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[Paula Jones Pleadings File] [6]

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1050/1167EALR

Paula Corbin Jones Appellee vs. William Jefferson Clinton Appellant ---------- United States of America, et al Amicus Curiae	*	Appeal from the United States District Court for the Eastern District of Arkansas

Motion of the Law Professors for leave to participate in the above matter as amicus curiae has been filed. The parties are hereby notified that they have ten (10) days to file written objections to the motion. If at the end of that time no objections have been filed, the motion for leave to participate as amicus curiae will be granted. The amicus will thereafter comply with the briefing schedule established herein. Participation in oral argument will be allowed only to the extent that time is relinquished by one of the parties.

May 10, 1995

Order Entered Under Rule 27B(a):

Michael E. Gans

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

5-10-95

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 95-1050 & 95-1167

PAULA CORBIN 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

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE
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PRELIMINARY STATEMENT

There Is No Jurisdictional Basis For Certain Aspects Of The Plaintiff's Appeal.

We respectfully submit that the Court lacks jurisdiction to hear two of the three issues raised on cross-appeal by the plaintiff Paula Corbin Jones ("plaintiff").[1]

A. There Is No Jurisdiction To Hear The Plaintiff's Challenge To The District Court's Order Of February 24, 1995, Staying Discovery Pending This Appeal.

As part of her third issue, the plaintiff challenges a portion of the District Court's February 24, 1995 order staying discovery in this matter pending appeal. (Jones Br. at x, 47-49). Even if an order staying discovery were subject to appeal, the plaintiff has lost any opportunity to challenge any aspect of that ruling because she failed to notice appeal of the February 24 order, as required by the Federal Rules of Appellate Procedure ("Rule") 3(a).

On December 28, 1994, the court below issued an order denying the President's Motion to Dismiss on Grounds of Presidential Immunity. (Add. 1-22) ("Order"). President Clinton promptly noticed an appeal of this Order and moved to stay all proceedings below. On January 17, 1995, the plaintiff noticed a cross-appeal of the December 28 Order.

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[1] The plaintiff did not assert any jurisdictional basis for her issues on appeal, relying generally instead on President Clinton's Preliminary Statement. (Opening Brief of Appellee/Cross-Appellant Paula Corbin Jones ("Jones Br.") at vii).

Over a month later, the District Court granted the President's Motion To Stay Pending Appeal. The plaintiff has never filed a notice of appeal from this second order.

"An appeal . . . must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Fed. R. App. P. 3(a) (emphasis added). The plaintiff's time to file a notice of appeal from the February 24 order expired before she filed her appellate brief. See Fed. R. App. P. 4(a)(1). As this Court has recognized, "[t]he timely filing of a notice of appeal is mandatory and jurisdictional." Bartunek v. Bubak, 941 F.2d 726, 728 (8th Cir. 1991). See also Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988) (same).

Nor can the plaintiff rely on her notice of appeal from the December 28 Order to bootstrap jurisdiction for her appeal of the subsequently-issued stay order. Pursuant to Rule 3(c), a notice of appeal "must designate the judgment, order, or part thereof appealed from." "Omission of any reference to the order appealed from is more than a technical deficiency; it creates a jurisdictional bar to the appeal." Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940, 946 (8th Cir. 1994). This Court therefore should not address the plaintiff's arguments with regard to the February 24 order.

B. Jurisdiction Also Is Lacking To Challenge The Trial Court's Decision To Defer Trial.

We also submit that jurisdiction is wanting for the plaintiff's second issue, which asks this Court to overturn the District Court's decision to stay trial. (Jones Br. at x, 38-47). "An order staying civil proceedings is interlocutory and not ordinarily a final decision for purposes of 28 U.S.C. § 1291." Lunde v. Helms, 898 F.2d 1343, 1345 (8th Cir.), cert. denied, 498 U.S. 897 (1990).[2]

Orders to stay proceedings are not subject to immediate appeal unless they are "tantamount to a dismissal and . . . effectively end[] the litigation." Boushel v. Toro Co., 985 F.2d 406, 408 (8th Cir. 1993). Even indefinite stays are not immediately reviewable if they contemplate further proceedings in federal court. Id.; Lunde, 898 F.2d at 1345. The stay of trial ordered below is not indefinite, but would terminate upon President Clinton's departure from office, at which time federal proceedings would resume. It therefore does not effectively end the litigation.

Thus, it is clear that the Court would lack jurisdiction to review the stay of trial, standing alone. Nor

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[2] Before the District Court, the plaintiff conceded that in all likelihood, a stay of proceedings would not be subject to interlocutory appeal. Recognizing this, she urged the trial court to dismiss the complaint, rather than stay the litigation, in the event that it found the President enjoyed temporary immunity. See Memorandum in Support of Paula Jones' Response In Opposition To President Clinton's Motion To Dismiss On Grounds Of Presidential Immunity (filed Oct. 21, 1994) at 67-68.

does it appear that the plaintiff may use President Clinton's appeal of the District Court's refusal to dismiss or stay the entire litigation based on presidential immunity, which is properly before the Court, as a vehicle to challenge the otherwise unreviewable decision to stay trial. See Swint v. Chambers County Commission, 115 S. Ct. 1203, 1209-12 (1995) (order denying motion for summary judgment was not subject to immediate appeal concurrent with order denying qualified immunity); McKesson Corp. v. Islamic Republic of Iran, Nos. 93-7167 & 93-7168, 1995 WL 217047 at *7 (D.C. Cir. Apr. 14, 1995) (no jurisdiction to hear cross-appellant's challenge to discovery order even though appeals court had jurisdiction to hear appellant's appeal of denial of sovereign immunity). Accordingly, we respectfully submit, the District Court's order staying trial is not subject to appellate review at this time.

