

NLWJC - Kagan

Counsel - Box 016- Folder 003

Paula Jones Case [2]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/07/1996	P5
001b. legal brief	Amy Sabrin to Elena Kagan & David Strauss; re: Paula Jones v. William Jefferson Clinton (3 pages)	05/07/1996	P5
002a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/06/1996	P5, P6/b(6)
002b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/06/1996	P5, P6/b(6)
003. note	Elena Kagan to Jack, Bruce, & Kathy; re: Motion (1 page)	n.d.	P5, P6/b(6)
004a. memo	David Strauss to Amy Sabrin; re: The Extension Application (2 pages)	05/01/1996	P5
004b. legal brief	re: Paula Jones v. William Jefferson Clinton (4 pages)	05/01/1996	P5
005. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Thursday Lawyers' Meeting (1 page)	04/30/1996	P5, P6/b(6)
006. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Thursday Lawyers' Meeting (1 page)	04/30/1996	P5, P6/b(6)
007. memo	Geoffrey Stone to Robert Bennett; re: The Petition (4 pages)	04/26/1996	P5
008. letter	Robert Bennett to Geoffrey Stone & David Strauss; re: Retention as Counsel (partial) (1 page)	04/23/1996	P6/b(6)
009a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5

COLLECTION:

Clinton Presidential Records
 Counsel's Office
 Elena Kagan
 OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
ip2022

RESTRICTION CODES

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RR. Document will be reviewed upon request.

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009b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5
009c. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5
010. memo	Elena Kagan to Jack Quinn et al; re: Conversation with Walter Dellinger (1 page)	04/11/1996	P5, P6/b(6)
011a. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)
011b. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)
011c. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)
012. memo	Elena Kagan to Jack Quinn & Kathy Wallman (2 pages)	02/14/1996	P5, P6/b(6)
013a. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Rex Lee (1 page)	03/05/1996	P5, P6/b(6)
013b. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Rex Lee (1 page)	03/05/1996	P5, P6/b(6)
013c. note	re: Handwritten Notes - Rex Lee (1 page)	03/05/1996	P5, P6/b(6)
014. notes	re: Handwritten Notes - Mandate (partial) (1 page)	n.d.	P6/b(6)

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THE WHITE HOUSE

WASHINGTON

May 9, 1996

MEMORANDUM FOR JACK QUINN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

The Washington Times reported today that President Clinton's lawyers have decided not to seek further time from the Supreme Court. As you know from my memo yesterday, I think this is the right decision. But I do not think Bennett and/or Sabrin should have announced it (if in fact one of them did so) before our office -- and the President -- offered an opinion.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005

Telephone No.: (202) 371-7000
Facsimile No.: (202) 393-5760

FACSIMILE TRANSMITTAL SHEET

Please deliver the following pages to:

Name: Elena Kagan, Esq.
Firm: Asst. White House Counsel Date: May 8, 1996
City: _____
Phone: 202-456-7594
Fax: 202-456-1647
From: Amy R. Sabrin Flr/Rm.: 8-7
Reference Number: 140480 Ext.: 7699

Total number of pages including this cover: 6

This facsimile is intended only for use of the addressee named above and may contain legally privileged and/or confidential information. If you are not the intended recipient of this facsimile, you are hereby notified that any dissemination, distribution or copying of this facsimile is strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone and return the original facsimile to us at the address above via the local postal service. We will reimburse any costs you incur in notifying us and returning the facsimile to us.

MESSAGE:

ruptcy judges have been found to have discretion to enjoin third-party litigation in other courts that threaten to imperil the debtor's ability to reorganize, even if the debtor is not a party to the litigation.¹⁸

[The choler with which the court below attacked the President's request for similar relief calls into question the care and objectivity with which it analyzed this case.] Moreover, if a plaintiff has a constitutional entitlement to access to the courts that can be overcome only by a constitutional mandate of immunity, as the Eighth Circuit asserts, all the above-cited stays are jeopardized. For these reasons too, review is warranted.

IV. The Panel Majority Also Erred In Reversing The District Court's Decision To Stay The Trial Until After President Clinton Leaves Office.

A. The Court of appeals lacked jurisdiction to review this aspect of the district court's ruling

Ordinarily, a decision by a district court to postpone a trial-- like any other scheduling decision--is reviewable, if at all, by writ of mandamus, or by appeal only after a final judgment in the case. [citations]¹⁹ Respondent did not seek a writ of mandamus but instead cross-appealed to challenge this

¹⁸CITES.

