983; conspiracy between the two defendants, and others, to accomplish the same violations, in breach of 42 U.S.C. § 1985; and the common law tort of outrage. (Defendant's Appendix, hereafter "App.," 20-23).

Count IV charges defamation, which Mr. Clinton wrongly asserts is no more than his denial of the events. (Br.17) Mr. Clinton and his agents decried the plaintiff as, inter alia, a "pathetic liar" who has knowingly made false public statements. Defendant Ferguson's defamation is also alleged. (App. 23-24).

Mr. Clinton portrays Mrs. Jones' filing delay as evidence that her case is a political attack instead of a personal civil dispute. (see, e.g., Br. 22-25) The District Court, in granting stays, was impressed that plaintiff's delay in filing showed no urgency to resolve the case. This conclusion is factually incorrect and entitled to no deference. Plaintiff's experience is typical of sexual harassment, which

often [has been] related in private or anonymously by women who did not know where to turn because of the experiences they were confronting. They were confronting verbal and physical abuse, from their colleagues, their clients, in the courtrooms, in the workplaces, and they were, like so many of us, just not sure what to make of it.

Hillary Rodham Clinton, speech to the American Bar Association, August 9, 1992. This was exactly Mrs. Jones' experience. (plaintiff's complaint, para. 30 and 31; App. 12-13).

Plaintiff was a young, unmarried woman in May 1991. She was silent about what happened, even when others later accused Mr.

Clinton of sexual improprieties. She did not approach a magazine, or any other media outlet, nor did she initiate public discussion. She did nothing to embarrass the President during his campaign or to sell her story. In January 1994, Defendant Ferguson publicly implicated Mrs. Jones in disgraceful conduct. Thus defamed, she immediately sought an acknowledgment of the hotel meeting and that she did nothing wrong. Rebuffed, she sought litigation counsel to represent a private citizen of modest means against the President. She sued to clear her name four months after the January disclosure. Given disclaimer of any interest in the judgment, promised to charity, all she can ever receive is redemption of her reputation. On these facts, no basis exists to conclude that prosecution of this case is less urgent because of pre-filing delay. No case is found that the prompt litigation of a plaintiff's claim, timely filed, depends on length of pre-filing "delay".

#### SUMMARY OF ARGUMENT

The question is not whether the rights of a young woman and private citizen must yield to the press of the nation's business. It is rather what kind of nation is this? Is the President above the law? Is Paula Jones the equal of every other citizen in the courts? Do we at every moment have a government of enforceable laws? Or does election to the highest office, and assumption of exalted power to execute federal law, simultaneously confer an exemption from laws which are applicable to all other persons? Such privilege makes the President the only person not

constrained by the law binding all other people whom he serves. It leaves him the only citizen so liberated from legal accountability.

It is no answer that the exemption Mr. Clinton seeks is "merely" temporary. That this is no answer has nothing to do with Paula Jones, or with her right to timely prosecute her claims. It has to do with constraints our Constitution imposes on those it entrusts with power. In separating and balancing the powers of each office, the goal was to ensure that every power is wielded under enforceable law. The President holds power subject to the Constitution's explicit checks and balances, and its implicit constraint that public officials are under law. All members of Congress, cabinet officers, and judges -- in fact, every wielder of public power -- are bound in their private capacities by laws they help to formulate, as well as law formulated by other governments in the federal system, and by the common law. The unique public power wielded by the President must be checked as much as other officials, and balanced by private accountability.

The Supreme Court recently reminded that "power is the object of the separation-of-powers prohibition." Plaut v. Spendthrift Farms, 1995 U.S. LEXIS 2843 at \*31 (April 18, 1995). Mr. Clinton claims the maximum degree of personal license at the very moment when his power is greatest. His reading of Nixon v. Fitzgerald, 457 U.S. 731 (1982) is hopelessly inconsistent with the rationale of that case, with the immunity doctrine considered therein, and with all other separation of powers authority.

The President's argument must be recognized for its

radical, unprecedented and unconstitutional claim of personal privilege. Even the Solicitor General implicitly rejects sub silentio the immunity claim.

Mr. Clinton and his amici argued below that subjecting the defendant to this lawsuit, and to the supposedly inevitable future avalanche of others, is an unbearable burden on the President, and that all proceedings (discovery and trial) should await the end of his Presidency. Mrs. Jones argues that pretrial discovery is needed to preserve evidence and to protect the right under the federal rules to prepare her case and to quickly rehabilitate her valuable reputation.

Balance of equities, actual burdens, the importance of the case to the parties or the country, and other ad hoc factors, are irrelevant to immunity's existence. If these factors are relevant to an equitable stay, the exercise of discretion is premature when Mrs. Jones and Mr. Clinton are not yet "at issue" and Mr. Clinton has offered no factual supportive proof. His suggestion of a presumption for a stay or dismissal in his favor, and that plaintiff has the burden to show her case should not proceed, proves only the creativity of counsel in postulating previously unrecognized litigation rules and procedures.

Political realities, not immunity, drive the President's efforts to dismiss or stay. His brief trumpets the enormous burden on his workday threatened by this case. (Br. 20) But his lawyer told the New York Times that "[t]he President's case is not a complicated case;" that he is ready to go to trial "next week and

destroy her [Paula Jones]" and indeed, that if his client were anyone else he would try the case right now rather than doing what he is doing, which is "wasting time with motions." The sole objective, he said, is doing whatever is necessary to delay discovery. He promised that if the immunity argument is rejected, the President will flood the court with another tide of pretrial motions to put off the day of reckoning. Ruth Shalit, The President's Lawyer, New York Times Magazine 43, 47 (October 2, 1994).

Mr. Clinton is correct that courts should not be pawns in a political game. (Br. 34) Only one party is a player in that game here and it is not the plaintiff. Delay is the name of the game. High-minded immunity argument seems, in that light, a disingenuous political stratagem. That ploy should be rejected, and immunity held unavailable as a shield against legal accountability. Adverse political consequences should concern neither the parties nor the courts.

Although the few facts to be discovered are crucially important, and at risk by lengthy delay, Paula Jones' claim is uncomplicated. As one prominent and disinterested observer told the New York Times:

When you think about it, I don't know what all of these lawyers [for Mr. Clinton]<sup>2</sup> are doing... There are two witnesses. One is the President of the United States. Presumably, they've talked to him already. He said it didn't happen. Well, that didn't take too long to find

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<sup>2</sup> According to the New York Times, one of the firms has seven lawyers "working full time, or part time, on the Jones case...." Id. at 47.

out. The second person is Paula Jones, whose lawyers may or may not be willing to let her talk to them. Possibly they'll interview the people whom she worked for, in whatever department she was in. But Arkansas is not a big state. She wasn't very high up. She didn't work there for very long. So there are not very many documents to review. As for the legal issues, they don't take very long to get to.<sup>3</sup>

Mr. Clinton demands to be clothed with an immunity no other President has ever sought, no authority has ever recognized, and no court has ever bestowed; an immunity that neither the framers nor Congress nor the people have conferred. The President seeks immunity for unofficial acts that places him, unlike any prior President or public official, above the law. There is no support in reason, the common law, the Constitution, or in simple justice, for his demand. It should be squarely rejected.

Finally, the proposition that Mr. Clinton would be equally and excessively burdened by the case against Ferguson is illogical and insupportable. This puts the President "off limits" as a source of evidence in any case in which he is merely a material or essential witness or custodian of necessary documents.

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<sup>3</sup> Alan B. Morrison, an attorney with the Litigation Group of Public Citizen, a public interest organization founded by Ralph Nader. See Ruth Shalit, The President's Lawyer, supra, at 47.

## ARGUMENT

### I. THE CONSTITUTION DOES NOT CLOTHE THE PERSON OF THE PRESIDENT WITH IMMUNITY TO AVOID ACCOUNTABILITY FOR PRIVATE CONDUCT WHILE HE IS PRESIDENT.

#### A. The Principles Underlying The Constitution's Separation Of Powers Are Inconsistent With The Idea That The President, In His Personal Capacity, Is Beyond The Courts' Reach While He Is President.

The founders believed every Constitutional power must be constrained. "Federalists and antifederalists both agreed ... that no one should ever be entrusted with unqualified authority." B. Bailyn, The Ideological Origins of the American Revolution 368. Having fought to escape a king whose power was too absolute, they were certain "that any release of the constraints on the executive -- any executive -- was an invitation to disaster." *Id.* at 379, citing remarks of Edward Rutledge (important participant in the Constitutional Convention, and signer of Constitution at the South Carolina ratifying convention); 4 Jonathan Elliot, The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention of Philadelphia in 1787 (1987 reprint of 2d ed.) 276.

Central to separation of powers, and checks and balances, is that no power is without constraints. While the founders created many weights and counterweights, one pre-eminent constraint is on every actor, and every office, one that governs everyone, everywhere, at all times: i.e. that every action and every actor is always under the law. "No man in this country is so high that he is above the law." United States v Lee, 106 U.S. 196, 220 (1882).

In separating, balancing, specifying, and limiting governmental power, the Constitution grants specific power to each branch, the office-holders of which, selected from the people, exercise duty within an ordered framework. Office-holders are protected, in certain circumstances, from private lawsuits seeking money damages for injuries suffered from official acts. The privilege does not remove accountability for violations of law, as Justice Powell wrote in Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) wherein he recited many remedies for presidential official misconduct.<sup>4</sup> Therefore, the President is not "above the law." If holding public office confers immunity, even temporarily, from suit for private actions, then indeed the office-holder - whether judge, prosecutor, legislator, or president - is above the law.

Chief Justice Burger, whose concurring opinion formed the Fitzgerald majority, expressed, on another occasion, the laudable and fundamental principle that no one is above the law:

Accountability of each individual for individual conduct lies at the core of all law--indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from 'The King can do no wrong.' This principle of accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice.

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<sup>4</sup> In Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) President Nixon urged that the Impeachment clause implied that he could not be commanded by a court to comply with a grand jury subpoena. The argument was rejected. The court observed that "b[y] contemplating the possibility of post-impeachment trials for violation of law committed in office, the Impeachment clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens." Id at 711 (emphasis added.)

Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 429 (1981)  
(dissenting opinion).

Perhaps Theodore Roosevelt most succinctly put the matter: "No man is above the law, and no man is below it. Nor do we ask any man's permission when we require him to obey it." <sup>5</sup>

The English King, in contrast to the American President whose advent was compelled by the failure of the Articles of Confederation to provide effective executive power, embodied the sovereignty of the nation in both his person and his office (which were inseparable). No distinction exists between the King's public and private person, and since judicial process is inferior to sovereign pre-eminence (the King's exclusive possession), it follows "that no suit or action can be brought against the King even in civil matters, because no court can have jurisdiction over him." William Blackstone, Commentaries, 241-243. In America, courts are co-equal with the legislative and executive, and the officials who serve in those offices retain their private capacity separate from their office. Hence Mr. Clinton is sued for money damages as "Mr." and not as "President" for acts committed in his personal capacity. In seeking even temporal immunity, Mr. Clinton, has confused his person with his office. When he elevates himself above his fellows, the Presidency becomes a safe haven from any personal accountability during tenure of its occupant.

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<sup>5</sup> With more spice as an apt egalitarian principle, is Montaigne's aphorism that: "Sit he on never so high a throne, a man still sits on his own bottom." Quoted in Arthur M. Schlesinger, Jr., The Imperial Presidency 411 (1971).

It is the office of the president which is immune when it acts. The Presidency only acts by the agency of a human who holds that office. When the Presidency acts, the human actor is protected, and not otherwise. When the President, who retains his personal rights and responsibilities, acts in that capacity, he enjoys no immunity derived from the office. Thus the President is not a King.

The centrality of accountability and restraints on power in the Constitution's architecture makes the immunity claim far more important than the lawsuit in which it is asserted; far more important than Paula Jones, or Bill Clinton, or what the latter did to the former. The founder's concept is at stake, and is threatened by temporal immunity, because constraints on executive power will not work if the executive is not accountable under the law while he holds power. Temporary escape from the law, with possible future reckoning, subverts accountability.

Constraining "law" is not merely the explicit checks in the Constitution, but includes implicit accountability imposed by positive and common law. There is no separation of the governors from the governed, at least in their personal capacities. Government of, by, and for the people simply means that the people comprise the government they established, to benefit themselves. This is the nature of the government President Lincoln at Gettysburg described as existing for 87 years and for which men died to make imperishable. That government is dedicated to the proposition that all are equal before the law.

These ideas are of no recent invention. The primacy of law to bind the people, ensure their liberties, and restrain their license, is an ancient and progressively developing ideal of freedom. The framers and their intellectual forbearers regarded law as the most important mechanism to constrain the prince, and to compel him to act for the public good. Subjection to law keeps the executive from being different, and keeps him from believing that he is different, from the people he rules. (See discussion in District Court's Memorandum Opinion and Order, at Add. 3 - 7).

Judge Wright eloquently wrote that: "Sub Deo et lege is our law as well as the law of Great Britain. No one, be he King or President, is above the law." (Add. 20) This egalitarian ideal pervading the Constitution's post-ratification history was advanced in classical sources upon which we know the founders drew, and by the political theorists whose disciples they clearly were. <sup>6</sup>

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<sup>6</sup> A few examples include: Deuteronomy XVII:18-20: "And it shall be, when [the king] sitteth upon the throne of his kingdom, that a copy of the law shall be with him; That he may keep all the words of this law and these statutes, and do them; So that his heart be not lifted up above his brethren, and so that he turn not aside from the commandments, to the right, or to the left." Similarly, Thucydides proclaimed that democracy has "the fairest of names, equality before the law; and further it is free from all those outrages which a king is wont to commit," as "the magistrate is answerable for what he does." The Persian Wars, Bk. 3, chaps. 80-82, quoted in Forrest MacDonal, The American Presidency: An Intellectual History 78. Finally, John Locke advised in his Second Treatise on Government, ch. 12, Section 143, that all who participate in the formation of the laws (as the President clearly does, through his power to propose legislation and his power to veto it) should "themselves [be] subject to the Laws, they have made" so that they will "take care, that they make them for the public good." The founders were intimately familiar with the major works of the Western canon, and looked directly to them for help with the problem of government. See, e.g., B. Bailyn, The Ideological Origins of the American Revolution 23 (1992) (colonists

"The executive" in the American Constitution "provided the strength of monarchy without tolerating its status above the law." Harvey C. Mansfield, Jr., Taming the Prince: The Ambivalence of Modern Executive Power xvi (1989). The President had no right to evade the law:

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

An American Citizen (Tench Coxe) I, Independent Gazetteer (Philadelphia) September 26, 1787, reprinted in I B. Bailyn, ed., The Debate on the Constitution 20, 24 (1993) (emphasis in original). Particularly jealous of executive power, the founders limited it sharply. Thus James Wilson, the designer of the Presidency, told the Pennsylvania Ratifying Convention that the President "is placed high, and is possessed of power far from being contemptible; yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen." 4 Jonathan Elliot, The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 (1987 reprint of 2d ed.) 480; see also *id.* at 523 ("Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? Is there a single distinction attached to him, in this system, more than there is to

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"had at their fingertips, and made use of, a large portion of Western culture"); Forrest MacDonal, supra, at 10.

the lowest officer in the republic?") Charles Coatsworth Pinckney, an important framer, told the Senate that the founders

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

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

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

Id. at 74.