SUMMARY OF ARGUMENT

The President asserts a limited immunity that would reasonably accommodate the plaintiff's right to seek redress in the courts, and the public's right to have the person they elected President available to perform the unique and demanding responsibilities of that Office. The plaintiff's approach, on the other hand, would permit no such accommodation. It would allow anyone to walk into a federal or state courthouse, file the most minimal, colorable claim, and force the President to attend to that litigation to the detriment of his constitutional responsibilities.

Rhetoric about placing the President "above the law" is not warranted here. The President does not seek to evade accountability for private conduct. He is willing to be called to account for his conduct and to be subject to the risk of liability as soon as he leaves office. He claims no privilege that would not be granted to the lowest private in the military under the Soldiers' and Sailors Civil Relief Act.

The central premise of the plaintiff's brief -- that foregoing damages against a President, while in office, would subvert constitutional checks and balances on presidential overreaching -- has been rejected by the Supreme Court. Nixon v. Fitzgerald, 457 U.S. 731, 751 n.31, 757 (1982). (See infra, Part I). Contrary to plaintiff's

contentions, Fitzgerald was as concerned with preventing the burdens of civil litigation from distracting a President from his duties, as it was with preventing litigation from inhibiting presidential decisionmaking. This is evident both from language in the opinion, and from the nature of the immunity the Fitzgerald Court extended to the President. (See infra, Part II).

Defending civil damages litigation such as this would impose extensively on the President's ability to devote time and attention to official duties. (See infra, Part III). The statements of plaintiff's own counsel refute the contention that this is a simple case. They told the media that they intend to exhaustively pursue far-reaching discovery into the President's conduct, including purported incidents beyond those alleged in the complaint, and will possibly seek a court-compelled physical examination of the Chief Executive. (App. 117-18).

> What we're pretty excited about is . . . [that] [w]e'll be able to ask the President certain pertinent questions . . . . Was this a pattern of conduct that involved the use of police for private functions that would not be . . . part of their duty? Are there other women involved? Who are they? . . . [A]ll is on the table in the discovery deposition, including evidence that can lead to admissible evidence. So it's a pretty wide-ranging effort that can be used to present a good case for our client.

(App. 122-23).

The plaintiff and supporting amici concede that the President is not to be treated as an ordinary litigant.

They contend nonetheless that a President's unique needs should be accommodated on a piecemeal basis, by requiring the President to demonstrate repeatedly throughout the litigation that defending this suit will unduly interfere with official duties. We submit that this approach would be far too burdensome to the Presidency, and would tread upon the separation of powers. (See infra, Part III(B)).

The plaintiff sets forth a number of hypothetical claims that purportedly would go unanswered if this Court recognizes the limited immunity invoked by President Clinton. Any ruling here will not affect the viability of other kinds of claims against a President. That such claims would ever be brought against a President, moreover, is highly speculative.

For example, even without the threat of suit, adverse publicity alone would be sufficient to deter a President from failing to pay a personal debt or failing to support a divorced spouse or child. Any litigation over a debt would solely involve financial damages, moreover, and there is no reason why it could not be handled in the same manner as we propose here. Domestic relations cases, on the other hand, typically involve consent decrees, the kind of injunctive relief that would not be foreclosed by any ruling in this case. There are, moreover, mechanisms that have been developed under existing domestic relations law for handling divorce, custody and support disputes even though one

of the parties is temporarily unavailable. These could easily be adopted to any such case that may arise involving a President. (See infra, Part IV).

Finally, the plaintiff asserts that the District Court abused its discretion in staying trial against both defendants until the President leaves office, and in staying discovery on the claims against Trooper Ferguson pending this appeal. As set forth in our Preliminary Statement, we believe that these issues are not properly before this Court. In any event, the stays issued by the District Court were required by presidential immunity. Even if they were not, they would be well within the sound discretion of the court to manage its own docket and to avoid duplicative and piecemeal litigation. In re United States Abatement Corp., 39 F.3d 556, 560 (5th Cir. 1994); Lunde v. Helms, 898 F.2d 1343, 1345 (8th Cir.), cert. denied, 498 U.S. 897 (1990). (See infra, Parts VI-VII).

ARGUMENT

I. DEFERRING PRIVATE CIVIL DAMAGES LITIGATION AGAINST A SITTING PRESIDENT DOES NOT PLACE HIM "ABOVE THE LAW" OR FREE HIM FROM ACCOUNTABILITY FOR PERSONAL MISCONDUCT.

Contrary to plaintiff's assertion, temporarily deferring this litigation would not place the President "above the law" (Jones Br. at 4-5), and would not subvert the constitutional principle of checks and balances by making the Presidency "a safe haven from any personal accountability." (Id. at 11) (emphasis added).

The plaintiff's contentions are premised on an inaccurate characterization of the limited immunity invoked by the President. President Clinton is not seeking absolute immunity. He does not ask to be excused forever from answering the plaintiff's claims, or from subjecting himself to the risk of liability. Nor does he suggest that Presidents generally should not be accountable under law for personal conduct. The only issue here is *when* a private civil claim for damages against an incumbent President will be heard; not *whether* it will be heard. The plaintiff's underlying premise, therefore, is incorrect.