¹⁹ Some courts of appeals have recognized an exception for cases in which a stay is "tantamount to a dismissal" because it "effectively end[s] the litigation" [citation--our CA Reply Br at viii, other CAs also?]. Even assuming that this exception should be allowed, it is obviously not applicable here. Among other things, the district court permitted discovery to continue and thus obviously contemplated that postponing the trial would not end the litigation.

ruling of the district court. Neither respondent nor the panel majority contended that an order scheduling a trial for a date in the future is appealable under 28 U.S.C. 1291 as a final or "collateral" order (see Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)). Instead, respondent and the panel majority assert that the court of appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. XXa n.4.

This Court has recently ruled, in Swint v. Chambers County Comm'n, 115 S. Ct. 1203 (1995), that the notion of "pendent appellate jurisdiction," if, it is viable at all, is extremely narrow in scope (see *id.* at 1212) and is not to be used "to parlay Cohen-type collateral orders into multi-issue interlocutory appeal tickets" (115 S. Ct. at 1211). The panel majority sought to avoid the clear implication of Swint by declaring that respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. XXa n.4. The court asserted that "[a]ll issues raised in the appeal and the cross-appeal... are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency, from civil suit for his unofficial acts?" Id.

Contrary to the panel's unsupported assertions, the issues are not inextricably intertwined, and they cannot both be resolved by answering this single question. The issue whether the President is entitled, as a matter of law, to a deferral of the litigation is analytically distinct from the question whether a district court may exercise its discretion to stay part of the litigation. The former question raises an issue of law, to be

decided on the basis of separation of powers principles such as those we have discussed; the latter is a discretionary determination that is to be made on the basis of the particular facts of this case. The former question, being purely an issue of law, is one on which the district court's determination is entitled to no special deference; the latter determination can be overturned only for abuse of discretion, as even the panel subsequently recognized (Pet. App. XXa n. 9).²⁰

The district judge, in deciding to postpone the trial in this case, explicitly invoked her discretionary powers over scheduling (see Pet. App. XXa (citing Fed. R. Civ. P. 40 and "the equity powers of the Court")), and based its decision on a detailed discussion of the particular circumstances of this case.

[Quote slip op. 18-19, from "This is not a case" to

"undue inconveniences," with ellipses.]

Id. at __. Review of the district court's decision to postpone the trial-- unlike review of its decision to reject the President's position that the entire case should be deferred--must address these particular facts of this case. In addition, an

²⁰ It is of course true that, should this Court agree with us that the President is entitled to a deferral of the entire litigation, any challenge by respondent to the district court's discretionary decision to postpone the trial will be moot. But that does not entitle respondent to have her claim heard along with the President's. The outcome of an interlocutory appeal will often moot other issues in a case. Whenever a public official successfully appeals a denial of a motion to dismiss based on qualified immunity, for example, any objections the plaintiff might have to other rulings by the trial court will be mooted, since the case will be dismissed. But it does not follow that an appeal asserting qualified immunity automatically given the court of appeals jurisdiction over an appeal challenging any other decision that the district court might have made in the case. See Swint __ U.S. at __.

appellate court cannot determine whether the district court's discretionary decision to postpone the trial is erroneous without taking into account the overall effect of the many decisions, on scheduling and other matters, that the district court will make in the course of this litigation.

Thus the issues raised respondent's cross-appeal-far from being "inextricably intertwined" with the President's submission-both can be resolved separately and should be resolved separately, after the case is concluded. Unless respondent can demonstrate the kind of abuse that would justify a writ of mandamus, her remedy is to show, upon appeal from an adverse final judgment, that the district judge's various discretionary scheduling decisions, considered as a whole in the specific context of this case, prejudiced her. The panel majority's expansion of the court of appeals' jurisdiction over interlocutory appeals was error.

B. The panel's decision to reverse the district court on this point was also plainly incorrect on the merits.

As Justice Cardozo explained for this Court, a trial judge's decision to stay proceedings should not be lightly overturned (Landis v. North American Co., 299 U.S. 248, 254-55, 256 (1936)):

[The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance....

We must be on our guard against depriving the processes of justice of their suppleness of adaptation

to varying conditions. Especially in conditions of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences of the public welfare or convenience will thereby be promoted.