Mr. Clinton seeks support from United States v. Nixon, 418 U.S. 683 (1974, and United States v. Burr, 25 F. Cas. 30, 187 (C.C.D. Va 1807) (Nos. 14,692d and 14,694) Marshall, C.J.), which required presidents to produce official presidential materials in response to subpoenas in criminal cases.<sup>7</sup> The President

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<sup>7</sup> Defendant musters support (Br. 15) from two men who did not participate in the Constitutional Convention and whose views on the exact issue were authoritatively rejected. Thomas Jefferson did, at one time, support President Clinton now posits (Br. 31), although Jefferson was at odds with himself as Justice White remarked in Fitzgerald, 457 U.S. at 778, n. 23, (J. White, dissenting). Jefferson claimed the subpoena to him United States v. Burr, 25 F. Cas. 187 (1807) should not have been issued. He was "filled with restatement" to learn that it had been. III Henry Adams, History of the United States During the Administration of Thomas Jefferson 450 (1930). President Jefferson's arguments in opposition to the Burr subpoenas are the same as those advanced by President Clinton. On Chief Justice Marshall's holding that the President must obey the law, Jefferson wrote:

Laying down the position generally, that all persons owe

misperceives these cases. They stand for the proposition that Presidents, like all other citizens, are ordinarily subject to judicial process. Since a President is "subject to the general rules which apply to others," Burr, 25 F. Cas. at 191, they "cannot be read to mean in any sense that a President is above the law." Nixon, 418 U.S. at 715. In Burr, Chief Justice Marshall "squarely ruled that a subpoena may be directed to the President", Nixon v. Sirica, 487 F.2d 700, 709 (1973) (en banc; per curiam), and that has been the law for 187 years.

The President may avoid the obligation to produce evidence only by a "privilege for Presidential communications," Id. at 708. The privilege is qualified, not absolute, U.S. v. Nixon, 418 at 716, in its limitation to communications "in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions,'" Nixon v.

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obedience to subpoenas, he admits not exception unless it can be produced in his law books. But if the Constitution enjoins on a particular officer to be always engaged in a particular set of duties imposed on him, does not this supersede the general law, subjecting him to minor duties inconsistent with these? The Constitution enjoins his constant agency in the concerns of 6 millions of people. Is the law paramount to this, which calls on him on behalf of a single one?

Jefferson, letter to George Hay (June 10, 1807), quoted in Dumas Malone, Jefferson the President: Second Term, 1805-1809 324 (1974). Jefferson's rhetorical question was categorically answered and his objection overruled by Chief Justice Marshall; and because the judiciary is ultimately empowered to interpret the law, the Chief Justice has had the last word. See United States v. Nixon, 418 U.S. 683 (1974).

As for President Adams, he is almost universally regarded as an exponent of an expansive view of the executive's powers. He was regarded by most of his contemporaries as close to a monarchist. See W. Page Smith, John Adams 755 (1962).

GSA, 433 U.S. at 449 (quoting U.S. v. Nixon, 418 U.S. at 708, 711, 713; citations omitted). Thus the privilege is only for official communications relating to official acts. And it may be overcome - - as United States v. Nixon dramatically demonstrated -- "in light of our historic commitment to the rule of law." United States v. Nixon, 418 U.S. at 682. This suit does not implicate the President's official communications, responsibilities, decisions, or acts. Mr. Clinton cannot avoid the judicial process since no presidential privilege is at stake.

The cases repeat the theme that the executive is under the law. President Lincoln's unlawful action to suspend the writ of habeas corpus, intended to prevent the nation's destruction during its most catastrophic emergency, was sternly rejected:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false ....

Ex Parte Milligan, 4 Wall. 2, 120-121. If that cumbersome law can not be suspended temporarily during war, this defendant can claim no unbearable consequences from having to defend a tort case.

**B. Immunity Case Law -- Including Nixon v. Fitzgerald -- Confirms That Presidential Immunity Is Confined To Suits Involving Official Conduct.**

Defendant principally relies on Nixon v. Fitzgerald, 457 U.S. 731 (1982) whose reasoning, he argues, compels that

"[i]mmunity for private claims for civil damages during a President's tenure in office is necessary to safeguard the Chief Executive's ability" to carry out his responsibilities even though no official acts are at issue. (Br. 9).

Fitzgerald is no solace to the President. The majority and concurring opinions extend immunity only to presidential acts. Damages liability is foreclosed "for acts within the 'outer perimeter' of [the President's] official responsibility," Fitzgerald, 457 U.S. at 756, and "a President . . . [is] not immune for acts outside official duties." Id. at 759 (Burger, C.J., concurring; emphasis added). Fitzgerald cites authority stretching over a century. "[T]he decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.; emphasis added). Immunity's basis in all the cases is that liability for official acts can distort judgment or make the official unwilling to act.

Immunity limited to official conduct is the very reason why the Court's decision in Fitzgerald did not "place[] a President 'above the law.'" Fitzgerald, 457 U.S. at 759 (Burger, C.J., concurring). This limitation no doubt dissuaded Presidents Theodore Roosevelt, Harry S. Truman, and John F. Kennedy -- each of whom were, while in office, sued for non-official conduct -- from seeking refuge behind the immunity barricade.<sup>8</sup> This Court is asked

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<sup>8</sup> See Sol. Gen. Amicus Br. 11, n.3. In People ex rel. Hurley v. Roosevelt, 179 N.Y. 544 (1904), and Devault v. Truman, 194 S.W.2d 29 (Mo. 1946), there is not a hint of a claim of

to be the first to dispense with the limitation on immunity to official acts, and the first to place the President above the law. Nothing in Fitzgerald, the immunity case law, or separation of powers, supports such an extraordinary, unprecedented step.

1. The Fitzgerald decision.

Nixon v. Fitzgerald, 457 U.S. 731 (1982), the most important applicable precedent, is worthy of further amplification. A government employee claimed that he was discharged in retaliation for his testimony before a congressional committee. His grievance was rejected, and suit was brought against several former presidential aides. Former President Nixon, later joined as a defendant, claimed absolute presidential immunity for his official acts. The district court and Court of Appeals denied the defense. Id. at 737-39.

By a 5-4 vote, the Supreme Court reversed and recognized "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." Id. at 756. Relying on cases such as Spalding v. Vilas, 161 U.S. 483 (1896), the Court observed that it "consistently . . . recognized that government officials are entitled to some form of immunity from suits for civil damages." Fitzgerald, 457 U.S. at 744. Central to all immunity case law, according to the Court, is that

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presidential immunity. Bailey v. Kennedy, No. 757,200, and Hills v. Kennedy, No. 757,201 (Cal. Super. Ct. July 5, 1962), President Kennedy's defense under the Soldiers' and Sailors' Civil Relief Act was rejected by the California state court; President Kennedy did not appeal. (See Br. 21, n. 16). Mr. Clinton has not claimed SSRA protection since to do so would show Congress as the only proper source of the relief he seeks. (See Br. 35, n.27).

officials not be deterred and distracted in the exercise of duty through fear of personal liability. Justice Powell explained:

In the absence of immunity, . . . executive officials would hesitate to exercise their discretion in a way 'injuriouly affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action. Considerations of 'public policy and convenience' therefore compelled a judicial recognition of immunity from suits arising from official acts[:]

'In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at the time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.'

Id. at 744-45 (quoting Spalding v. Vilas, 161 U.S. at 498-99; emphasis added). "[T]he prospect that damages liability may render an official unduly cautious in the discharge of his official duties" is "[a]mong the most persuasive reasons supporting official immunity," he concluded. Id. at 752 n.32. Immunity is necessary to "provid[e] an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." Id. at 752 (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)). Fitzgerald emphasized that immunity is only for official acts.

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

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

Id. at 753, 757 (emphasis added).

These words are not dicta. Sharply disputed in Fitzgerald was which acts are subject to immunity. "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." Id. at 755. The variety of presidential functions, however, requires the broadest scope of immunity recognized in the case law, i.e. immunity "for acts within the 'outer perimeter' of . . . official responsibility." Id. at 756; see, e.g., Spalding v. Vilas, supra., 161 U.S. at 498; Barr v. Matteo, 360 U.S. 564, 575 (1959). These principles were then applied to the facts. Were former President Nixon's alleged actions within the "'outer perimeter' of . . . official responsibility [?]" . They are within the penumbra, since a federal statute puts it within the President's constitutional and statutory authority to prescribe the manner in which the Secretary [of the Air Force] will conduct the business of the Air Force." 457 U.S. at 757 (citing 10 U.S.C. § 8012(b)).

Mr. Clinton concedes Fitzgerald applies to official acts, but urges the nation's business is too important to allow distraction by suits for "mere" private damages. (Br. 19, 27) A President's public duties cannot be performed if he must attend to

private legal obligations, so immunity during his term is the logical and proper extension of the Fitzgerald rationale.

Fitzgerald never opines that private actions for damages cannot go forward because the President lacks the time or energy to both defend them and do his job. The danger of distraction only applies to the risk that fear of personal liability from the exercise of one of his policy options might prevent him from making the choice that is best for the nation.

Chief Justice Burger, of the five-Justice majority, wrote "separately to underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers." Id. at 758 (Burger, C.J., concurring). In rejecting the view of the four dissenters that the President was being placed "above the law," see, e.g., id. at 766-67 (White, J., dissenting at 767 and Blackmun, J., dissenting at 797-798), Chief Justice Burger emphasized that "a President, like Members of Congress, judges, prosecutors, or congressional aides -- all [75,000 in 1982] having absolute immunity -- [is] not immune for acts outside official duties." Id. at 759; 759 n.2 (Burger, C.J., concurring; emphasis added); see also id. at 761 n.4 (plaintiffs may "raise the question whether an official -- even a President -- had acted within the scope of the official's constitutional and statutory duties. The doctrine of absolute immunity does not extend beyond such actions."). Therefore, "[i]t strains the meaning of the words to

say [immunity] places a President 'above the law.'" <sup>9</sup> Id. By contrast, if Mr. Clinton is immune from private torts, the meaning of words is not strained that he is "above the law."

The four dissenters opposed immunity even for official acts. However, the majority opened the immunity umbrella to its outer limit; i.e. to the "outer perimeter" of the President's official duty. The Chief Justice concurred, not to put a gloss on the majority opinion, but to admonish the dissenters that their concerns were unjustified, and that he joined the majority only because the decision did not reach unofficial acts. If Mr. Clinton's claim of immunity from suit for private acts was presented to the Fitzgerald court, a 9-0 vote is an inescapable prediction.

## 2. The immunity case law.

The rule that immunity is confined to lawsuits involving official acts did not begin with Fitzgerald; it was established in the long, unbroken line of cases on which Fitzgerald relied. The Court's first major brush with official immunity was Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), recognizing absolute judicial immunity. The Court articulated the theme that echoes in later cases involving executive officials, that damages for the exercise of official duties are precluded:

It is a general principle of the highest

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<sup>9</sup> Immunity from money damages suits involving official conduct does not place the President "above the law," since there are other remedies, inter alia, impeachment, press scrutiny, and Congressional oversight, which constrain him. Fitzgerald supra., 457 U.S. at 757-758.

importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.

80 U.S. (13 Wall.) at 347. Judges are immune for actions in which they arguably had subject matter jurisdiction. Id. at 351-52. The distinction, "between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists," the Court observed, was well-established in the English common law. Id. at 353 & nn. \*, †; see also id. at 349 & nn. †, ‡. Like prior common law, Bradley says nothing about the danger of distraction by private lawsuits over personal conduct.

Spalding v. Vilas, 161 U.S. 483 (1896), an early case prominently featured in Fitzgerald, extended an analogous immunity to officers of the executive branch:

[T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply, to a large extent, to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.

161 U.S. at 498. (emphasis added) In a passage quoted in Fitzgerald, the Spalding Court explained the reason for this rule: "The head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the

subject of inquiry in a civil suit for damages." Id. (emphasis added), quoted in Fitzgerald, 457 U.S. at 745.

Likewise, in Barr v. Matteo, supra., 360 U.S. 564, (1959), a defamation case against an executive official, Justice Harlan's plurality opinion emphasized that "[t]he privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government," id. at 572-73, and that it is "the relation of the act complained of to 'matters committed by law to his control or supervision'... which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil . . . suits," id. at 573-74.<sup>10</sup> This principle eviscerates Mr. Clinton's argument. The instant case concerns no "matters committed by law to [the defendant's] control or supervision."<sup>11</sup> Immunity from suit for private conduct would stand

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<sup>10</sup> Other absolute immunity cases are to the same effect. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 424-431 (1976) (state prosecutors in actions under 42 U.S.C. § 1983, where prosecutors' "activities were intimately associated with the judicial phase of the criminal process"); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (Section 1983 actions against state "judges for acts within the judicial role"); Tenney v. Brandhove, 341 U.S. 368, 376-79 (1951) (Section 1983 actions against state legislators "acting in the sphere of legitimate legislative activity").

<sup>11</sup> This rule and the reasoning behind it -- that immunity is limited to official acts and is designed to protect the integrity of official decision-making processes -- are also reflected in the Supreme Court's qualified-immunity decisions. See Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) ("it is important to note, even at the outset, that one policy consideration seems to pervade the analysis [of official immunity]: the public interest requires decisions and action to enforce laws for the protection of the public"); Butz v. Economou, 438 U.S. 478, 506 (1978) ("[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law,"

Barr v. Mateo on its head since the privilege would then be "a badge or emolument of exalted office."

In short, official immunity of any sort -- whether for Presidents or prosecutors, postmasters or police, judges or governors, and whether absolute or qualified -- is always limited to official acts. Mr. Clinton cites no case to the contrary. Centuries of Anglo-American jurisprudence disclose none.