Moreover, the chief tenet of plaintiff's argument -- that "[t]he founders' concept . . . [of] constraints on executive power will not work if the executive is not accountable under the law while he holds power" (Jones Br. at 12) -- was rejected by the Supreme Court in Nixon v. Fitzgerald, 457 U.S. 731 (1982).[3] Fitzgerald held that Presidents are absolutely immune, *during* their tenure in office as well as after, from liability for civil damages for official misconduct, and repudiated the argument that this would place Presidents "above the law" or undermine consti-

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[3] In this and many other respects, the plaintiff's opposition is based substantially on the reasoning and sources employed by the dissent in Fitzgerald, which by definition were not accepted by the majority of justices on the Supreme Court.

tutional principles of official accountability. Id. at 751 n.31, 757.

Specifically, the Court held that immunizing Presidents absolutely from a damages remedy for official acts "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive."

> There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

457 U.S. at 757 (footnotes omitted). See also id. at 758 n.41 (the assertion that immunity "places the President 'above the law' . . . is rhetorically chilling but wholly unjustified"); id. at 759 (Burger, C.J., concurring) ("It strains the meaning of the words used to say [that immunity from civil damages] places a President 'above the law.'").

So too here, merely deferring litigation of a private civil damages claim -- a far more modest accommodation to the Presidency than denying damages altogether -- does not threaten the Founders' concept of checks and balances. First and most significantly, a President still would be subject to liability in damages for personal misconduct, an extremely effective deterrent. Second, all the "formal and

informal checks" listed in Fitzgerald, above, apply with equal force to a President's personal conduct as to his official conduct. Accordingly, the principles invoked by the plaintiff are not subverted. (See President's Opening Brief ("Pres. Br.") at 34-38).

The plaintiff's discussion of the constitutional history of the Presidency, as well as the cases of United States v. Nixon and United States v. Burr, similarly relies on rhetoric rather than legal analysis. (Jones Br. at 13-17). The plaintiff asserts that those cases stand for the proposition that Presidents, like all other citizens, are subject to judicial process. (Id. at 16). That is accurate as far as it goes. However, Nixon and Burr also stand for the proposition that courts are to show the utmost deference possible to the Presidency, consistent with the fair administration of justice. United States v. Nixon, 418 U.S. 683, 707, 715 (1974) (citing United States v. Burr, 25 F. Cas. 187, 190-92 (C.C.D. Va. 1807) (No. 14,694). The immunity asserted here -- temporarily deferring civil litigation until the defendant leaves office while preserving the plaintiff's right to pursue a damages remedy -- is consistent in all respects with Burr and Nixon, and does not place the President beyond judicial process.

II. THE PLAINTIFF'S READING OF FITZGERALD IGNORES THE SUPREME COURT'S CONCERN THAT PRIVATE CIVIL CLAIMS COULD DISTRACT PRESIDENTS FROM THEIR OFFICIAL DUTIES.

A. The Fitzgerald Court Was Concerned About The Burden Of Litigation.

President Clinton does not dispute that the holding in Fitzgerald was motivated in part by concern that potential tort liability for official conduct would chill the exercise of discretionary presidential authority. But the plaintiff's brief refuses to acknowledge the Court's concomitant concern that Presidents not be drowned in a sea of litigation, to the detriment of their ability to perform their constitutional duties. (Jones Br. at 17-29). Thus, the plaintiff quotes a portion of a passage from Fitzgerald dealing with the former concern (id. at 27-28), but omits the remainder of that passage that makes clear that the Court was equally concerned with the latter:

> Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

457 U.S. at 752-53 (footnote omitted).[4]

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[4] Chief Justice Burger also observed that civil suits against a President would both "inhibit the processes of Executive Branch decisionmaking and impede the functioning of the Office of the Presidency" because they would have the "serious effect of diverting the attention of a President

(continued...)

It is significant as well that the Fitzgerald majority ruled in favor of President Nixon, who strenuously argued that litigation burdens alone justified presidential immunity:

> The very process of responding to suits seeking civil damages imposes substantial costs on a present or former President, in terms of both time and money. Moreover, if a suit is filed against a President in office, it diverts the Chief Executive's attention from the public business. . . .
>
> It is wishful thinking to believe that suits against Presidents can be handled for them without their direct participation. Absent absolute immunity, central issues in a suit against a President are sure to include the extent of his participation in the events from which the suit arose, the degree of his knowledge of surrounding circumstances, and his intentions. The only direct source for this information, to which any reasonably diligent attorney must seek access in the first instance, is the President himself. At a bare minimum, the President would have to be interviewed in detail at the outset and as often thereafter as is necessary as facts or allegations emerge. A President is also entitled, like any other litigant with his personal financial position at stake, to confer with his counsel on developments in a suit and to make informed decisions on the overall conduct of his defense. Discovery may also take up still more of his time. If the suit finds the President still in office, time spent on these unavoidable tasks will reduce the total available for public business.[5]

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[4](...continued)
from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money." See id., 457 U.S. at 763 (Burger, C.J., concurring) (emphasis added).

[5] Brief for Petitioner Richard Nixon, Nixon v. Fitzgerald, Nos. 79-1738, 80-945, at 34-35 (Oct. 27, 1981) (available on LEXIS).

It is no accident that these themes were echoed in the majority opinion in Fitzgerald. 457 U.S. at 751-53.