The panel justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet.App. XXa n. 9. It is unclear what the panel mean by labeling the district court's order the "functional equivalent" of "temporary immunity": the district court denied the President such of the relief he sought. But it is entirely clear that the panel majority, in its sweeping and conclusory ruling, did not begin to conduct the kind of careful weighing of the particular facts that might warrant a conclusion that the trial judge abused here discretion. This unsupported over-realing by a court of appeals to assert jurisdiction over the stay of trial, and to substitute its references for an appropriate exercise of discretion by a district court, warrants review by the Supreme Court.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005

Telephone No.: (202) 371-7000
Facsimile No.: (202) 393-5760

FACSIMILE TRANSMITTAL SHEET

Please deliver the following pages to:

Name: Elaena Kagan
Firm: The White House Date: May 8, 1996
City: Washington, DC
Phone: _____
Fax: 202-456-1647
From: Robert S. Bennett Flr/Rm.: 11/39
Ext.: 7180

Total number of pages including this cover: 3

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MESSAGE:

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

MICHAEL E. GANS
Clerk of Court

VOICE (314) 539-3600
885 (800) 652-8871
<http://www.wildew.wustl.edu/8th.clr>

May 8, 1996

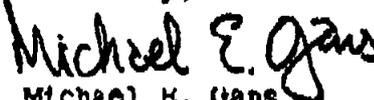
Mr. Robert S. Bennett
SKADDEN & ARPS
Tenth Floor
1440 New York Avenue, N.W.
Washington, DC 20005

Re: 95-1050/1167EALR Paula Corbin Jones vs. William J. Clinton

Dear Counsel:

Enclosed is a copy of an order entered today in the above case at the direction of the court.

Sincerely,


Michael E. Gans
Clerk of Court

mjh

Enclosure(s)

cc: Daniel M. Traylor
Gilbert K. Davis
Joseph Cammarata
Kathlyn G. Graves
Stephen Engstrom
Carl S. Rauh
Amy Sabrin
Scott R. McIntosh
Kathleen M. Sullivan
Christopher A. Hansen
Ronald D. Rotunda
Jim McCormack

District Court/Agency Case Number(s): LR-C-94-290

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

No. 95-1050/1167EALR

Paula Corbin Jones,
Appellee/Cross-Appellant,

vs.

William Jefferson Clinton,
Appellant/Cross-Appellee.

*
*
*
*
*
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*

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

President Clinton's motion to extend the stay of mandate has been considered by the Court and is denied. Judge Ross voted to grant the motion.

May 8, 1996

Order entered at the Direction of the Court:

Michael E. Gaus

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

THE WHITE HOUSE

WASHINGTON
May 8, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

The Eighth Circuit has denied the President's motion for an extension of the stay. The Court acted as soon as it reviewed Jones's opposition to the motion. The Clerk never even had a chance to circulate the reply memo that Skadden filed yesterday.

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FACSIMILE TRANSMITTAL SHEETFROM: Amy R. SabrinDIRECT DIAL: (202) 371-7699DIRECT FACSIMILE: (202) 371-7963DATE: May 7, 1996FLOOR/OFFICE No.: 8/7REFERENCE NUMBER: 140480

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- | | |
|---|--|
| 1. NAME: <u>Elena Kagan, Esq.</u>
FACSIMILE No.: <u>202-456-1647</u> | FIRM: <u>Asst. White House Counsel</u>
TELEPHONE No.: <u>202-456-7594</u> |
| 2. NAME: <u>David Strauss, Esq.</u>
FACSIMILE No.: <u>312-702-0730</u> | FIRM: <u>The University of Chicago</u>
TELEPHONE No.: <u>312-702-9601</u> |

Total number of pages including cover(s): 4

MESSAGE: We would like any comments ASAP. Thanks

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NOS. 95-1050 and 95-1167**

PAULA CORBIN JONES, :
:
Appellee/Cross-Appellant :
:
v. :
:
WILLIAM JEFFERSON CLINTON :
:
Appellant/Cross-Appellee :

**PAULA JONES' OPPOSITION TO PRESIDENT CLINTON'S
MOTION TO EXTEND THE STAY OF MANDATE**

Paula Corbin Jones, by counsel, strenuously objects to President Clinton's Motion to Extend the Stay of Mandate for the following reasons:

1. Counsel for President Clinton boldly, but incorrectly, assert that Mrs. Jones' rights would not be altered by the granting of the 31-day extension of the mandate. If Mr. Clinton's motion is denied and he is required to file his petition as presently scheduled on May 16, 1996, then the Supreme Court will consider the petition in conference on June 21, 1996 in time to grant or deny the petition before the summer recess. However, if this court grants an extension of the stay, the Supreme Court's decision on the writ will not be announced until the first Monday in October. A 31-day extension of the stay is in reality a 113-day extension.