3. Litigation burden and the separation of powers.

Mr. Clinton concedes the difference between this case and Fitzgerald. Since Paula Jones' claims are unrelated to official actions the case may not warrant absolute immunity. (Br. 17) He agrees the Court's rationale is that actions within the outer perimeter of a President's duties can have a chilling effect on the exercise of discretionary authority, and that his conduct here is not within that perimeter. (Br. 17) But he also claims a stronger case for immunity than in Fitzgerald because, unlike Mr. Nixon, Mr. Clinton is still in office and therefore actually subject to this chilling effect. (Br. 9) See discussion infra. at 29.

Mr. Clinton refers to Fitzgerald language on two subjects -- the burden of litigation and the doctrine of separation of powers -- to support his unprecedented immunity. On litigation burden, he embraces the language that "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." On

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so "it is not unfair to hold liable the official who knows or should know he is acting outside the law").

separation of powers, he is fond of the description of presidential immunity as "a functionally mandated incident of the President's unique office...." (Br. 13-14, 18, Fitzgerald, 457 U.S. at 749, 751).

a. The Litigation Burden.

The Supreme Court's discussion of "litigation burden" is solely in the context of the impact of possible money damages for unlawful official conduct. Since the breadth of the President's duties make him a likely target for law suits over official acts, his immunity for official acts, his absolute, not qualified:

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

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges -- for whom absolute immunity now is established -- a President must concern himself with matters likely to "arouse the most intense feelings." Pierson v. Ray, 386 U.S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. Ferri v. Ackerman, 444 U.S. 193, 203 (1979).<sup>[12]</sup> This concern is

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<sup>12</sup> In Ferri v. Ackerman, the Supreme Court refused to grant immunity to appointed defense counsel from suit for legal malpractice. The Court explained that

compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.

Fitzgerald, 457 U.S. at 752. The Court simply applied to the Presidency its prior immunity rationale; i.e. "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." Id. at 752 n.32.

Discussion in Fitzgerald about lawsuit distraction, and diversion of energy and attention from duty, cannot be extrapolated to support "temporal immunity." Fitzgerald is "rooted in the constitutional tradition of the separation of powers supported by our history." Fitzgerald, supra. 457 U.S. at 749. The separation of powers doctrine applies only to official acts. The Constitution does not expressly grant this immunity, but constitutional case history supports it for judges, prosecutors, and presidents. The immunity is not "qualified" as for lower executive officials such as governors and cabinet officers; it is "absolute" so as to ensure

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[a]s public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

Ferri, 444 U.S. at 203.

the effective functioning of the president's office, just as judges and prosecutor's must be similarly undiverted in the performance of their office. Fitzgerald's language may only be read in that constitutional context; a context which destroys the President's premise.

The President also overlooks the real implication from Mr. Nixon's suit after he was President. The suit could not possibly divert Mr. Nixon's attention from official duty. Yet absolute immunity still covered him since all presidents must be shielded from the fear of ever defending the consequence of their official actions, but not from the universal mental distress defendants suffer when sued for private conduct. It is the abstract, not actual, "distraction" which compels immunity.

Since ours is a constitution being expounded, immunity is not some "will-o-the wisp" which varies in the context of balancing the equities, the importance of plaintiff's case, or the actual presidential burdens. Mr. Clinton therefore is mistaken that actual burdens justify immunity. He believes this case will be "especially burdensome, personally intrusive, and time consuming" (Br. 20) given allegations which are "titillating or degrading" (Br. 23) and which "seek to impugn the President's character and conduct..." (Br. 20) He also fears a President may have "acute vulnerability" (Br. 10) to "concocted" private claims "alleging unwitnessed one-on-one encounters." (Br. 23)

First, we wonder how burdensome can this litigation be for Mr. Clinton when his counsel was ready to go to trial in

October 1994 and "destroy her" [Paula Jones]. See supra. 6-7.

Second, Mr. Clinton's conduct itself, if true, is what impugns his character and not the words in a pleading describing that conduct. The complaint must be detailed in alleging civil rights violations and the tort of outrage. What is particularly degrading to the Office of the President is not that this action was brought, but rather that Mr. Clinton chooses to hide behind his Presidential chair to shield himself from accountability for personal, non-official conduct.

Third, this is not a concocted claim based solely on a one-on-one encounter. There are witnesses to the events at issue, including co-defendant Danny Ferguson and others who can support Paula Jones' factual allegations. On Mr. Clinton's outrageous conduct in the hotel room, Paula Jones can identify certain "distinguishing characteristics" (Complaint, paragraph 22 at Def. App. 11), which could not have been visible absent that conduct.

Fourth, a court can quickly dispose of a frivolous lawsuit. For example, as a result this case, Mrs. Jones was sued for \$27 million in damages due to her allegedly tortious interference with someone's contractual relationship with the President that he be free to perform his duties. Daniel Schramek and Thomas Delor v. Paula Corbin Jones, U.S. District Court in the Middle District of Florida, Tampa Division, No. 94-868-Civ-T-17. That case was swiftly dismissed by Order entered February 21, 1995, and Mrs. Jones' motion for sanctions was granted on April 12, 1995.

Finally, distraction is irrelevant to the existence of

immunity.<sup>13</sup> Life has many distractions for which the courts cannot protect a President.<sup>14</sup> One unprotected distraction is becoming a defendant as a result of personal conduct. If otherwise, a lender could not call a President's defaulted note or foreclose on collateral; a President's wife would wait for divorce and alimony, and his children could go hungry absent child support.<sup>15</sup> The

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<sup>13</sup> Absolute immunity from a civil money damage suit does not foreclose suit for a different remedy, even when official action is involved. Fitzgerald, 457 U.S. at 758 n. 41. If the lodestar is actual distraction, then suits for equitable remedies, which could be equally distracting, are also foreclosed. Fitzgerald rejects the latter proposition.

<sup>14</sup> On the question of burden on the President, the Fitzgerald court found "instructive" Chief Justice Marshall's observation that the "demand" of the President's duties "is not unremitting". Id. at 711 n. 49 (quoting United States v. Burr, supra, 25 F. Cas. at 34). The Court added that "the tasks of compliance [with the subpoena] may obviously be delegated in whole or in part so as not to interfere with the President's official responsibilities." Id. The same is true here: Mr. Clinton has obviously delegated in substantial part the burden of litigation (which, of course, has been enormously compounded by his efforts to avoid adjudication on the merits) to his counsel. Further, a President's distractions, for reasons other than his official duties, are presumably the same for all citizens. Concerns of health, family, finances, and political criticism surely impinge on a President's mind and time, but they are beyond judicial protection. He voluntarily gave depositions in the Whitewater investigation, of pre-presidential events. The investigation is a lightning rod for Mr. Clinton's political enemies. It has involved scores of staffers in addition to the President himself. His official duties are not so unremitting as to foreclose his attention to Whitewater wherein he has retained private counsel. Since Whitewater is a civil and criminal investigation which involves the President's family and friends, certainly his distraction is greatly magnified above the instant case. Yet he is still able to perform his duties, and has not sought immunity. This case is simple, and, according to the President's counsel, can be favorably disposed in a trial of ten to twenty minutes. See Vanity Fair, August 1994, at 85.

<sup>15</sup> Probably not considered by the President is the deleterious effect temporal immunity would have on a President who cannot engage in the normal commercial transactions as other

victim of his negligence could not seek relief. The tax man could not make civil collection efforts. Mrs. Jones could not seek the redemption of her irreplaceable reputation. Shakespeare wrote that a damaged reputation is far more harm than theft of one's purse. (Iago, Othello)

Mr. Clinton's answer is that, because the President is "always in session" and consists of a single person, compelling him to do anything to deal with this case will force him to abandon his duties.<sup>16</sup> This argument assumes that plaintiff's counsel has no capacity to understand, or accommodate, the demands of the President's office in the discovery and trial process; or more importantly, that the trial court lacks sensitivity and power to accommodate. Deposition, production of documents, and consultation with counsel are not paralyzing to the work of hard working citizens. If the case lacks merit, the court will deal with it quickly, and harshly with plaintiff and her counsel. If eventual trial proceedings promise onerous time burdens, the court can be

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citizens because no one will deal with him if he cannot be held to account for eight years.

<sup>16</sup> "But had the presidential burden become so much heavier than ever before? The scope of the national government had expanded beyond imagination, but so too had the facilities for presidential management. \* \* \* \* The President could fill his hours with as much motion as he desired; but he also could delegate as much 'work' as he desired. 'A president moves through his days surrounded by literally hundreds of people whose relationship to him is that of a doting mother to a spoiled child. Whatever he wants is brought to him immediately--food, drink, helicopters, airplanes, people, in fact, everything but relief from his political problems.'" (Arthur M. Schlesinger, Jr., The Imperial Presidency 384-385 (1973), quoting George Reedy, The Twilight of the Presidency 20-26 (1970).

trusted to employ its many remedies. Immunity is not dependent on these varying factors of litigation schedules. It arises, if at all, only under the Constitution's separation of powers. And separation of powers only grants immunity for official conduct.

b. Separation of Powers.

Immunity is premised on the unique effects of damages claims involving official, presidential acts. The separation of powers concern is the specter of Article III courts imposing paralyzing damages liability upon the President for the exercise of his Article II duties.

Chief Justice Burger wrote in Fitzgerald that "the Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking, just as other branches should be hesitant to probe into judicial decisionmaking," and that "scrutiny of day-to-day decisions of the Executive Branch would be bound to occur if civil damages actions were made available to private individuals." Nixon v. Fitzgerald, 457 U.S. at 761-62. "This is not to say that, in a given case, it would not be appropriate to raise the question whether an official -- even a President -- had acted within the scope of the official's constitutional and statutory duties. The doctrine of absolute immunity does not extend beyond such actions." Id. at 761 n.4.

If separation of powers mandates that suit against the leader of the Executive Branch must wait until he is out of office, the doctrine protects the nine Justices of a co-equal branch from private accountability while in office, which is often more than

theoretically for life. A Justice might never be sued. The President suggests that because power is concentrated in only one person in the executive branch, he is entitled to more protection. (Br.11-12) This demeaning attitude toward the Judiciary is unjustified even as a matter of degree (1 v. 1/9) since, as the Fitzgerald case proves, the deciding vote of one Justice, (Chief Justice Burger), established official immunity for all Presidents! If the President, who complains of supposed delay in bringing suit, can delay his day of reckoning until out of office, then each Justice enjoys the same privilege when sued for private conduct.

No separation-of-powers case suggests that constitutional bounds are trespassed by litigation that does not seek liability for official acts. Nixon v. Administrator of General Services, 433 U.S. 425 (1977) ("Nixon v. GSA"), expounded the test: "the proper inquiry focuses on the extent to which [the challenged action] prevents the Executive Branch from accomplishing its constitutionally assigned functions (citation omitted)." Nixon v. GSA, 433 U.S. at 443. Only when the action of another branch "'impermissibly undermine[s]' the powers of the Executive Branch, or 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions,'" is separation of powers violated. Morrison v. Olson, 487 U.S. 654, 695 (1988) (Chief Justice Rehnquist quoting CFTC v. Schor, 478 U.S. 833, 856 (1986), and Nixon v. GSA, 433 U.S. at 443); see also, e.g., Mistretta v. United States, 488 U.S. 361, 383, 409 (1989).

Paula Jones filed a purely private lawsuit which concerns only unofficial, nonpresidential, pre-inaugural actions. Nothing about it threatens the functioning of the Executive Branch. It will not require the Court "to probe into the elements of Presidential decisionmaking." Nixon v. Fitzgerald, 457 U.S. at 761 (Burger, C.J., concurring). It will not "subject Presidential actions to undue judicial scrutiny," id. at 762 (Burger, C.J., concurring) -- indeed, any scrutiny at all. It will not "involve . . . judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information." Id. at 762 (Burger, C.J., concurring). It will not involve "scrutiny of day-to-day decisions of the Executive Branch." Id. at 762 (Burger, C.J., concurring). It will not result in any intrusion into the presidential decisionmaking process, let alone a "large-scale invasion of the Executive function by the Judiciary." Id. at 762 (Burger, C.J., concurring).

The rationale for official immunity does not support dismissal or delay. Liability for unofficial conduct will not cause Presidents to "hesitate to exercise discretion in a way 'injuriously affect[ing] the claims of particular individuals.'" Fitzgerald, 457 U.S. at 744-45 (quoting Spalding v. Vilas, 161 U.S. at 499). It will not diminish presidential "ability to deal fearlessly and impartially with "the duties of his office." Id. at 752 (quoting Ferri v. Ackerman, 444 U.S. at 203). It will not place the President "under an apprehension that the motives that

control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages," and thereby "seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch...." Id. at 745 (quoting Spalding, 161 U.S. at 498). And thus this case will not "prevent the Executive Branch from accomplishing its constitutionally assigned functions," or "disrupt the proper balance between the coordinate branches "of government, or 'impermissibly undermine' the powers of the Executive Branch." Morrison v. Olson, 487 U.S. at 695 (quoting Nixon v. GSA, 433 U.S. at 443, and CFTC v. Schor, 478 U.S. at 856).

Mr. Clinton's exaggerated fear is that this case may inspire a parade of horrors to which no district court would subject even the officers of a publicly held company, never mind the President. Defendant says that allowing this case to go forward may "require [him] to spend months in deposition and pre-trial preparation with lawyers, and weeks at trial, while the urgent business of the nation -- foreign and domestic, civilian and military -- awaited the Chief Executive's attention." (Br. 20.)

Thoughtful consideration of the probable simple discovery and trial, should alleviate defendant's panic. The court can, should, and will protect the President's time while allowing plaintiff to pursue her claim and gather the evidence she will need at trial. Document requests can be disseminated with no burden to anyone, since no-one need "attend" anything. Witnesses can be deposed without the President's presence. Timing of the

President's deposition is subject to his schedule.

Mr. Clinton suggests only he can decide when he is available for questioning, and ominously implies he might not obey a judge's order to testify. ("If a President refused to comply, could the President be held in contempt?"). (Br. 31) Every President since Gerald Ford has been questioned in judicial proceedings. Never has a president had to confront a judge who refused to accommodate a rescheduling request.