Furthermore, if the Supreme Court had been solely concerned that civil liability might render a President unduly cautious in the exercise of his executive authority, it would have limited the President only to qualified immunity, as it did for presidential aides, cabinet members, and numerous other public officials;[6] or confined the President's absolute immunity to the core functions of the office, as it did for judges, prosecutors, and Members of Congress.[7] Such qualified or functional immunity would have been sufficient to preserve the integrity of the official decisionmaking process. 457 U.S. 765-66 (White, J., dissenting). The Fitzgerald majority, however, extended immunity to the outer limits of a President's official conduct, regardless of function, and made it absolute. This extra protection was necessary to prevent this unique

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[6] See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[7] See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors absolutely immune, but only for functions intimately associated with the process of criminal prosecution); United States v. Brewster, 408 U.S. 501 (1972) (Speech or Debate Clause immunity limited only to purely legislative acts); Pierson v. Ray, 386 U.S. 547 (1967) (judges absolutely immune, but only when performing judicial acts).

constitutional actor from being diverted from his official duties by the demands of litigation.[8]

Additionally, the Fitzgerald majority quoted, with approval, statements in which Justice Story and President Jefferson submit that incumbent Presidents cannot be subjected to civil process because doing so would take them away from the performance of their official responsibilities. Id. at 749 & 751 n.31. These citations further evidence the Court's concern that unnecessarily subjecting

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[8] The plaintiff and amici are in error when they contend that the immunity recognized for the President in Fitzgerald was no different than that accorded judges and prosecutors. The Court recognized that the scope and breadth of the President's duties, and the fact that he alone could perform them, distinguish the Chief Executive from all other federal and state officials. 457 U.S. at 749-50. The "singular importance" of the President to our governmental scheme also distinguishes Chief Executive from private litigants. Therefore, the questionable proposition that business leaders are able to delegate their responsibilities and to carry on their businesses while defending litigation misses the point: it is not simply that defending litigation would be burdensome to the President personally, but that taking the President away from official duties would be detrimental to the nation as well.

The plaintiff's brief is also misguided where it contends that if the President is accorded immunity in the form of deferring non-exigent, private civil damages litigation during his term in office, federal judges must be accorded the same kind of immunity from private claims, which, the plaintiff submits, would be life-time immunity because judges are appointed for life. Setting aside the speciousness of this logic, it is apparent that taking a single justice or judge from his or her official duties for a period of time to defend a private lawsuit, while undesirable, would not cripple the ability of the judicial branch to perform its constitutional functions.

a President to civil litigation would divert the President's time and attention from his duties.

The Solicitor General of the United States concurs in this interpretation of Fitzgerald. Contrary to the plaintiff's assertion that the Solicitor General rejected "sub silentio" the President's claim of temporary immunity (see Jones Br. at 6), the Solicitor General agreed that this litigation should be stayed in its entirety because "the burden of defending against private lawsuits poses an unacceptable threat to the President's conduct of his office." (Brief for the United States as Amicus Curiae at 5). The Solicitor General further stated that private litigation against an incumbent President implicates "interests that are both public and constitutional in nature." (Id. at 9, citing Fitzgerald, 457 U.S. at 749-50).

The plaintiff further asserts that Presidents Theodore Roosevelt, Harry Truman and John F. Kennedy were sued for non-official conduct while serving as President, and that they did not assert immunity because they recognized that the kind of immunity acknowledged in Fitzgerald was limited to official conduct. (Jones Br. at 18). Fitzgerald, of course, was decided nearly 20 years after the last of these men served as Chief Executive. Moreover, as discussed in the President's Opening Brief, all three of these suits were filed *before* the defendants became President, not while they served, and the Roosevelt and Truman cases were

effectively complete and dismissed, except for final appeals, before the defendants assumed the Presidency. (Pres. Br. at 21 n.16.) Accordingly, there would have been little or no interference whatsoever with the performance of presidential duties, and no need to assert immunity.

B. Chief Justice Burger's Concurring Opinion Did Not Say That Sitting Presidents Could Be Subjected To Private Civil Damages Claims.

The plaintiff asserts that Chief Justice Burger wrote a concurrence in Fitzgerald "only" to make clear that the majority opinion was limited to official acts. (Jones Br. at 22-23). The Chief Justice wrote separately, however, not because he was concerned that the majority opinion might be misunderstood to extend absolute immunity to unofficial acts, but to underscore that presidential immunity was founded on the Constitution, and was not simply a matter of common law or public policy that could be overridden by an act of Congress.[9]

Nor is it accurate to suggest that Chief Justice Burger would subject an incumbent President to civil damag-

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[9] "I write separately to underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries." 457 U.S. at 758. See also id. at 760 ("The immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Absolute immunity for a President for acts within the official duties of the Chief Executive is either to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity and I agree.").

es litigation based on private conduct. The only view he expressed was that *absolute* immunity did not cover unofficial acts, a position with which we concur. 457 U.S. at 759, 761 n.4. He was speaking, moreover, in the context of a case involving a *former* President. There thus is nothing in Chief Burger's concurring opinion to support the plaintiff's contention that civil damage actions such as this could proceed against a sitting President, and much to support the opposite conclusion -- that he would have been surprised to learn that incumbent Presidents could be subjected to a court's jurisdiction at the whim of private plaintiffs.

Fitzgerald himself disavowed the contention that he could sue a sitting President. Fitzgerald 's counsel -- including the ACLU appearing here as amicus in opposition to a stay -- asserted on Fitzgerald's behalf that litigation burdens would not be onerous for an incumbent President, because "the district court can stay all proceedings until he leaves office."[10]

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[10] Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28 available on LEXIS (emphasis added).

III. CIVIL DAMAGES LITIGATION SUCH AS THIS WILL DIVERT A PRESIDENT'S TIME AND ATTENTION FROM OFFICIAL DUTIES.

A. Civil Litigation In Which The President Is Named As A Defendant Would Be Unduly Burdensome.

Contrary to the plaintiff's claims, defending this litigation, as well as the similar private civil damages claims that inevitably would follow, will divert the President's time and energies from the execution of his Article II responsibilities. (See Pres. Br. at 20-25, 44-48).