2. Mr. Cammarata, undersigned co-counsel for Mrs. Jones, was informed by Christopher Basil, Deputy Clerk of the Supreme Court, that if Mrs. Jones files her response to the petition on or before May 24, 1996, then the issue of whether to grant certiorari will be discussed by the Justices at the June 21 conference of the court. May 24 is the last day to file a response in time for that

conference. The procedural time requirements of the Court include a ten day delay, from the filing of Mrs. Jones' response, before the papers are distributed to the Justices. The last possible distribution date before the June 21 conference is June 5. If this court denies Mr. Clinton's motion, Paula Jones will file her response to the petition no later than May 21, 1996. With the pleadings from both sides filed by that date, the decision whether to grant certiorari will be made on June 21, 1996.

3. If an extension of the stay deprives Mrs. Jones of a decision on certiorari before the summer recess, then her case on the merits will be prejudiced. Mrs. Jones' access to justice is compromised by further lengthy delay because she cannot commence discovery to preserve her evidence, including against Mr. Ferguson since that part of the case has been placed on hold although Mr. Ferguson has no conceivable claim of presidential immunity. Witnesses may die. Memories may fade. Documents may be lost or destroyed.

4. Mr. Clinton's counsel also assert that a petitioner would have at least 90 days, and possibly as much as 150 days, to prepare a petition for writ of certiorari and that Mr. Clinton will file his petition in less time. This argument is a red herring. Mr. Clinton can still enjoy these time periods, however, he should not do so while being the beneficiary of the extraordinary relief of a continued stay of the mandate.

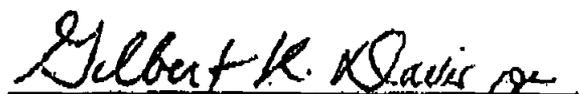
5. Mr. Clinton advises that two additional attorneys have been recently added to his army of lawyers. Mrs. Jones is asked to wait while these two attorneys are "brought up to speed". These attorneys, it is said, will assist in thoroughly and appropriately addressing the issues to be raised in the petition. Mrs. Jones answers first that counsel for Mr. Clinton stated on numerous public occasions, after May 1994, their view that this matter would wind up in the Supreme Court. Yet it is only after the stay of mandate is granted that these two new attorneys are retained. The stay should not be extended and the case delayed for 113 days due to the failure to retain additional counsel in a timely fashion. Second, two more attorneys for Mr. Clinton's legal team cannot alter the basic question of temporal immunity or change the cast which is set on the legal authorities involved in deciding that question. There has been extensive research, analysis and argument by counsel for both parties in repeated pleadings, briefs, and oral argument in the district court and this court.

6. There is nothing new that can or may be said to the Supreme Court. In light of this, the inescapable conclusion to be drawn from Mr. Clinton's request for an extension is that he seeks judicial cover for political purposes; i.e., a 113-day delay which ensures nothing will be done before the November presidential election. Mrs. Jones, on the other hand, seeks only to proceed with pretrial discovery -- as this court said she should be able to do to prepare her case for trial -- before evidence becomes too stale or lost.

7. Finally, if this court is inclined to grant the extension, Mrs. Jones respectfully requests that the stay be lifted with respect to the Ferguson part of the case. Mr. Ferguson clearly does not enjoy immunity. In balancing the interests of judicial economy, and the interests of the defendants in keeping the cases "inextricably intertwined", Mrs. Jones' compelling interest in soon utilizing the established rules for all litigants who need to marshal their proofs, outweighs all other interests in a further extension of the stay.

WHEREFORE, Paula Corbin Jones, in reliance on what is stated herein, and the additional arguments previously advanced in her initial opposition to the stay, respectfully requests that Mr. Clinton's Motion to Extend the Stay of Mandate be denied.

Respectfully submitted,


Gilbert K. Davis


Joseph Cammarata

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Fairfax, Virginia 22031
(703) 352-3850

Daniel M. Traylor, Esq.
900 West Third Street
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Little Rock, Arkansas 72201

Counsel for Paula Corbin Jones
Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1996, I caused copies of the foregoing Opposition to President Clinton's Motion to Extend the Stay of the Mandate, was sent via facsimile and first-class mail, postage pre-paid on:

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Washington, D.C. 20530-0001


Joseph Cammarata

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

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 Appellee/Cross-Appellant :
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 v. : Cross-Appeals from the United
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TO EXTEND THE STAY OF MANDATE**

President Clinton, through undersigned counsel, hereby moves to extend the stay of mandate issued by the Court in the above-captioned matter until June 17, 1996.