If the President's attendance at a witness deposition is necessary, and cannot be accommodated, it still does not make sense to bar the plaintiff for up to six years from using discovery tools of the Federal Rules of Civil Procedure. It may be reasonable, in the event, to require the witnesses to be questioned twice.<sup>17</sup>

The trial judge can oversee pretrial process. Stopping this and every other private case in its tracks, because of a mere possibility that a confrontation might develop between the President and an uncomprehending judge, is disproportionate. Under Nixon v. GSA, supra., and other cases discussed, it is Mr. Clinton's burden to demonstrate that an absolute bar on private claims is needed to avoid impediments that "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions (citation omitted)." Nixon v. GSA, 433 U.S. at 443. He has not, and cannot, make this showing. Temporal immunity must be rejected.

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<sup>17</sup> Mr. Clinton says the staleness of evidence will hurt him as much as it hurts the plaintiff. (Br. 28) But the plaintiff has the burden to prove her case. If evidence disappears, the district court will not declare a "tie": the plaintiff will lose.

**II. THE DISTRICT COURT CORRECTLY REJECTED A STAY OF DISCOVERY, BUT ERRED BY STAYING THE COMMENCEMENT OF THE TRIAL UNTIL AFTER THE CLINTON PRESIDENCY BECAUSE, CONTRARY TO THE TRIAL COURT, THE PRESIDENT DOES NOT ENJOY LIMITED, TEMPORAL IMMUNITY FROM TRIAL AS A MATTER OF LAW AND A STAY IS NOT OTHERWISE JUSTIFIED BY FRCP 40 OR THE COURT'S EQUITY POWER. THE PLAINTIFF HAS IMPORTANT LEGAL INTERESTS TO BE JUDICIALLY DECIDED IN AN EXPEDITIOUS MANNER; AND SHE HAS THE RIGHT TO BE TREATED LIKE ALL OTHER LITIGANTS IN HER ACCESS TO THE LAW'S PROCESS.**

The District Court correctly rejected a stay of all proceedings, pretrial and trial, on immunity grounds.<sup>18</sup> For reasons heretofore discussed, and for adverse consequences to plaintiff hereafter set forth, the trial should not be stayed.<sup>19</sup>

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<sup>18</sup> The Restatement (Second) of Torts, (1977) Chapter 45A discusses immunities of public officials in detail. Section 895D (Public Officers, in the Chapter entitled "Immunities") states: "Except as provided in this Section a public officer is not immune from tort liability." None of the subsections of Section 895D remotely suggest that immunity is a defense for an act of an official before assuming office. Temporary immunity is not mentioned. Comment g of Section 895D states:

An immunity protects an officer only to the extent that he is acting in the general scope of his official authority. When he goes entirely beyond it and does an act that is not permitted at all by that duty, he is not acting in his capacity as a public officer or employee and he has no more immunity than a private citizen.

<sup>19</sup> Defendant's analogy to the Soldiers' and Sailors' Relief Act ("SSRA") is peculiar. (Br. 35-36) SSRA creates statutory immunity for certain members of the military, but expressly does not establish any protection for the President or any other civilian. If the SSRA proves anything, it is that Congress did not wish the President, as Commander in Chief, to enjoy such protection. The Supreme Court's interpretation of the SSRA also makes the defendant's analogy inapt. In Boone v. Lightner, 319 U.S. 561 (1943) the Court applied the SSRA to an Army captain who had been sued for breach of fiduciary duty because he speculated on his own account with the assets of a trust fund set up for his daughter. Justice Jackson, for the Court, wrote:

The defendant was a member of the bar, and the charges struck at his honor as well as his judgment. Instead of seeking the first competent forum and the earliest

The court below parsed the immunity doctrine to permit pretrial discovery but foreclosed a trial while Mr. Clinton is President. Plaintiff agrees with the President that this ruling is inconsistent. Either there is, or is not, immunity which requires dismissal or the delay of all proceedings. Absent immunity, no proceeding should be stayed unless later circumstances justify the exercise of judicial discretion under either Rule 40 or perhaps the court's equity power. "We must never forget that it is a constitution we are expounding." McCullough v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819) (Marshall, C.J.). Immunity is not some fluid doctrine which depends on a court's balance of the equities to declare a party immune under the Constitution.

The District Judge incorrectly supported immunity and a delay of trial by comparing the relative importance of different types of cases. Her view is that Paula Jones' interest in vindicating her reputation is less important than the case of a terribly injured accident victim who needs instant money, or a divorce, custody, or support case "in which personal needs of other parties are at stake." Other cases, "such as an in rem foreclosure would likely be tried with few demands on Presidential time." Moreover, the plaintiff should not be heard to complain of delay

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possible day to lay his account out for vindication, he sought to escape the forum and postpone the day. \* \* \* [The soldier's] absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Boone, Id. at 573. The President's desire here for delay is more likely policy than concern for distraction.

when she waited until "two days before the three-year statute of limitations expired." (Add. 18-19).

Mrs. Jones believes the need to clear her name is very important since her reputation is all she will carry to the grave. She felt no need to enlist a court's help before her name was publicly soiled. Faced with the public insinuation of moral misconduct, in early 1994, she sought a remedy, with as much alacrity as may be expected of any citizen, to defend her honor.<sup>20</sup> No right is more important to vindicate. Mrs. Jones must wait to start discovery; meanwhile, memories fade, evidence may be lost, and even defendants may be unable later to provide information. She needs to salvage her good name. An irony is that while the President keeps his job, and thereby prevents Mrs. Jones from securing her reputation, Mrs. Jones' soiled reputation can keep prospective employees from hiring her. Plaintiff's financial status may be a real casualty of delay. The President is more concerned with his embarrassment than with Mrs. Jones continuing harm from trial postponement. As for the expected demand on the president's time, there is hardly a case less-complicated.

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<sup>20</sup> Plaintiff is aware of no case which penalizes a litigant for filing on or near the final day permitted by the applicable limitation, as distinguished from filing on the first permissible day. The speed at which a case proceeds to trial is not controlled by the speed with which it was filed. Victims of sexual harassment - particularly those who are victimized by powerful men - are often unable for emotional reasons to respond immediately to seek legal or public redress. Many bear their burdens silently for years, out of pain or fear or shame. Here only after Mrs. Jones was publicly accused of having willingly accepted Mr. Clinton's advances, and was branded "pathetic" and a "liar" by Mr. Clinton and his agents in the national press, did she choose to file suit.

Judge Wright grounded her stay of trial on (1) limited temporary immunity from trial; (2) Rule 40 of the Federal Rules of Civil Procedure, ("FRCP"); and (3) the equity power of the court. The exercise of discretionary power to delay trial is premature. No circumstance has arisen to justify a stay. The only reason to grant a stay now, when the parties are not even "at issue," is if the President enjoys limited, temporary, immunity from suit, which he does not. Immunity from trial commencement is inconsistent with case law herein discussed, and with the holding below that the President is not immune from suit for private conduct.

The defendant and Solicitor General propose, without authority, to shift to plaintiff the burden of establishing a right to go forward now. A presumption exists in favor of all plaintiffs that a properly plead case should proceed on a normal litigation track. In principle, everyone is equal before the law. Mrs. Jones even has a due process right to equal access to the law's processes. She enjoys the same privileges as the highest office holder.

"[A] plaintiff has the right to pursue his or her case vigorously and to have his or her claim resolved expeditiously." White v. MAPCO Gas Prods., Inc., 116 F.R.d. 498, 502 (E.D. Ark. 1987). "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily upon [the] ... suppliant for relief" in the form of a stay of proceedings. Landis

v. North American Co., 299 U.S. at 256.<sup>21</sup>

Federal courts are required to exercise jurisdiction conferred by Congress and the Constitution, and to adjudicate the controversies before them. Chief Justice Marshall observed:

[I]t is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of its jurisdiction \* \* \* With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); see also New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 359 (1989); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) ("[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction"); Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1858).

Only exceptional, recognized circumstances justify declination of adjudication. Abstention doctrines, for reasons of judicial economy and comity, permit deferral of proceedings. Even then -- where there is an alternative forum to forthwith advance the adjudicatory process -- abstention is "the exception and not

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<sup>21</sup> Whoever requests "a stay must make a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." Landis, Id. "[D]iscretion is abused by a stay of indefinite duration in the absence of a pressing need." Id. A "stay is immoderate and hence unlawful unless so framed in its inception, that its force will be spent within reasonable limits." Id. at 257.

the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976); see also County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959) ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it"). The abstention cases recognize the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging." Colorado River, 424 U.S. at 817.

Virtually the only time courts may be relieved of the obligation to adjudicate cases is when an alternative forum is available to resolve the dispute. Younger<sup>22</sup> abstention is designed to accommodate "parallel judicial processes." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n. 9 (1987). Likewise, under Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), a court may stay determination of a federal constitutional claim to permit adjudication in state court of state law issues that might render the decision of the federal question unnecessary. Under Burford v. Sun Oil Co., 319 U.S. 315 (1943), a federal court may decline to decide state law issues that would unnecessarily interfere with a state's administration of its own affairs. Under Colorado River, supra, a federal court may defer to a parallel state court proceeding where the dispute can be resolved.

This is all consistent with the cases governing equitable

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<sup>22</sup> Younger v. Harris, 401 U.S. 37 (1971).

stays: "The underlying principle clearly is that 'the right to proceed in court should not be denied except under the most extreme circumstances.'" CFTC v. Chilcot Portfolio Management, Inc., 713 F.2d 1477, 1484 (10th Cir. 1983), quoting Klein v. Adams & Peck, 436 F.2d 337, 339 (2d Cir. 1971).

In Landis v. North American Co., 299 U.S. 258 (1936) the case upon which Mr. Clinton and his amici rely, the question was whether a district court could stay proceedings to await decision by another court in a case on the same issues. Litigation was begun in two federal courts testing the constitutionality of a statute. The lower court's stay was an abuse of discretion, because no "clear case of hardship or inequity" was made to overcome the possibility that the stay might damage another party. Id. 299 U.S. at 255. A stay extending "a second year or even more," to await a decision by the other district court, "exceeded" even on a dispositive question of law, "the limits of a fair discretion." Id. at 256. "Relief so drastic and unusual overpasses the limits of any reasonable need," and is "immoderate and hence unlawful." Id. at 257

Applying Landis, where a "second year" of a stay was rejected, the stay here of least two and perhaps six years is a clear abuse of discretion.

The extent of trial burdens cannot be determined at this threshold stage where the parties (Mr. Clinton and Mrs. Jones) are

not even "at issue."<sup>23</sup> If, as Mr. Clinton says, some counts of the complaint are defective, the case may further simplified. If the record of the plaintiff's employment with the State of Arkansas is undisputed, a partial summary judgment on some or all of the "hostile work environment" claims may be entered in favor of a party. Perhaps documents or telephone records exist which show conclusively where then-Governor Clinton was at the crucial times on May 8, 1991, thereby narrowing even further the scope of the factual dispute to be resolved by a jury.

Until these matters are known -- that is, until this case is closer to trial -- no one can say that trial will necessarily so burden Mr. Clinton that he cannot do his job. "Sufficient unto the day are the troubles thereof." Let the District Court decide about the propriety of a trial when the burdens of a trial are clear. Doing so now, on a blank slate, was an abuse of discretion.

Mr. Clinton bemoans plaintiff's public statements.<sup>24</sup> He writes that the burden on a president is dramatically magnified by the fact that he is such an attractive target for scandalous suits. (Br. 21-23) Gennifer Flowers' tattle, and the history of Brock Adams' and Gary Hart's careers, prove that one need not file a lawsuit to make scandalous claims. Indeed, if the goal is to

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<sup>23</sup> Mrs. Jones and Mr. Ferguson are "at issue" because Mr. Ferguson answered. Mr. Ferguson, like Mrs. Jones, should not be burdened with excessive delay in resolving his case.

<sup>24</sup> Mrs. Jones' every public utterance seems to have been collected in the lengthy appendix filed with Mr. Clinton's brief. None of these documents was introduced into evidence below. Neither the propriety nor relevance of this appendix is clear.

scandalize, rather than to seek the truth, filing a lawsuit seems to be the worst way to achieve it. By filing her claim in court, Mrs. Jones has done or will do the following:

- ◆ She has verified her complaint;
- ◆ She has subjected herself, and every hostile witness the defendants can find, to discovery;
- ◆ She has submitted herself to the authority of the Court, including the potential for Rule 11 and other sanctions if her complaint is found to be frivolous<sup>25</sup> and she, or her attorneys, otherwise engage in unacceptable conduct (including abuse of the discovery process); and
- ◆ She has submitted her claims against Mr. Clinton to a neutral decisionmaker with the power to vindicate him.

Needless to say, others who have made charges against public figures, including against Mr. Clinton, have done none of these things, though they have achieved more notoriety, earned more money, and perhaps have done far more damage to Mr. Clinton's career, than has Mrs. Jones. If these are the plaintiff's goals she clearly has more effective ways to pursue them than litigation.

In summary, there is no legal principle known as "limited, temporary, immunity from trial," and there are no grounds on which to otherwise exercise discretion. The Court's decision to delay the trial rests on no Constitutional right, or judicial authority, and the granting of a stay under FRCP 40 and perceived

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<sup>25</sup> Mr. Clinton believes that Rule 11 sanctions will not protect him because the gain from suing him more than counterbalances any potential penalties. While there is no reason why a district judge cannot impose sufficient penalties to protect Mr. Clinton, to be borne in mind is that many celebrities -- such as Michael Jackson, or the Archbishop of Chicago -- are as vulnerable to the tactics Mr. Clinton so fears. Lawsuits against famous people should be subject to no more judicial hostility than cases against unknown citizens.

equity power is an abuse of discretion. That part of the order which granted the stay is in error and should be reversed.

**III. THERE IS NO BASIS FOR STAYING THE COMMENCEMENT OF DEFENDANT DANNY FERGUSON'S TRIAL, OR STAYING DISCOVERY ON HIS CASE PENDING DECISION ON THIS INTERLOCUTORY APPEAL.**

No case cited by defendant, his amici, or the court below, or known to plaintiff's counsel, has ever stayed litigation against one party because another party opposed its prosecution. The President's effort to clothe Mr. Ferguson in the ermine of immunity must fail. No basis exists for staying trial or discovery pending resolution of the appeal vis-a-vis Mr. Ferguson. Moreover, proceeding in Mr. Ferguson's case, wherein the President is merely a witness, has the salutary effect of mitigating the plaintiff's risks of losing valuable evidence and witnesses by delay.

In Dennis v. Sparks, 449 U.S. 24 (1980), the Court recognized that a state judge charged with a violation of 42 U.S.C. § 1983 had absolute immunity from suit for official conduct. But the suit could proceed against the judge's alleged co-conspirators who did not share that immunity. The court rejected the private defendants' concern that if the suit proceeded against them, the judge's immunity would be "seriously eroded." Id. at 29.