This litigation puts at issue the President's integrity and personal conduct over a lengthy period of time. In arguing that "there is hardly a case less complicated" than this one (Jones Br. at 40), the plaintiff relies on a statement attributed to a lawyer with absolutely no knowledge of or involvement in this matter, and partial and distorted statements from a newspaper article, purportedly attributed to President Clinton's counsel. (Id. at 6-8). Plaintiff's counsel studiously ignore their own recent statements -- made within 24 hours of the District Court's order permitting discovery to go forward in this case -- that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President, including his alleged relationships with women other than the plaintiff. (See App. 122-23 quoted supra, p. 2). "We believe it's going to be a very exhaustive process," Ms.

Jones' counsel also stated to the press. "It will take some time."[11]

Plaintiff's counsel also stated that they may seek an unprecedented medical examination of the President. (App. 118, 125). There thus is no doubt that defending this particular case will significantly diminish the time and energy available to the President to devote to his official duties.

The many suits that are likely to follow if the immunity bar is lowered will similarly overburden the Presidency. (See Pres. Br. at 21-25). The unfortunate reality is that Presidents are attractive targets for such claims, especially given their potential political impact. See Fitzgerald, 457 U.S. at 752-53; id. at 763 (Burger, C.J., concurring) (Presidents are extremely vulnerable to civil damages claims, which could be used as vehicles for extortion).

Under modern rules of pleading, moreover, civil claims are very easy to bring and very difficult to dispose of promptly. Minimally responding even to a meritless suit would require a President to locate and hire an attorney, review the complaint, review the facts with his attorney, and assist the attorney in answering the complaint and/or

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[11] Stephen LaBaton, Sexual Harassment Suit Should Not Be Tried While Clinton Is President, Judge Rules, N.Y. Times, Dec. 29, 1994, at B6.

preparing a motion to dismiss. Suits that survive motions to dismiss and proceed to discovery would be even more time-consuming, and discovery in and of itself can become a tool to achieve political embarrassment or extortionate settlements. (See Pres. Br. at 20-25, 33-34).[12]

B. The President Should Not Be Required To Make Repeated, Piecemeal Showings That The Demands Of This Litigation Will Interfere With The Performance Of His Duties.

Plaintiff and her supporting amici further argue that instead of deferring this litigation in its entirety, the President should be required to show, at each step of litigation, that a particular litigation burden would disrupt the performance of presidential duties. (Jones Br. at 32-33, ACLU Br. at 18-20; Law Prof. Br. at 17-19). Interestingly, they contend that staying the entire litigation would place the President "above the law," but at that same time, they recognize that numerous exceptions to the rules of civil procedure would be required to accommodate the needs of the Presidency if the lawsuit were to go forward.

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[12] The plaintiff additionally quotes Chief Justice Marshall for the proposition that the demands of a President's duties are not so "unremitting" as to preclude him from responding to a subpoena in a criminal case. (Jones Br. at 31 n.14, quoting United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D). The quote is inapposite here, where the President is a defendant in a civil matter, and not merely a third party in possession of documentary evidence, as was the case in the criminal prosecution of Aaron Burr. In any event, whatever the accuracy of Chief Justice Marshall's observations about the demands of the Presidency in 1807, the demands of the modern Presidency are incessant.

For example, they advocate special rules of pleading in cases where an incumbent President is a defendant (Law Prof. Br. at 18); heightened relevancy requirements in civil discovery against a President (id.); granting the President temporary stays (ACLU Br. at 6); bending deadlines to fit the President's schedule (Jones Br. at 36-37; ACLU Br. at 14); and excluding the President/defendant from participating in third-party discovery, or even from his own trial. (Law Prof. Br. at 19).

In advocating these accommodations, the plaintiff and supporting amici implicitly and explicitly concede that the demands of the Presidency require departures from customary procedural rules. (See ACLU Br. at 6, 14 ("[T]he President should not be treated as an ordinary litigant.")). The approach they recommended, however, fails to protect the constitutional interests at stake here, and is impractical as well. Requiring the President to make repeated showings at every step of discovery and trial would only add to the burdens and distractions of civil litigation. Such a requirement also would impinge upon the separation of powers, because it will engender numerous confrontations between a trial court and the Chief Executive over the allocation of the latter's time. (See Pres. Br. at 33-34). Finally, such a requirement would unduly disrupt the administration of justice, because it would necessitate repeated exceptions to the rules of civil procedure.

C. The President's Voluntary Testimony In A Criminal Investigation Does Not Undermine His Claim That This Civil Damages Litigation Should Be Deferred.

The plaintiff further suggests that because the President gave two, brief depositions to the Office of Independent Counsel in the Whitewater criminal investigation, he cannot complain that defending this civil litigation will distract him unduly from his duties. (Jones Br. at 31 n.14). This is hardly compelling, because the law is clear that a President, under limited conditions, can be compelled to give evidence in a criminal investigation. See, e.g., United States v. Nixon, 418 U.S. 683, 713 (1974); United States v. North, 713 F. Supp. 1448, 1449 (D.D.C. 1989), aff'd, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). The President voluntarily submitted to the depositions, moreover, and was only a witness, not a defendant.

A civil proceeding, however -- especially one where the President is a party -- is another matter. An incumbent President has never been compelled to give evidence in a civil case. See United States v. Nixon, 418 U.S. at 711-12 & n.19 (expressly declining to rule on whether a President could be compelled to produce evidence in a civil proceeding). As the Supreme Court has explained, there are weighty factors present in criminal matters that may justify imposing on the President's time and attention, but these broad-based public interest factors are absent in

civil litigation. Fitzgerald, 457 U.S. at 754 & n.37 ("there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions").