It is urged that if petitioner and other private co-conspirators of the judge are to be subject to § 1983 damages actions and if a case such as this is to go to trial, the charge of conspiracy and judicial corruption will necessarily be aired and decided, the consequence being that the judge, though not a party and immune from liability, will be heavily involved, very likely as a witness forced to testify about and defend his judicial conduct.... But there is no ... constitutionally based privilege immunizing judges from being required to testify about their judicial conduct in third-party litigation.

Id. at 30. Any inconvenience to Mr. Clinton from having to testify in Jones v. Ferguson is outweighed by the plaintiff's right to seek relief against a non-immune party. Just as the judge's immunity in Dennis did not cloak his co-conspirators, any immunity Mr. Clinton has should not cover Mr. Ferguson. The President must give evidence when he is not a party -- even in cases involving official conduct. United States v. Burr, supra, and United States v. Nixon, supra.

Nor can Mr. Clinton be legally prejudiced by having the case against Mr. Ferguson proceed to trial first. A verdict in favor of Mr. Ferguson could collaterally estop Mrs. Jones from suing Mr. Clinton. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). But a verdict for her would not prevent Mr. Clinton from re-litigating any issue in his case, for it is well-settled that a person who does not participate in litigation as a party cannot be legally bound by what happened. See e.g., Martin v. Wilks, 490 U.S. 755 (1989). Mr. Clinton would, in fact, benefit from the Ferguson trial proceeding first. Plaintiff would produce evidence and she would be required to commit to positions of fact and law. The President could mount a defense knowing the full extent of her case.

A plaintiff is not required to sue all defendants against whom she claims to be transactionally related. A plaintiff may sue a string of defendants seriatim, no matter how closely related their alleged legal violations, as long as she is not collaterally estopped by factual findings in prior suits. See United States v.

Kales, 314 U.S. 186, 197-200 (1941); White v. Kelsey, 935 F.2d 968, 970 (8th Cir. 1991) ("A claim is not terminated against one person who may be liable for a loss by a judgment against another person liable for the loss"); Restatement (Second) of Judgments 49 (1982); Charles A. Wright, 18 Federal Practice and Procedure Section 4407, at 52-53 & n.9 (1981 & Supp. 1994).

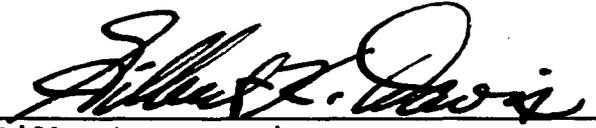
Had Mrs. Jones proceeded first against Mr. Ferguson and won, the rules of merger and res judicata would not prevent a second suit against Mr. Clinton. She could have also filed suit against each separately, but at the same time. Mrs. Jones simply chose to sue both defendants in a single lawsuit. She should not be penalized for that choice by deferral of the Ferguson trial until the end of the Clinton Presidency.

For all the same reasons and given that Mr. Ferguson has no immunity, there should be no stay of discovery in the Ferguson matter pending the resolution this appeal.

CONCLUSION

For all the foregoing reasons, plaintiff respectfully requests that the decision of the District Court be affirmed that there is no immunity and that discovery should proceed. Further, the decision of the District Court should be reversed to the extent the Court found limited temporal immunity and discretion under FRCP 40 and equity, to justify a delay of commencement of trial until after the Clinton Presidency. Also, the stay of discovery relating to Mr. Ferguson pending final appellate resolution should be lifted.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 1994, I caused copies of the Opening Brief of Appellee/Cross-Appellant Paula Corbin Jones, to be served by first-class mail on:

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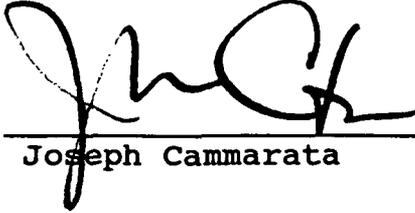
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**In the United States Court of Appeals  
for the Eighth Circuit**

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No. 95-1050  
No. 95-1167

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PAULA JONES

Appellee,

vs.

WILLIAM JEFFERSON CLINTON

Appellant,

and

DANNY FERGUSON

Defendant.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
Civil No. LR-C-94-290

---

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

---

Christopher A. Hansen  
Steven R. Shapiro  
American Civil Liberties Union  
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132 West 43rd Street  
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## INTEREST OF AMICUS CURIAE

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

The ACLU as *amicus* takes no position on the truth or falsity of the allegations of the Complaint and takes no position on the validity of most of the various defenses raised by the President. We submit this Memorandum solely to address one point: a President, sued for civil damages for actions taken outside the scope of his official responsibilities, is not entitled to an automatic (or nearly automatic) dismissal or stay of the entire case until he leaves the Presidency.<sup>1</sup>

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<sup>1</sup> This case arises in the context of allegations of actions that occurred prior to Mr. Clinton being elected President. However, the arguments made by the President would apply equally to actions taken by a President while President if those actions were outside the official responsibilities of the Presidency. Thus, the critical factor is not when the actions occurred, but whether they were within the official responsibilities of the President.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff alleges that while the President was Governor of Arkansas, he made unwanted sexual advances, and that when she rejected these advances, she suffered in her employment with the Arkansas state government. The plaintiff asserts that it was initially her intention to take no action. However, when an article appeared in the press, which she believed implied that she had had a consensual, sexual relationship with the President while he was Governor, she "saw herself as held up falsely to public scorn" and, given the discrepancy between this account of the incident and the account she had given to her friends, believed her friends might believe she had been untruthful. Appendix, pp. 80-88. In addition, she alleges that the President denied her account of the incident, further casting doubt on her truthfulness.

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

The district court denied the motion. 869 F. Supp. at 698. After reviewing the historical record and relevant case law, the court found that the Constitution itself was "silent on all of this" and that there was no dispositive case law. The court held that:

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

Id.

After rejecting the broad assertion of immunity, the court next considered a "limited or temporary immunity from trial."

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

The President has appealed, joined by the United States and an *amicus* group of distinguished law professors. Although each

proposes a slightly different legal standard,<sup>2</sup> the President and his amici each proposes a rule of law that would make it completely or virtually impossible for any person to pursue a civil suit for damages for actions taken by a President outside the scope of his official duties while the President holds office.

We agree with the district court's conclusion that there is no dispositive law on this question. We also agree with the general approach adopted by the district court and the President and his amici. This Court must balance the interests involved in reaching its conclusion as to the appropriate rule of law to apply. However, we agree with the district court, and disagree with the President and his amici on the allocation of the burden of proof. In our view, the burden is on the President to establish the need for, and necessary scope of, any delay. See Section I.

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<sup>2</sup> The President argues that the entire case should be dismissed until he leaves office. Opening Brief of Appellant William Jefferson Clinton, (Clinton brief) at 9, 26. The only arguable exception to this conclusion that the President suggests is that the President will "cooperate" in discovery if there is a genuine danger that evidence will be lost as a result of delay. The United States argues that the entire case should be stayed unless "the plaintiff will suffer irreparable injury without immediate relief and . . . 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." Brief for United States as Amicus Curiae, (United States brief) at 6-7. The law professors argue that the entire case should be delayed "absent a showing of compelling exigency by the plaintiff." Brief Amicus Curiae of Law Professors in Support of Appellant William Jefferson Clinton, (Law Professors' brief) at 3. All three briefs argue that, to the extent the rule is less than absolute, this case does not fit the grounds for any exception.

We also agree with the district court that the President has not met his burden of establishing the need for an absolute or virtually absolute rule requiring the delay of any civil case for damages filed against a President for actions taken outside his official responsibilities. We recognize, obviously, the importance of allowing the President to conduct the nation's business without undue distraction. However, we also believe that there are important values on the other side of the scale that are entitled to recognition, including the plaintiff's interest in securing a prompt and just resolution of her claims and the interest in maintaining the appearance and reality of evenhanded justice. See Section II.

Finally, the district court distinguished among the various stages of a case, holding that it would delay one stage (the trial), but would not delay another stage (discovery). The President and his *amici* argue that the courts must delay a case in its entirety, regardless of the actual diversion of the President's time necessary to respond to the particular stage of a case. We agree with the district court that the issue of delay must be considered at each stage of each case. In our view, delay should not be granted unless the President shows that, given the particular stage of the case (e.g., motion to dismiss, deposition, interrogatory), the suit will significantly interfere with his ability to carry out the specific duties of his office then commanding his attention, and that his ability to carry out those duties cannot be preserved by a less drastic alternative

than a potential eight year stay. See Section III.

The standard we propose does not mean that the President is without recourse. As this litigation proceeds, the court can and should be sensitive to the unique demands of the Presidency and thus may fully utilize its authority over the pace and nature of litigation to minimize the demands on the President. The President need not be treated like any other litigant and may be permitted additional time to respond to certain motions or discovery, or be given other accommodations needed, including a temporary stay of proceedings, at a particular stage under particular circumstances. However, in our democracy, no person, including the occupant of the Presidency, should be guaranteed absolute immunity, even though time-limited, for wrongs done to another and unrelated to the office of the Presidency.

#### ARGUMENT

- I. THE DISTRICT COURT WAS CORRECT THAT THE PRESIDENT HAS THE BURDEN OF ESTABLISHING THAT, AFTER THE RESPECTIVE INTERESTS ARE BALANCED, IMMUNITY IS WARRANTED.

The district court found that neither the Constitution nor any court decision provides an authoritative answer on the question presented by this case. The district court also found that in determining the scope of any claim for immunity, the court must balance the respective interests with the burden of establishing the need for immunity on the party seeking immunity. Jones, 869 F. Supp. at 697-98. Based on the limited case law in this area, those findings were correct.

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court unanimously held that in an appropriate case, the President could be compelled to provide evidence in a pending federal criminal case. The Court first held that it was the province of the courts to determine the scope of any privilege, including one asserted by the President. 418 U.S. at 703-05. The Court then held that in determining the scope of any privilege, the Court must balance the competing interests. 418 U.S. at 711-12. The Court held that a generalized interest asserted by the President (in that case, confidentiality) could not outweigh the specific interest in providing relevant evidence in a criminal case. 418 U.S. at 712-13. The Court acknowledged the special care that needed to be taken in light of the unique position of the Presidency and was careful to limit its holding to criminal, not civil, cases. 418 U.S. at 712-16.

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

In Nixon v. Fitzgerald, 457 U.S. 731 (1982), another closely divided court held that the President was one of the officials

entitled to absolute immunity in some instances. Specifically, the Court held that the President was absolutely immune from damages for actions taken "within the 'outer perimeter' of his official responsibility." 457 U.S. at 755.

Noting that "[t]he President occupies a unique position in the constitutional scheme," 457 U.S. at 749, the Fitzgerald court concluded that absolute immunity was warranted for actions taken within the scope of the President's official responsibilities for two reasons.<sup>3</sup> First, "damages liability may render an official unduly cautious in the discharge of his official duties." 457 U.S. at 752 and n. 32. Second, suit could "distract a President from his public duties to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve." 457 U.S. at 753.

As the President acknowledges, the first rationale does not apply here because the complaint is based on actions that allegedly took place before he assumed office. And while the concern about distraction is a real one, Fitzgerald certainly does not hold that an automatic stay is appropriate in all cases during a President's incumbency, especially since that issue only arises in cases where absolute immunity does not otherwise

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<sup>3</sup> In explaining its holding, the Court reviewed the Constitution, history and the common law. The Court held that it must weigh "concerns of public policy, especially as illuminated by our history and structure of our government." 457 U.S. at 747-48. With respect to the President, the Court found that common law provided little guidance and that "the inquiries into history and policy . . . tend to converge." 457 U.S. at 748. In our view, no fair conclusion in this case can be drawn from the limited and fragmentary historical evidence.

attach.

In short, none of these authorities provides a definitive answer to the question raised by this case. In fact, only two clear rules emerge. First, in measuring the need for, and scope of, a claim of immunity, the burden of proof is on the party seeking immunity. Butz, 438 U.S. at 506.<sup>4</sup> Second, as all parties recognize, in determining whether to acknowledge a claim of immunity, the Court must balance the interests of the respective parties and the public interest. Thus, the structure of analysis utilized by the district court was correct.

II. THE DISTRICT COURT WAS CORRECT THAT THE INTERESTS OF THE PRESIDENT, ALTHOUGH SUBSTANTIAL, WHEN BALANCED WITH THE INTERESTS OF PLAINTIFFS, DO NOT JUSTIFY AN AUTOMATIC DISMISSAL OR STAY OF THE ENTIRE CASE.

A. The Interests of the President

The President and his *amici* suggest two major policy interests to support a broad immunity in this case: to prevent the President from being distracted from the duties of his office and to preserve the separation between the executive and judicial branches. As the district court correctly held, neither of these considerations, either separately or in conjunction, militates in favor of a rule that requires the automatic dismissal or delay of all of the proceedings in this case.

The ACLU agrees with the President that he, as any defendant,

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<sup>4</sup> To the extent the President and his *amici* argue to the contrary, they are simply wrong. See Clinton brief at 25, Law Professors' brief at 12-13, United States brief at 16.

may be called upon to expend time in his defense. We also agree that there may be occasions when the time required will be substantial and when the time being spent will divert him from his attention to his duties as President. And we further agree that there is a strong national interest in ensuring that the President not be unduly distracted from his responsibilities as President. Thus, in our view, the first concern raised by the President -- distracting him from his duties--- is an important one.

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

Many suits against an incumbent President are likely to be frivolous.<sup>5</sup> Courts have ample tools at their disposal for quickly dispensing with frivolous litigation, and it is fair to

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<sup>5</sup> According to presidential counsel Lloyd Cutler's office, Mr. Carter hasn't been named in any suits for personal damages except those in which the president is cited along with a number of other defendants and quickly dismissed from the case. Mr. Ford's lawyer, Dean Burch, of Pierson, Ball & Dowd, of Washington, D.C., said the former president has been slapped with a number of suits relating to his pardon of Mr. Nixon, but "To be candid I just refer them to Justice and don't worry about them." None of the suits has survived summary judgment.

"Nixon Ready to Testify," The National Law Journal, 27 (Sept. 29, 1980).

presume that those tools will be quickly employed when the President is a defendant. See Fed. R. Civ. Pro. 12, 12(f), 56. Furthermore, courts have broad authority to impose sanctions on parties and lawyers who file lawsuits "for any improper purpose, such as to harass;" lawsuits that lack "evidentiary support;" and lawsuits that are lacking in legal basis. Fed. R. Civ. Pro. 11. Courts also have the power to award attorneys fees, cite parties for contempt, and impose sanctions under their inherent powers. Id. (committee comments); Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

The President suggests that these devices will be ineffective in preventing frivolous litigation against a President because those bringing the suit are often more interested in the publicity than in the result of the action. However, the attention paid to those bringing allegations against a President comes not from the court proceedings, but from the factual allegations themselves and the media attention surrounding them.<sup>6</sup> Even if the President is given the kind of immunity he seeks -- a stay of proceedings until the end of his Presidency -- a complainant is free to do what has already been done in this case: make public charges and file a complaint. The complainant is free to outline the evidence he will put forth at trial. And

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<sup>6</sup> The President was asked questions about the plaintiff's claims in this suit during a meeting with a prominent world leader. This encounter occurred before judicial proceedings began in this case, and would likely still have occurred even if there were a rule that suits of this kind are stayed until the end of a President's term of office.

he will have an added advantage: he can rightly say that the President has chosen to hide behind presidential immunity rather than honestly confront the charges.<sup>7</sup> The only practical method for dealing with frivolous allegations is swift action under the Federal Rules to dismiss such cases.

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

The concern about the President's time applies equally in the case of injunctive relief sought against the President, whether that injunctive relief is based on actions taken outside or within the scope of his official responsibilities. Even with regard to actions taken within the President's responsibilities, the Supreme Court has implicitly held that such actions may go forward. In the immunity cases, the Court repeatedly cites Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952), for the proposition that "[i]t is settled law that the separation-of-

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<sup>7</sup> If this Court really wanted to guard against the danger of frivolous allegations against a President, it would have to prohibit citizens from making public allegations against the President, whether or not they actually file a complaint or proceed to trial. But such a rule would clearly violate the First Amendment.

powers doctrine does not bar every exercise of jurisdiction over the President . . ." Nixon v. Fitzgerald, 457 U.S. at 753-54.

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

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

Thus, both Youngstown and Nixon must stand for the proposition that distraction to the President, while relevant, is insufficient, standing alone, to justify any absolute immunity or stay. Where the distraction to the President is the principal

factor supporting immunity, the critical issues are how great the distraction is likely to be, whether that distraction can be mitigated through less drastic alternatives than a stay, and what impact a stay will have on plaintiff's competing interests. By definition, those judgments can only be made on a case-by-case basis. Indeed, as we suggest in Section III, in our view, those judgments should be made at each state of each case.

Second, the President and his *amici* argue that presidential immunity is necessary to preserve the separation of powers. The President argues that if a President moved for a continuance on the ground that he had to attend to an urgent matter of national interest, and the Court denied the motion, "would not the Court be substituting its judgment for the President's with respect to matters committed to the Executive Branch?" Clinton brief at 31.

As we have suggested, the President should not be treated as an ordinary litigant. Substantial deference should be given to his assertion, in a particular context, that his official duties require additional time or rescheduling of a particular matter. The history discussed by the President suggests that the courts have been and will be sensitive to the President's unique status. Clinton brief at 32, n. 25.

It is well-settled, however, that the judiciary has not only the power but the duty to review the actions of the other coordinate branches. This principle was established by the U.S. Supreme Court almost two centuries ago in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). More recently, in United States v.

Nixon, the Supreme Court applied this principle to President Nixon's attempt to use a claim of executive privilege to insulate his presidential papers and tapes from a subpoena. In rejecting President Nixon's claim, the Supreme Court relied on the Constitution's grant of power to the judiciary, as well as its own holding in Marbury.

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

#### B. The Interests Of Plaintiffs

As noted, the President and his *amici* do not appear to dispute that in an appropriate case, immunity would not shield the President from being subjected to injunctive relief, even for acts committed at the center of his responsibilities as President. See Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952). This proposition, if accepted, would also appear to suggest that the President could be subjected to injunctive relief for acts committed either before his Presidency or committed during his Presidency but irrelevant to his responsibilities. Thus, for example, a President would

presumably not be permitted to rely on any immunity doctrine, were his or her spouse to seek dissolution of the marriage; and a court would have the authority to resolve issues of child custody and support, notwithstanding that they affected the occupant of the Presidency. See, e.g., Clinton brief at 29-30, n. 23.

Assuming, therefore, that immunity does not automatically prevent the court from issuing injunctions against the President, whether the underlying issues arise out of his duties or not, the President's argument in this case appears to be that any plaintiff's interest in a damages remedy is always significantly less than any plaintiff's interest in injunctive relief.

Although this proposition may often be true, it cannot be said that it is always true. Adoption of the President's absolute view of immunity would thus result in some less important cases, pled to seek injunctive relief, going forward, while other more important cases, pled to seek damages, are long delayed. It is difficult to imagine the justification for such a rule.

In addition, cases seeking damages are often not purely, and sometimes not even primarily, about money. The ACLU takes no position on the motives of the plaintiff in this case. However, we note her assertion that her interest in this case is not in obtaining damages, but in restoring the damage that has been done to her reputation. Delay in obtaining damages can be overcome by the devices suggested by the President, including an award for past action in present dollars or an award of interest; although

to plaintiffs of limited means, that delay may cause them irreparable harm. Damage to one's reputation cannot be overcome. If the plaintiff is correct, both in her version of the events at issue and in her assertion of damage to her reputation, that damage will continue for the years of the Clinton Presidency. In this respect, the harm the plaintiff asserts is continuing harm, as is the harm asserted when a plaintiff seeks injunctive relief. Her interest in repairing the damage she believes has been done to her reputation is no less important than the interest of many plaintiffs seeking forms of injunctive relief. It thus merits no more immunity.

Finally, and perhaps most importantly, the ACLU acknowledges that the nation has an interest in ensuring that the President attend to his awesome responsibilities. However, the nation also has an interest in equal justice under law. Up to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporally. Imbler v. Pachtman, 424 U.S. 409 (1976), Stump v. Sparkman, 435 U.S. 349 (1978) (prosecutors and judges subject to suit for acts outside their official responsibilities). The nation has an interest in ensuring that our system of justice, rightly a matter of national pride, is available to all of its people, regardless of whether the party is high-born or low, holds high office or does not. That interest -- that compelling interest -- is far more important than the facts of this case. That interest, combined with the

other interests of plaintiffs seeking redress for harms, argues against adopting a rule that automatically immunizes the President from civil suits during the duration of his incumbency.

III. THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT THE GRANTING OF IMMUNITY SHOULD BE DECIDED AT EACH STAGE OF A CASE AND NOT FOR THE CASE AS AN ENTIRETY.

The district court concluded that it would delay the trial of this case but would not delay the discovery. In our view, the district court was correct in concluding that the question of a stay or delay of this case should be decided at each stage and not for the case as a whole.

The specific facts of this case illustrate the need to look at the circumstances of each case rather than applying an automatic rule. The President asserted in his motion in the district court that if his immunity claim were denied, he would be likely to move to dismiss on the grounds of statute of limitations, laches, and failure to state a claim. Each of these bases for a motion to dismiss must be established on the face of the complaint, and each presents a pure issue of law. Fed. R. Civ. Pro. 12. It will require little or none of the President's time for his counsel to file and argue those motions. If any of those motions are meritorious, the case will be dismissed and will have required little or no expenditure of time by the President. Accordingly, a generalized concern over the President's time provides no basis for dismissing or adjourning this case prior to resolution of motions to dismiss.

The President and his *amici* challenge the district court's conclusion that there should be an issue-by-issue determination by arguing, with considerable force, that discovery can be as time consuming, and therefore as distracting, as trial. Of course, as suggested above, cases have more stages than discovery and trial, but even looking solely at the discovery stage, it is certainly true that some forms of discovery, such as the President's deposition, would inevitably require a considerable expenditure of his time. However, other forms of discovery, such as production of documents, are likely to require minimal attention by the President. The district court has considerable authority to order that discovery proceed in the manner least disruptive of the President's time. For example, as trial courts have in the past, the district court in this case could require that any questioning of the President be done by written questions. Clinton brief at 41-43; Fed. R. Civ. Pro. 26(c), 31. We do not read the district court's decision in this case as precluding the President from seeking such relief at an appropriate stage.

In short, the President's request for an absolute rule of temporal immunity ultimately rests on three flawed propositions: that suits seeking injunctive relief will always require less expenditure of time than suits seeking damages, that plaintiffs seeking damages always have a less compelling need for immediate relief than plaintiffs seeking injunctive relief, and that all stages of all cases are equally distracting for a President. The

district court properly rejected these propositions and properly held that questions of temporal immunity from civil damages should be decided at each stage of each case.

#### CONCLUSION

For all these reasons, *amicus curiae* the ACLU respectfully asks that the decision of the district court denying automatic, temporal immunity to the President for all stages of this case be affirmed.



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April 28, 1995

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I hereby certify that on April 28, 1995, I caused copies of the foregoing brief to be sent by Federal Express to:

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## INTEREST OF AMICI

The appeal by President Clinton before this Court raises a grave question regarding the degree of personal power conferred upon the President of the United States by virtue of his office. *Amici curiae*, the law professors submitting this memorandum, have published and lectured widely on the subjects of constitutional law in general or on the separation of powers. This brief sets forth their considered views on the issues raised by President Clinton's appeal. It speaks solely to these matters of constitutional principle, and not to the merits or to any other issue regarding this case. *Amici* sign this memorandum on their own behalf and not as representatives of their respective schools.

## STATEMENT

The last several decades have seen a number of sharp conflicts over the relative powers of the President and the government's other branches. Until now, the Executive's arguments have been limited to the assertion of an exclusive right on the part of the President or his subordinates to exercise some official governmental power that might otherwise -- and perhaps more properly -- be shared by two branches, or be within the sole domain of the legislature or the courts.

The pending immunity claim is of a new and deeply troubling kind: for the first time, a purely personal privilege is said to attend the office of the presidency. Though the immunity now claimed is said to be a mere temporal restriction, we believe the argument advanced to support it ignores one of the Constitution's overwhelmingly important goals: to control power. For that reason, the personal immunity claimed cannot be made to fit within the law governing the immunity of federal officials from personal liability for official conduct, or within a coherent view of the relationship between the President's powers and those of the other branches.

## SUMMARY OF ARGUMENT

The arguments submitted in support of President Clinton's claim of immunity from suit start with the proposition that the burden is upon the plaintiff to demonstrate that subjecting

the President to a suit for purely private conduct<sup>1</sup> will not impose an excessive burden upon the office of the presidency, or prevent the fulfillment of the President's duties. We submit that this is incorrect, and indeed that the burden is exactly reversed: we believe that the Supreme Court's separation of powers jurisprudence allows the President to escape the courts' jurisdiction in a civil action dealing with non-official conduct only if *he* can demonstrate that the assertion of such jurisdiction will interfere with his fulfillment of the duties of his office. We submit further that he has not made such a showing.

The President and his amici suggest that this burden rests on the plaintiff because she challenges only private conduct -- so that there is, so it is said, no public interest in the plaintiff's enforcement of her rights. But we believe strongly that this stands the law, and indeed the entire concept of the rule of law, on its head: there is a compelling public interest in assuring that the law -- particularly the Civil Rights Statutes, which enable the people to make real use of essential Constitutional liberties -- is enforced uniformly, and that the presidency (or any other public office) is not used as a shield behind which an individual can hide to avoid equal justice under the law. To ensure that public office is not so used, every public official seeking exemption from the ordinary course of judicial proceedings has the burden of demonstrating that the particular exemption he or she seeks is necessary to the execution of his or her public duties.

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<sup>1</sup> Significantly, the bulk of the private conduct at issue here is particularly distant from the President's official functions, because it allegedly occurred before President Clinton entered office. These allegations must be distinguished from the potentially more difficult situation where the acts at issue were committed while the defendant was in office, but were private in the sense that they were unrelated to his performance of his presidential duties.

We understand that one count of plaintiff's complaint, for defamation, does relate to actions taken by or on behalf of President Clinton while he was in office. We express no view on the extent to which the actions at issue in this Court are within the outer perimeter of his official duties, as that concept is defined by *Fitzgerald*.

In contrast, President Clinton asserts immunity here not on the basis of any particularized conflict with his executive responsibilities. Rather, he says he is immune from this entire case, and from most other entire cases, merely as an incident of holding office, and for as long as he remains in office. Consideration of other cases that might be filed against a President, all well within the very general rule urged upon this Court by the President, the Solicitor General, and to a certain extent the President's academic amici, makes clear that the claimed immunity is far too broad. Instead, the courts are empowered to, and should, protect the President from any specific action, such as a discovery or trial demand, that will actually interfere with the performance of his job.

Secondly, the President's personal lawyers -- although not, as we discuss below, the Solicitor General -- have approached this case as if it were the law that Presidents are immune from suits related to their conduct in office. The academic amici lend some support to this proposition, though the silences in their brief on this point are at least as telling as the statements. Both the President and his amici, however, move from this premise to what they portray as the next question, namely whether the President is similarly immune from suit related to his private conduct.

The premise, however, is wrong, as the President's amici essentially concede. *Nixon v. Fitzgerald* does not hold that the President cannot be sued for his official acts. And in fact, since the Watergate era, a consensus has developed among the lower courts that the President can be sued, while in office, over his official conduct. This amenability to suit even for acts regarding his official duties is a profoundly important mechanism for helping to ensure that the President remains under the law, which defines the scope of his official powers. There is no need for this Court to adopt the President's broad characterization of the immunity of his office. We urge this Court not to do so.

Rather than barring suits over the President's acts, *Nixon v. Fitzgerald* simply forecloses one potential remedy -- an award of damages against the individual -- in such proceedings. It does so for one reason: because the existence of that remedy might distort the President's judgment, preventing him from objectively assessing the factors he must consider as he goes about his duties.

Once it is apparent that *Fitzgerald* is about a particular remedy -- personal payment of damages -- for allegedly improper *official* action, we believe it clear that the case simply does not speak to the question now before this Court. Rather, a correct assessment of President Clinton's immunity claim must be derived from the separation of powers doctrine and specifically from the cases governing the President's amenability to judicial process. Those authorities, we submit, make no room for the President's claim that he is too busy while in office to be held accountable for his personal actions, whether taken while in office or previously. If any immunity is to be created beyond that provided for by existing law (and we perceive the need for none), it is only for Congress to declare and respond to that need.