IV. THE COURT NEED NOT ADDRESS WHETHER A PRESIDENT MAY TEMPORARILY DEFER ANY LITIGATION OTHER THAN PRIVATE SUITS FOR CIVIL DAMAGES.

The immunity the President here asserts applies narrowly only to civil lawsuits seeking money damages for completed conduct. Any holding here simply would not be determinative of whether an incumbent President is amenable to suit for any other kind of claim, whether based on private or official conduct. It is unnecessary, therefore, for the Court to speculate about hypothetical claims that have yet to be brought against incumbent Presidents.

Notwithstanding the limited nature of this immunity, the plaintiff and supporting amici conjure up all manner of legal rights that purportedly would be breached if this case were deferred until the President leaves office. The plaintiff, for example, submits that if President Clinton's position is accepted, "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." (Jones Br. at 31. See also Law Prof. Br. at 5). These fears are unfounded.

With respect to the plaintiff's first example, the likelihood that a President would fail to pay a debt or

taxes is, of course, extremely remote in view of the various pressures that creditors can bring to bear on an elected official, not the least of which is untoward publicity.[13] In any case, it may well be that the lender's only damages are monetary in nature, and that there is no reason why he could not wait until the President leaves office to be made whole. A private civil action for money based upon an asserted commercial obligation of a President should not be permitted to disrupt the functioning of the Presidency any more than the claim at bar, and should therefore be dealt with in the same manner as we submit is appropriate here.

The possibility that a President would fail to support his children or divorced wife, or would fail to submit to a court's jurisdiction to litigate a divorce, is even more implausible. If such an unlikely case were to arise, the immunity asserted here would not necessarily impede suits for injunctive decrees, such as a divorce would entail.[14]

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[13] In fact, modern Presidents are required to report, on public financial disclosure statements, any outstanding debt over $10,000. See 5 C.F.R. § 2634.305(a).

[14] The opposition misstates our argument concerning the distinction between injunctive relief and damages. We do not contend that "suits seeking injunctive relief will always require less expenditure of time than suits seeking damages." (ACLU Br. at 13, 19. See also Jones Br. at 31 n.13). Rather, what we contend, and what is implicit in the nature of the injunctive remedy, is that plaintiffs seeking injunctions may have a more urgent need for relief than those seeking damages. Indeed, to obtain an injunction, a plaintiff must show that his or her interests will be irreparably harmed if such relief is not granted, and that such harm cannot be redressed by damages alone.

Our legal system, moreover, has had experience with allocating the burdens of deferring divorce and custody litigation in the event that one party is unable to participate because he or she is called away to serve an overriding national interest. The Soldiers' and Sailors' Civil Relief Act permits litigation involving active duty service members, including divorce and custody proceedings, to be stayed in most circumstances. 50 U.S.C. app. § 521 ("SSCRA"). See Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989) (temporary order for child support may be entered, but litigation of permanent order appropriately stayed pursuant to SSCRA); Coburn v. Coburn, 412 So.2d 947 (Fla. Dist. Ct. App. 1982) (trial court abused its discretion in refusing to postpone custody proceedings until such time as father would be unhampered by military service to defend the action). These models could be employed in a domestic relations case involving a President as well.[15]

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[15] The President does not rely directly on the SSCRA, choosing instead to invoke the constitutional protections due the Presidency. Nonetheless, we feel compelled to address certain statements about that Act in the opposing briefs. The plaintiff asserts that the Act "expressly does not establish any protection for the President." (Jones Br. at 38 n.19). Although the SSCRA does not expressly include the Commander-In-Chief, a review of its legislative history reveals no intent to exclude him, and it would be consistent with the overall purpose of the Act to extend its coverage to the commander of the armed forces as well as those who serve in them. See 50 U.S.C. app. § 510. Indeed, it is inconceivable that when Congress re-enacted the SSCRA on the eve of World War II, it affirmatively intended, by not referencing expressly the Commander-In-Chief, to permit private civil

(continued...)

V. LITIGATION OF THIS NATURE THREATENS THE SEPARATION OF POWERS.

The plaintiff asserts that the separation of powers is transgressed only when a court imposes damages for the exercise of a President's official duties. (Jones Br. at 33-35). The test, however, does not turn on the imposition of damages, but on whether judicial branch action of any kind would "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) (Nixon v. GSA). This is the precise situation posed by litigation of the plaintiff's civil claim during the President's tenure in office: a trial court's supervision of the President as a defendant could interfere with functions assigned to the Executive. (Pres. Br. at 30-34).

The plaintiff and supporting amici concede that court orders issued in the course of ongoing private civil liti-

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[15](...continued)
lawsuits to take Franklin Roosevelt away from his duties. It is more plausible that Congress never even imagined lawsuits like this one could be brought against incumbent Presidents, and therefore did not think it necessary to expressly provide additional protection by way of statute. In any event, the SSCRA provides a useful example of another instance in which our legal system subordinates the interests of individual litigants to overriding national interests when circumstances require.

The academic amici who filed in support of the plaintiff incorrectly state that the SSCRA is effective only in time of national emergency. (Law Prof. Br. at 16 n.13). As the text of the Act clearly indicates, it applies to all service members on "active duty," without regard to a state of war or emergency. 50 U.S.C. app. § 511(1).

gation could unduly burden the Presidency if the court were unbending. However, they contend that these situations should be dealt with seriatim as they arise, and that a President may rely on the courts to show deference to the demands of his Office. (Jones Br. at 36-37; Law Prof. Br. at 15-16). This course of action, however, would set the stage for judicial "scrutiny of day-to-day decisions of the Executive Branch." Fitzgerald, 457 U.S. at 762 (Burger, C.J., concurring). In particular, it would require the judiciary to set priorities for the President's time and to categorize presidential functions as official, political or personal -- the very distinctions the Supreme Court said courts should not be in the business of making. Id. at 756.