#### ARGUMENT

I. THE BROAD IMMUNITY FOR WHICH THE PRESIDENT AND HIS AMICI CONTENTEND WOULD BAR MANY CASES WHERE NO PRESIDENTIAL OR OTHER PUBLIC INTEREST WOULD BE HARMED BY SUBJECTING THE PRESIDENT TO LEGAL PROCESS

Because the President attempts to block this entire case, the immunity claim as presented to this Court is quite categorical. The President's argument first is that *no* cases can go forward that relate to his private conduct or his conduct prior to taking office; alternatively he

claims that the burden is upon the plaintiff to show irreparable prejudice if consideration of his or her claim were suspended for as long as the President remains in office.<sup>2</sup>

The President's argument would require that he be exempt during his term of office from numerous obligations to which everyone else in the Nation is held, even though there is no compelling reason for such an exemption. If the President were to default on an ordinary mortgage, for example, we can see no reason why the mortgage holder should be barred from enforcing its rights. They are only financial rights, it is true -- and therefore significantly less pressing than the interest in reputation at issue in this case. This is equally the case if a President were to fail to abate a nuisance on real property, with respect to which his neighbors would otherwise be entitled to injunctive relief. Similarly, if a President's spouse sought a divorce and child custody. As discussed below, the separation of powers cases impose upon the President the burden to show that calling him to account on any such matter would actually interfere with his conduct of his office. He does not explain how such a burden would be created by requiring him to defend actions of this kind, though the rule he contends for would bar each such case.

Certainly it would not be an excessive burden for the President's lawyers to file a motion to dismiss, for example, in any of these hypothetical cases, if the complaint were legally deficient. Such a motion would involve only purely legal issues, with respect to which the President's counsel would be able to act without any significant assistance from the defendant himself. If the motion were denied, an Answer -- at least to a short complaint like the one filed in this case -- would also be no great burden to prepare. Surely fulfillment of this duty cannot

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<sup>2</sup> Perhaps, however, the President's amici would be satisfied with a substantially narrower rule, under which plaintiff may proceed now to obtain discovery from everyone but the President personally. See Brief Amicus Curiae of Law Professors In Support of Appellant William Jefferson Clinton (hereinafter "Amicus Br."), at 16 ("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"). This position is fundamentally inconsistent with the position taken by the President's personal counsel.

reasonably be expected to create an actual impediment to the President's execution of the duties of his office.

As we show in greater detail below, the President may very well be entitled to relief from a particular discovery demand at a particular time, or from a particular demand regarding the conduct or scheduling of a trial. But the law imposes upon the President the burden of demonstrating that he is entitled to any relief from the obligations imposed on any other citizen. obligation to show need to be excused, and even then to be excused merely to avoid some conflict with his official duties. to any relief from the obligations imposed on any other citizen. This is true, the Supreme Court has explained, of the President's obligation to give evidence, *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("the public \* \* \* has a right to every man's evidence" even when that evidence is a confidential official public paper).

The President and his academic amici also suggest that the claim at issue here is less important than other claims might be, and that requiring the plaintiff to wait up to six more years even to prosecute this claim is not a significant burden. We are surprised by this argument as much as convinced that it is wrong. As it is, sexual harassment of the kind alleged here -- a willful sexual degradation -- affects the emotional well-being of anyone touched by it. There is clearly a strong public interest in enforcing the laws providing redress against such conduct by public officials, as Mr. Clinton was when the acts here at issue allegedly took place. Further, the reputational interest at stake is not only highly important: it is deeply compromised by delay. That the plaintiff chose to remain silent about what she has alleged to have happened to her at the time is no basis for watering down the rights she has left when her anonymity is taken from her by actors totally outside her control.<sup>3</sup>

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<sup>3</sup> The President's academic amici even say that, while this case cannot go forward, neighbors of the President might be allowed to sue him now to get an injunction compelling him to abate a nuisance. Amicus Brief at 13. This position is not only surprising for the weight it gives (or fails

II. *Nixon v. Fitzgerald* BARS ONLY DAMAGE SUITS RELATED TO A PRESIDENT'S OFFICIAL ACTS, AND IT DOES SO ONLY BECAUSE THE PROSPECT OF PERSONAL LIABILITY FOR OFFICIAL CONDUCT WOULD PREVENT THE PRESIDENT'S OBJECTIVE ASSESSMENT OF THE FACTS HE SHOULD CONSIDER IN CARRYING OUT HIS DUTIES -- NOT BECAUSE THE PRESIDENT IS TOO BUSY TO ATTEND TO PRIVATE LAWSUITS

In addition to attempting to shift the burden on this issue from the President to the plaintiff, Mr. Clinton's personal lawyers have argued that the Supreme Court's holding in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), requires that courts categorically avoid "subjecting Presidents to liability for the performance of official duties." Opening Brief of President Clinton (hereinafter "Clinton Br.") at 17. This is incorrect. It is essential that *Fitzgerald* be recognized for the narrow decision it is. It bars only a particular remedy. Its analysis is entirely consistent with the other cases discussing the lack of that particular remedy -- and the existence of others -- in cases charging official misconduct by other, less exalted, officials.

An official's liability to pay damages personally for misconduct while in office is one of the tools that can, under certain circumstances, help ensure that the "official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz v. Economou*, 438 U.S. 478, 489 (1978). "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Id.* at 506.

Whether such an action is permissible against any particular official, the Supreme Court has repeatedly made clear, turns on the nature of his or her duties. Thus the Court has adopted what it has called a "functional" approach to the immunity of federal officials for their official misconduct, *Fitzgerald*, 457 U.S. at 746, under which an immunity of "varying scope" is

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to give) to claims of sexual harassment; it is also inconsistent with the position taken by the President.

In making the above arguments, we of course take no position on whether the incidents described by the complaint actually took place.

granted to federal officials depending upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

In the application of these principles the Supreme Court has recognized the danger that the execution of certain public offices might be disrupted if the prospect existed that the officeholder might have to pay damages personally for his or her official actions. Such liability, the cases say, could prevent the officer from acting "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967), quoting *Bradley v. Fisher*, 13 Wall. 335, at 349 note (1872). See also *Ferri v. Ackerman*, 444 U.S. 193, 204-205 (1979) ("[t]he point of immunity for [officials entirely shielded from personal liability] is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion").

For this reason both state and federal judges have exactly the same kind of immunity as the President of the United States: they can never be held personally liable to pay damages for any official action taken within the scope of their duties. *Dennis v. Sparks*, 449 U.S. 24 (1980). So do prosecutors, *Burns v. Reed*, 111 S. Ct. 1934 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993); grand jurors, *Imbler, supra*, 424 U.S. at 422-423; and other officers, both state and federal. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Butz v. Economou*, 438 U.S. at 513 (administrative hearing officers); *id.* at 515 (government lawyers wielding powers analogous to those of a prosecutor).

None of the other officers who possess this immunity from personal damage suits for *official* acts has any protection, however, temporary or permanent, from suits related to his or her private conduct while holding office. This is so because the considerations barring personal liability for official acts have no bearing on the individual's amenability to suit for private conduct.

The briefing submitted on the President's behalf nonetheless contends that *Fitzgerald* barred personal liability for official acts in part because the mere obligation to defend lawsuits -- any lawsuits -- would be an improper drain on the President's time. Similarly, the President's academic amici say *Fitzgerald* rested on several pillars, one of which was the drain on presidential time caused by private litigation. But no other immunity case is founded on that rationale, and neither is *Nixon v. Fitzgerald*: the case simply does not say that an immunity from damages actions should be created, even in part, because the mere fact of being sued would distract the President from his execution of his office. We submit that adoption of this argument would be tantamount to an assertion that, while performing his duties, the President is too busy to obey the law.

The *Fitzgerald* Court did indeed say 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." See Clinton Br. at 18, Amicus Br. at 8, both citing 457 U.S. at 751. But the "diversion" of which the Court spoke is the diversion of his attention a President would suffer if, *in evaluating possible official actions*, he had to worry that one option or another might result in litigation in which he could be held personally liable. The *Fitzgerald* Court barred only those "private lawsuits" seeking to make the President pay out of his own pocket for damages allegedly caused by his *official conduct*. And the Court did so not because the President was too busy to attend to the cases in which such a claim might be made, so that he could not think about such cases and still have time to perform his duties, but because the prospect of the personal obligation to pay damages would distort his judgment *as he did his job*:

As is the case with prosecutors and judges -- for whom absolute immunity is now established, -- a President must concern himself with matters likely to 'arouse the most intense feelings.' *Pierson v. Ray*, 386 U.S., at 554. Yet, as our decisions have recognized, it is in precisely *such cases* that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office. *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979). \* \* \* Cognizance of *this* personal vulnerability 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.

451 U.S. 751 (emphasis added). The arguments on behalf of President Clinton misapprehend this proposition, and attempt to transform it into the far different assertion -- which the Supreme Court did not make -- that private damages actions would force the President to think about such cases instead of thinking about his job. Neither *Fitzgerald* nor any other case of which we are aware so holds. Rather, the language in these cases about the burden of being a defendant reflects the Supreme Court's concern about the impact of litigation regarding official acts.<sup>4</sup> Any effort to make the cases say that the problem is litigation *per se* must begin by taking the relevant language out of context. It also ignores the Court's admonition in *Fitzgerald* held that "the sphere of protected action must be related closely to the immunity's justifying purpose." 457 U.S. at 755.<sup>5</sup>

Since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) through *United States v. Nixon*, 418 U.S. 683 (1974), and extending beyond *Nixon v. Fitzgerald* and into the present,

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<sup>4</sup> The one difference between the other immunity cases and *Nixon v. Fitzgerald* is that the possible harm from interference with the President's exercise of his discretion, caused by the imposition of personal liability for a faulty exercise of that discretion, is greater than it is from such interference in the exercise of discretion by other office holders. The concern about the unique scope of the President's duties, and of judicial interference therein, is shared by the other cases dealing with judicial review of discretionary choices by the President himself, see *e.g.*, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1868), and manifests the courts' traditional reluctance to review the substance of the President's decisionmaking unless it is absolutely necessary. The short discussion in Part IV.B of the Supreme Court's *Fitzgerald* decision deals with this principle, and the result is, in part, based on this consideration. See 457 U.S. at 754-755. But this reluctance has no place in this case, which does not relate to the President's official actions

<sup>5</sup> The President's academic amici repeatedly cite a lone concurrence by Justice Scalia, in *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2789 (1992), in support of their broad reading of presidential immunity. But even Justice Scalia -- who is clearly the most vigorous proponent of presidential powers now on the Supreme Court -- argued only against the issuance of injunctive relief against the President *related to his execution of his duties*, on the ground that "[i]t is incompatible with his constitutional position that he be compelled personally to defend *his executive actions* before a court." *Id.* at 2789 (emphasis added). In any event, for better or worse, Justice Scalia's views on the scope of presidential power have been repeatedly and definitively rejected by a majority of the Supreme Court. See *Mistretta v. United States*, 499 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988).

the lower courts have come to agreement on the principle that the President is amenable to suit, *even* in his official capacity, when his presence as a defendant is absolutely necessary. There is now "no room for any difference [of opinion] as to the President's amenability to legal process." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 612 (D.C. Cir. 1974). If a plaintiff is entitled to relief and relief can only come from the President, the courts will require the President to afford relief. See, e.g., *id.*; *Romer v. Carlucci* and *Western Solidarity v. Reagan*, 847 F.2d 445 (8th Cir. 1988); *Minnesota Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973); *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972).<sup>6</sup> The President's academic amici point out, correctly, that such judicial second-guessing of official presidential actions is to be avoided when possible; and indeed, both before and after *Fitzgerald*, the courts have used a variety of other requirements, including standing, ripeness, and the political question doctrine, to avoid reaching the merits of cases against the President.<sup>7</sup> Even the President's amici do not say courts can never assert jurisdiction over the President in a case about his official duties. And to our knowledge no case holds that the mere fact that he is President makes the Chief Executive immune from a suit challenging his official acts. See also L. Tribe, *American Constitutional Law* 278 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

We urge this Court not to reach a conclusion, or to embrace reasoning, inconsistent with this law. "In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, Mr. Chief Justice Marshall commented (5 U.S. (1 Cranch) at 162-63) upon the importance of providing an individual with a

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<sup>6</sup> A thorough and useful analysis of the relevant precedents, of which there are many, is set forth in Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L. J. 739 (1992).

<sup>7</sup> A relatively complete collection of these arguments appears in the various opinions in *Goldwater v. Carter*, 444 U.S. 996 (1979). None of those opinions suggests that President Carter was immune from the suit, which concerned his termination of the United States's treaty with Taiwan. Insofar as immunity is a threshold doctrine, one would have expected to see it raised if the government thought it applied.

remedy when he is injured by a violation of law and noted the availability of the King himself in Great Britain as a defendant in such a situation." *National Treasury Employees Union, supra*, 492 F.2d at 609. A decision that the President is not amenable to judicial process would make achievement of this important goal impossible.<sup>8</sup> See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (courts must be open to litigants in a ripe controversy seeking to compel the President to stay within the confines of his war powers).<sup>9</sup>

### III. SEPARATION OF POWERS PRINCIPLES REQUIRE THAT THE PRESIDENT BE SHIELDED ONLY FROM SPECIFIC DEMANDS ON HIS TIME THAT WOULD ACTUALLY INTERFERE WITH HIS DUTIES

Because we believe that *Fitzgerald* does not speak to the question before this Court, we submit that the appropriate resolution of the President's immunity claim should be guided by other separation of powers cases, dealing with the President's amenability to process and with the standards governing separation of powers disputes. Those standards, we submit, make clear that this case should be permitted to go forward now.

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<sup>8</sup> A number of other precedents, both in and out of court, show that Presidents have been directed to provide testimony. These authorities are directly relevant to the pending immunity claim, because they speak to the question whether the President's duties prevent his compliance with the orders of a court. The conclusion in each of these instances was that his duties were no basis for excusing him from such compliance. See generally I Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (West Pub. 2d ed. 1992) §7.3. At §7.1, the same Treatise lists voluntary and involuntary presidential appearances going back 200 years. See *id.* at 571-583.

<sup>9</sup> Significantly for present purposes, the government's response to this development has been neither public protest nor explicit agreement, but silent acquiescence. In the clearest and most elaborate appellate holding of which we are aware that the President can be named as a defendant when necessary, the government obeyed a court of appeals decision directing the President to afford relief, and did not petition for certiorari. *National Treasury Employees Union, supra*. This is consistent with the fact that, before this Court as in the court below, the Solicitor General has not joined in the constitutional argument advanced by the President's personal counsel. Inasmuch as one of the Solicitor General's most important functions is to defend the Constitutional powers and prerogatives of the presidency, we find his refusal to make this argument quite telling.