While we are confident that most courts would be highly deferential to the President in these regards, there is nothing in the course of action proposed by the plaintiff and supporting amici to prevent a politically-motivated judge -- including an elected state judge -- from wielding authority inappropriately for partisan ends. A President should not be put in a position where he might have to choose between defying such a court order or foregoing the performance of legitimate and important presidential functions, or where he has to be held in contempt to obtain interlocutory appellate review of such orders. See United States v. Nixon, 418 U.S. 683, 691-92 (1974). Nor should

the judiciary be placed in a position where questions about its political motivations undermine public confidence in the impartial administration of justice. These untoward circumstances can be avoided simply by deferring litigation over civil damages until a President leaves office, with minimal impairment to the interests of private plaintiffs.

Where, as here, there is "the potential for disruption" of Executive Branch functions, the Court must determine whether "that impact is justified by an overriding need to promote objectives within the constitutional authority" of the judicial branch. Nixon v. GSA, 433 U.S. at 443. The President recognizes that providing a forum for the redress of civil rights and common law torts is an appropriate and important objective within the constitutional authority of the federal judiciary. The issue is whether there is an "overriding need" here to promote this objective at this time, if doing so could impair the President's ability to perform his constitutional functions. The key is "to resolve those competing interests in a manner that preserves the essential functions of each branch." United States v. Nixon, 418 U.S. at 707. Temporarily deferring this litigation does just that.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY STAYING TRIAL; IT DID SO BY NOT STAYING THE CASE IN ITS ENTIRETY.

The plaintiff contends that the District Court erred in staying trial in this litigation, whether it did so on

the grounds of immunity or as a matter of judicial discretion. (Jones Br. at 38-47).[16] The stay was appropriate both as a matter of immunity and as a matter of judicial discretion, however, and should have been extended to the entire proceedings.

Regardless of her reasons for doing so, the fact remains that the plaintiff chose to sue Mr. Clinton when he was the President of the United States. This indisputably puts this litigation on a different footing from other cases.

In particular, it requires the trial court to show the utmost deference to the Presidency, and to weigh the plaintiff's interest in pursuing the litigation against the public's broad-based constitutional interests in the full and effective performance of presidential duties. Fitzgerald, 457 U.S. at 753-54. Weighing the competing interests in determining the propriety of a stay would be required even in the absence of presidential immunity. See White v. MAPCO Gas Products, Inc., 116 F.R.D. 498, 501 (E.D. Ark. 1987). Thus, the trial court was correct insofar as it compared the relative interests at stake here. Because one of the parties is the President, however, that weighing

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[16] As explained in our Preliminary Statement, we believe the Court is without jurisdiction to consider this aspect of the plaintiff's cross-appeal, but will nonetheless address it on the merits.

tilts in favor of deferring the entire litigation and not only the trial. (See Pres. Br. at 39-48).[17]

The plaintiff argues that her purported desire to clear her name -- or more precisely, her desire to seek to do so now, and in court -- outweighs the broad-based public interest in the undistracted performance of presidential duties. (Jones Br. at 40). Implicit in this argument is the assertion that defamation claims are legally more significant than other claims, which they are not. For example, courts do not give defamation claims for damages expedited treatment before other claims. Nor is there a right to due process to vindicate one's reputation. Paul v. Davis, 424 U.S. 693, 701-02 (1976).

The plaintiff states that she would not have sued the President, but for the fact that her reputation was sullied by a magazine article which accused her of moral misconduct with then-Governor Clinton. (Jones Br. at 40 & n.20). The article, however, appeared in a magazine of limited circulation and referred only to a woman named "Paula," without identifying a last name. It was not until the plaintiff

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[17] The plaintiff suggests at several points that if presidential immunity is founded on the Constitution, it cannot be subject to a balancing test. (See, e.g., Jones Br. at 39). Fitzgerald plainly holds to the contrary, however. 457 U.S. at 754. See also United States v. Nixon, 418 U.S. 683, 711 (1974); ACLU Br. at 4. Other constitutional rights are also subject to balancing tests. See, e.g., Connick v. Myers, 461 U.S. 138, 140 (1983) (free speech rights of public employees must be balanced against the interest of the state, as employer, in promoting efficiency of public services).

chose to respond to the article in a very public fashion (see App. 60-67) that the allegations in the magazine, and her involvement with them, became generally known. Even then, she did not sue the publication or the article's author, but rather, the President, even though he has denied having any sexual encounter with her whatsoever, and therefore cannot be the source of any reputational injury on that count. And when the President, through his lawyer and press officer, attempted to defend his own reputation by denying her allegations about his conduct, she sued him.

As significant as one's interest in reputation is, a plaintiff's only *legal* interest in the tort of defamation is the recovery of money damages. In fact, damages are an element of the tort; in some cases they are presumed, and in others they must be proved, but in all cases, a cause of action for defamation will not lie absent a basis for finding that the plaintiff suffered damages.[18] Because potential recovery of damages, possibly with interest, would be available to the plaintiff whenever this case goes to trial, her legal interest in redressing any harm to her

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[18] Mitchell v. Globe Int'l Publishing, 773 F. Supp. 1235, 1238 (W.D. Ark. 1991); Little Rock Newspapers, Inc. v. Dodrill, 660 S.W.2d 933, 934-35 (Ark. 1983) (plaintiff in defamation suit cannot recover for mental suffering alone).

reputation will not be impaired by deferring this case until President Clinton leaves office.[19]

In arguing against staying trial, the plaintiff also averts to the general principle that courts have a duty to decide cases over which they have jurisdiction. (Jones Br. at 42). This and the plaintiff's citations to abstention doctrine cases overshoot their mark, because the President is not asking the trial court to decline jurisdiction, but merely to defer its exercise by dismissing the complaint without prejudice to its reinstatement, or to stay the litigation.