While the burdens of the presidency are great, Chief Justice Marshall observed when he subpoenaed President Jefferson that "this demand is not unremitting." *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807).<sup>10</sup> The Supreme Court's cases dealing with the separation of powers, like those in all federal courts focused specifically on the President's amenability to judicial process, make clear that the appropriate inquiry in evaluating a claim of presidential immunity is whether the specific presidential conduct sought will actually interfere with the President's execution of the duties of his office. A generalized assertion like the one offered here, that whole categories of cases pose too great a burden because the President is too busy to attend to them, is not enough to justify the suspension of personal responsibility for which the President asks.

- A. Under General Separation Of Powers Principles, Immunity From Suit Regarding Private Conduct Can Be Justified Only If President Clinton Can Show That His Amenability To Suit Would Actually Interfere With His Fulfillment Of the Duties Of His Office

As Justice Powell explained in his concurrence in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 963 (1983), "the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." The first of these two

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<sup>10</sup> President Jefferson is one of the authorities commonly cited (see, e.g., Amicus Br. at 11) for the proposition that Presidents are not amenable to judicial process; Jefferson insisted no subpoena should have issued in *Burr*, and he said his subsequent release of the documents there demanded was "voluntary." See generally 9 *The Writings of Thomas Jefferson* (Ford ed.) 63-64. Chief Justice Marshall, however, disagreed with Jefferson; held him amenable to process; and ordered him to produce the documents. Because "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803), Chief Justice Marshall has prevailed in this disagreement, which is why the Supreme Court followed his view, and not Jefferson's, in *United States v. Nixon*. See *id.*, 418 U.S. at, e.g., 713.

inquiries is the relevant one here: President Clinton argues that subjecting him to suit while in office would interfere unduly with his performance of his official functions.

In *Nixon v. GSA*, the Court articulated this standard, and applied it to resolve whether a challenged action "interfere[s] impermissibly with [another branch's] performance of its constitutionally assigned function:"

in determining whether [a challenged act] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 71-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443. See also *Mistretta v. United States*, 488 U.S. 361 (1989) (question is "the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions").

In *Nixon v. GSA* the Court upheld a statute stripping former President Nixon of control over his presidential papers, because he could not show that the challenged provisions would disrupt the conduct of duty by the Executive Branch. Similarly, in *United States v. Nixon*, the Court required the President to provide subpoenaed documents, in large part because no specific claim had been made of a "need to protect military, diplomatic or sensitive national security secrets." Rather, the claimed privilege was said to "depend[] solely upon the broad, undifferentiated claim of public interest in the confidentiality of [presidential] conversations." 418 U.S. at 706. This generalized assertion of privilege, the Supreme Court held, had to yield to the prosecutor's demand for information in connection with a simple criminal trial.<sup>11</sup>

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<sup>11</sup> Ignoring all of the above law, the President's academic amici assert that the burden is on the plaintiff to justify the assertion of judicial power over the Mr. Clinton, and they quote a line from *United States v. Nixon* in which the Court explained that it had ordered Mr. Nixon to produce evidence because there had been a "demonstrated, specific need for evidence." Amicus Br. at 12. Amicis' use of this short quote ignores the central fact that the Supreme Court in that case had required such a showing only *after* it had satisfied itself, by reviewing a number of directly applicable

Because no specific burden on President Clinton is yet at issue in this case, these precedents require the Court to attach significantly less weight to the President's claim of immunity. To demonstrate the need for protection from suit while in office at this threshold stage of the case, the President must offer more than a hypothetical assertion of interference with his ability to perform his constitutionally assigned functions. If this litigation proceeds and the President complains of undue burden, the district court has ample discretion to adjust the proceedings for good cause, to consider motions to limit discovery, and otherwise to protect the presidency.

B. Cases Dealing With The President's Amenability To Process Also Require The President To Make A Specific Showing Of Conflict With His Duties In Order To Escape Any Particular Court Order

When Chief Justice Marshall subpoenaed President Jefferson, he noted that a court can protect the President from being harassed by vexatious and unnecessary subpoenas by its conduct after rather than before issuance. *United States v. Burr*, 25 F. Cas. 30, 34 (CC Va. 1807). See also *United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990) (while "it is settled that a President, whether former or incumbent, may be subpoenaed to be a witness in judicial proceedings in an appropriate case," courts have attempted "to exercise this power in a way that would be least damaging to the Presidency or onerous to the particular individual occupying the Office, to the extent that this was possible and consistent with the rights of the litigant who was in need of such testimony"). This approach "balances the accountability of the President with the practical demands of his office; it gives the courts the discretion to evaluate a President's claim of hardship in the

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precedents, that a presidential privilege existed (in the confidentiality of *official* papers). Once such a privilege is found to exist, a party seeking to overcome it must indeed explain why the privilege has to yield. Here, however, the issue is the antecedent question *whether* the immunity claimed exists in the first place. The law, as we discuss above, is that, to prove the existence of this or any other privilege, the party asserting it must show why it is necessary to enable him to carry out his official duties. The assertion to the contrary by the President's amici is thus incorrect.

context of particular demands and to adjust his ordinary obligations to the legal system in light of those hardships." Ray, *supra*, 80 Ky L. J. at 812.

Especially because this approach fits with the way the Supreme Court has analyzed other, analogous separation of powers problems, see *Nixon v. GSA, supra*; *Mistretta v. United States, supra*, we submit that this is in fact the appropriate inquiry: to avoid a particular kind of judicial process President Clinton must point to a specific form of interference in the conduct of his duties that would be caused if such process issued.<sup>12</sup> A mere general assertion that he will be forced to spend all of his time attending to private legal obligations is not sufficient.<sup>13</sup>

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<sup>12</sup> Once he identifies a specific action required of him, however, and a specific reason why he cannot perform it, the proof he need offer to justify adjustment of the burden need not be overwhelming. In *United States v. Nixon* the Court emphasized that it would show "the utmost deference" when national interests are asserted as a reason for the courts to lift a litigation burden from the President. 418 U.S. at 710. Similarly, if more generally, a district court should be willing to alter the timing or scope of discovery sought from the President on the basis of his assertion of "a facially legitimate and bona fide reason" for such a change. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Consistently with this standard, the courts have quite properly been deferential to a Presidents' assertion that a particular presidential action cannot be performed as, or when, requested. See *infra* Part IV.

<sup>13</sup> To the extent that any greater protection is necessary for the President, it is within Congress's power under the Necessary and Proper clause of Article I to authorize less expansive protections, such as indemnifying the President from the costs of a civil suit if he prevailed. (A similar protection is afforded by the Ethics in Government Act, 28 U.S.C. §593(f).) The legislature exercised this very power when it enacted the Soldier's and Sailor's Civil Relief Act of 1940, 50 U.S.C. app. §§501-91. That act -- which does not protect the President or other civilians who govern the military, such as the Secretary of Defense -- represents the sort of immunity for which the President asks. (Because it applies only during a period of national emergency, it would not bar this action even if it did protect the President.)

Congress's decision not to insulate the President in this way should be respected. As Justice Jackson explained in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (emphasis added), the President's powers are at their lowest level when he claims prerogatives "incompatible with the expressed *or implied* will of Congress." We submit that the legislature's decision not to protect the President from civil suit, even temporarily during a period of national emergency, represents a judgment that should not be second-guessed by this Court.

#### IV. A WIDE VARIETY OF TOOLS IS AVAILABLE TO THE COURT TO PREVENT THE USE OF LITIGATION AS A TOOL OF HARASSMENT

There is probably no federal court in which baseless cases have not been filed against public officials for improper motives, including the plaintiffs' opposition to the defendants' substantive policies. See, e.g., *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (damages action against, inter alia, President Reagan and British Prime Minister John Major for their order that certain targets in Libya be bombed). Many such cases can be dismissed for failure to state a claim. See *id.*; *Komasinski v. Internal Revenue Service*, 588 F. Supp. 974 (N.D. Ind. 1984) (dismissing suit for failure to state a claim and for bad faith in using a complaint to advance a political, rather than a legal claim).<sup>14</sup> In addition, if appropriate, sanctions may be imposed on the litigants and/or their counsel. See *Saltany*, 886 F.2d at 440; *Komasinski*, 588 F. Supp. at 979 (requiring individual plaintiff to pay attorney's fees to government defendants because action was brought "for philosophical reasons rather than because of a sincere belief that a right had been violated").<sup>15</sup>

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<sup>14</sup> See also 28 U.S.C. §1915(d) (authorizing dismissal of in forma pauperis cases when the court is satisfied that the action is frivolous or malicious).

<sup>15</sup> President Clinton argues that the mere act of opening the courthouse door to private actions will cause an avalanche of such cases, and that people who are substantively opposed to a particular President's platform will use the courts to attempt to embarrass the President politically and to frustrate his efforts to implement the platform on which he was elected. The President implies that this case is indeed such an effort. We do note, however, that there has been no such deluge until now. We perceive no basis for predicting one in the future.

Moreover, we have no way of knowing what the plaintiff's reasons are for prosecuting this case. We believe strongly, however, that they are irrelevant to the question now before this Court. If it is meritorious this case should go forward, and the plaintiff should prevail, on the same time schedule she would face if she were suing anyone else, subject to the adjustments that are demonstrably necessary to accommodate the President's duties -- adjustments, we wish to emphasize, that it is essential for courts to make and that they can and should make. If the case is meritless, and instead a political vendetta of some kind, the courts have many established tools for dealing with it, which are used often and successfully against baseless cases brought for improper motives against public officials. Use of these tools is vastly better than the law the President asks this Court to make: that he is unaccountable for his private actions precisely when his power is at its zenith.

The standard rules governing the subjection of the President to legal process are also capable of dealing with cases alleging conduct witnessed only by the plaintiff and defendant, and which may therefore be more difficult to dispose of on a threshold motion. Indeed, Section 1983 claims are often brought for actions witnessed only by the plaintiff and defendant -- an archetypical example is the charge of police brutality. The courts have responded to this problem not by barring such cases but by imposing heightened pleading requirements and by an increased willingness to dispose of such cases on summary judgment. See, e.g., *Arnold v. Jones*, 891 F.2d 1370 (8th Cir. 1989); *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987).<sup>16</sup> There is no reason why analogous requirements could not be imposed here. Such requirements are also often used to bar discovery in clearly meritless cases. Similarly, discovery from the President might only be permitted if a plaintiff can offer corroboration of some kind that his or her claims have a factual basis.

In the same vein, it has long been the law that discovery from the President may only be had if no other source is available for the same material. See, e.g., *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989); *United States v. Mitchell*, 385 F. Supp. 1190 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 933 (1977); *cf. United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (the party seeking documentary discovery from the President must clearly establish its materiality). Indeed, changes made to Federal Rules of Civil Procedure 26-37 by the 1983 and 1993 amendments empower -- and indeed oblige -- the district courts to prevent harassing discovery against any party, even one less exalted than Mr. Clinton.

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<sup>16</sup> While a heightened pleading requirement was rejected in *Leatherman v. Tarran County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993) for municipalities, the Supreme Court expressly disclaimed any intention to affect the law on the liability of individual official actors. See *id.* at 1162 (noting "that, unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified -- under § 1983").

Similarly, the President's personal attendance at a trial has, to our knowledge, never been required; now that videotape depositions are available there is little reason to expect that such attendance would ever be necessary in any but the most singular circumstances. See *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975). Documents subpoenaed from the President are routinely scrutinized *in camera* for relevance, as required by *United States v. Nixon*, and nonresponsive material is not turned over to the discovering party. *United States v. Nixon*, 418 U.S. at 715-716; *United States v. Poindexter*, 732 F. Supp. 135 (D.D.C. 1990). In *Poindexter*, President Reagan was also given the unusual right to have his counsel review the defendant's *ex parte* submissions to the court setting out his discovery plan and defense strategy. 732 F. Supp. 163, 164 (D.D.C. 1990).<sup>17</sup>

V. THE ABSOLUTE TEMPORAL IMMUNITY PRESIDENT CLINTON SEEKS IS FUNDAMENTALLY INCONSISTENT WITH THE CONSTITUTION'S EFFORT TO ENSURE THAT ALL OF THE POWERS IT CONFERS ARE CHECKED AND BALANCED

If there is any theme at all to the Constitution's separation of powers, it is that every grant of power must be counterbalanced by an effective, contemporaneous, corresponding restraint: the doctrine pervades the architecture of the Constitution in order "to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). One profoundly important restraint binding the President, who participates in the creation of federal law and superintends its execution, is that he is bound by that law equally while he wields those great powers as when he does not. The provisions invoked in the complaint in this case -- 42 U.S.C. § 1983, and the Equal Protection and Due Process clauses of the Fourteenth Amendment -- are part of this law. For precisely this reason "[n]o man in this country is so high that he is above

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<sup>17</sup> The availability of these unique protections shows that analogy to the criminal context, which both the President and the Solicitor General offer as a tool for analysis, is inappropriate. Criminal prosecution of a sitting President is problematic because imprisonment would quite clearly prevent the President from doing his job. A flexible order that, at some time convenient to the President, he sit for his deposition, is simply not the same thing. This President and others have in fact been questioned in legal proceedings without any untoward consequences.

the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Davis v. Passman*, 442 U.S. 228, 246 (1979), quoting *United States v. Lee*, 106 U.S. 196, 220 (1882).

Obedience is enforced by the courts, often at the behest of the people the law was designed to protect, rather than by the government acting on their behalf. The President's obedience is no less necessary -- and no less important to the Nation -- because compelled in this way.

### CONCLUSION

Although the separation of powers doctrine exists as our "greatest security against tyranny," *Mistretta v. United States*, 488 U.S. at 381, many disputes about the doctrine are far removed from any real threat of the exercise of unconstrained power. See, e.g., *Bowsher v. Synar*, *supra*; *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). The absolute temporal immunity President Clinton claims here, however, would eliminate the only mechanism that now enforces his obedience of the law he is empowered to execute. The important laws at issue in this case are among those he is charged with enforcing, and we can see no reason to enable him to completely shield himself now from accountability for any breaches of that law.

The Supreme Court's cases clearly place upon the President the burden to explain why the license he seeks is necessary. We believe he has not borne that burden. Rather than issuing one dramatic ruling, liberating him and every successor from the obligation to respond in court like everyone else, we submit that this Court should require the President to explain how any particular demand of him in this case would interfere with his ongoing obligations. Instead of categorically consigning this plaintiff to legal limbo for several years, the trial court can then use its discretion to prevent any disruption of the presidency from this plaintiff's mere efforts to enforce her rights.

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