VII. THE DISTRICT COURT APPROPRIATELY STAYED PROCEEDINGS ON THE FERGUSON CLAIMS.

The plaintiff appears to make two assertions with respect to the claims against State Trooper Danny Ferguson. First, she contends that the District Court's Order of December 28, 1994 erred in staying trial on the Ferguson claims. (Jones Br. at 47). Additionally, she contends that the District Court erred in its February 24 order

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[19] It is doubtful, moreover, that the plaintiff has even stated a cause of action for defamation against the President. See Barr v. Matteo, 360 U.S. 564 (1959) (federal officials absolutely immune from libel claims based on statements made in the course of their public duties); Selby v. Burgess, 712 S.W.2d 898 (Ark. 1986) (client cannot be held liable for allegedly slanderous statement made by attorney preliminary to litigation).

staying discovery on those claims pending this appeal. (Id. at x, 47).[20]

A. The Court Below Was Correct To Stay Trial On The Ferguson Claims.

The determination to stay the Ferguson claims was a matter well within the sound discretion of the District Court, which should not be overturned absent a clear showing of abuse of discretion. Webb v. R. Rowland & Co., 800 F.2d 803, 808 (8th Cir. 1986). The court below determined that it was necessary to defer the trial against Trooper Ferguson along with the trial against President Clinton, because the claims against the Trooper and the President were "integrally related" (Add. 19); the President was the "primary defendant" (id.); the Ferguson case revolves around the President's actions (Add. 35); and discovery could not proceed on the Ferguson claims "without the heavy involvement of the President through his attorneys." (Id.) Given these findings, there was no abuse of discretion. (See also Pres. Br. at 46-49).

The Court's inherent power to control its docket and conserve judicial resources is enough to justify staying the Ferguson trial, inasmuch as even the plaintiff concedes, most of the litigation would have to be duplicated

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[20] For the reasons set forth in our Preliminary Statement, we do not believe either of these issues are properly before the Court. In the event the Court disagrees, however, we will address the merits of the plaintiff's contentions with respect to the Ferguson claims.

when the case goes forward against the President. In re United States Abatement Corp., 39 F.3d 556, 560 (5th Cir. 1994); Webb, 800 F.2d at 808; Stadler v. McCulloch, No. 93-CV-3093, 1995 WL 259349, at *3 (E.D. Pa. Apr. 24, 1995) ("Courts must consider the time and effort of counsel and the litigants with a view toward a policy of avoiding piecemeal litigation.").

Dennis v. Sparks, 449 U.S. 24 (1980), does not require a different result. (See Jones Br. at 47). If anything, Dennis supports the President's position.

In Dennis, a judge was held absolutely immune from trial *and liability*, and was no longer a party to the case. One of the remaining, non-immune defendants then asserted that to compel the judge to participate in discovery *as a witness* would intrude upon judicial immunity. In rejecting this claim, the Supreme Court expressly distinguished cases such as this one, where an official is not merely a witness, but still could be held liable:

> [A] proceeding in which [the official] cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages.

Id. at 31.

Even if this litigation is deferred against President Clinton, he remains a defendant, facing potential liability when the case resumes. It was therefore appropriate to stay trial as to both defendants.

B. The Court Was Correct To Stay Discovery On The Ferguson Claims Pending This Appeal.

The District court exercised its discretion to stay discovery on the claims against Trooper Ferguson while the President's appeal was heard. (Add. 34-35). We think this was the right result not only as a matter of discretion, for the same reasons cited above, but as a matter of law, because the District court was without jurisdiction to permit any matter that was part of this immunity appeal to go forward. Johnson v. Hay, 931 F.2d 456, 459 n.2 (8th Cir. 1991).

The Eighth Circuit has recognized that upon the filing of a notice of appeal in an immunity case, "[j]urisdiction [is] vested in the court of appeals and the district court should not act further." Id. A similar rule operates in other jurisdictions. As the Tenth Circuit explained, noticing an appeal in an immunity case, as in all other appeals under 28 U.S.C. § 1291, "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Stewart v. Donges, 915 F.2d 572, 575 (10th Cir. 1990) (emphasis added) (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).

The plaintiff did not challenge the lower court's decision to stay proceedings against the President pending appeal, but only that part of its decision staying discovery on the Ferguson claims. The plaintiff disregards the

critical fact that here, the issue of whether the case should proceed against Trooper Ferguson is one of the "'aspects of the case involved in the appeal.'" Johnson, 931 F.2d at 459 n.2 (quotation omitted).

On appeal, the President asserts that due to the high degree of congruency between the claims against the two defendants, presidential immunity extends to the entire case. (See Pres. Br. at 46-48). If discovery were to go forward on the claims against Trooper Ferguson, therefore, the District Court effectively would usurp the authority of the Court of Appeals to decide this crucial issue on the merits, and would negate the very purpose for which a right to immediate appeal is recognized in immunity cases. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985); Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989). Thus, both as a jurisdictional matter and as an exercise of judicial discretion, the stay of discovery was appropriately extended to the entire case.

CONCLUSION

For all of the foregoing reasons, this matter should be remanded to the District Court with orders to dismiss the complaint in its entirety without prejudice to its reinstatement when President Clinton leaves office, or

alternatively, to stay all proceedings until that time.

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