On April 16, 1996, the Court stayed the mandate for 30 days, until May 16, pursuant to Federal Rule of Appellate Procedure 41(b). As provided in that rule and in the order, once the President notifies the Court that he has filed a petition with the Supreme Court, the stay would be extended indefinitely until the Supreme Court disposes of the matter.

Rule 41(b) explicitly envisions that the stay of the mandate may be "extended for cause shown." For the reasons stated below, we respectfully submit that there is ample cause for extending the stay in this case for an additional 30 days. We note that even with this extension, we will be filing a

petition for a writ of certiorari well before the expiration of the period established by the applicable statutes and Rules of the Supreme Court for filing such petitions. See 28 U.S.C. § 2101(c); Supreme Court Rule 13.

As the judges on the panel in this case stated, this case presents a "novel question", Jones v. Clinton, 72 F.3d 1354, 1356 (8th Cir. 1996), that "raise[s] matters of substantial concern given the constitutional obligations of the office" of the President. Id. at 1363 (Beam, J., concurring). The case already has produced four divergent opinions from the judges of this court, in addition to the opinion of the district court. We are most reluctant to present a case of such importance to the Supreme Court on a rushed basis. Ordinarily, a petitioner has at least 90 days, and possibly as much as 150 days, to prepare a petition for a writ of certiorari. 28 U.S.C. § 2101(c); Supreme Court Rule 13. Even if the court grants this request for an extension of the stay, we will draft, revise and print our petition in less time than that.

Moreover, because of the intrinsic significance of the issues, and because of the importance of presenting them to the Supreme Court in a manner that will best enable the high Court to determine whether to review them, two additional attorneys have been retained to assist us in preparing the petition. They are Professors Geoffrey Stone and David Strauss of the University of

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As explained in our initial motion to stay the mandate, without a stay the President's claims essentially will be forfeited, and the ability of the Supreme Court to review the decision of this Court, and, should it decide to do so, to grant full relief to the President, will be compromised. It is, we believe, beyond fair dispute that the issues in this case are far more important, and the likelihood of a grant of certiorari significantly higher, than in the ordinary case in which this Court grants a stay of the mandate. We accordingly request this additional brief extension of the stay.

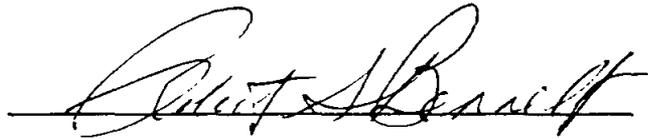
The cross-appellant's rights would not be altered by this relief. The date by which the petition will be filed under this regime is still earlier than had President Clinton used the full period allotted for filing a petition. Moreover, the stay previously ordered by the Court would have been extended automatically in any event, upon notification that the President had filed his petition with the Supreme Court, as provided in Rule

41(b). Therefore, staying the mandate an additional brief period under the same conditions would not change the plaintiff's situation.

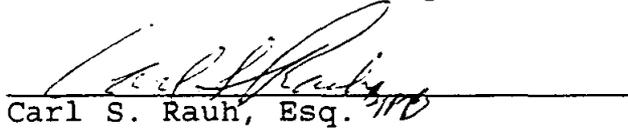
Accordingly, we respectfully seek to extend the stay of mandate for another 30 days. Because a 30-day extension would fall on a Saturday, we ask that the stay be set to expire on the following Monday, June 17, 1996.

Respectfully submitted,

By:



Robert S. Bennett, Esq.



Carl S. Rauh, Esq.

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

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Counsel to President William J. Clinton

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 1996, I caused copies of the President's Motion To Extend The Stay Of Mandate to be served by hand on:

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Joseph Cammarata, Esq.
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Fairfax, Virginia 22031

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

and by first-class mail on:

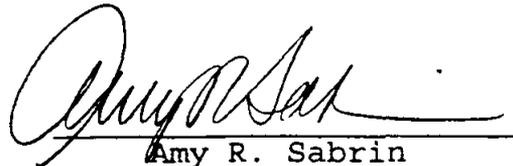
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FACSIMILE TRANSMITTAL SHEET

FROM: AMY SABRIN
DIRECT DIAL: 202-371-7699
DIRECT FACSIMILE: 202-371-7963

DATE: May 2, 1996
FLOOR/OFFICE No.: 8-7

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|------------------------------------|--|
| 1. NAME: <u>JACK QUINN, ESQ.</u> | FIRM: <u>WHITE HOUSE COUNSEL</u> |
| FACSIMILE No.: <u>202-456-6279</u> | TELEPHONE No.: <u>202-456-2632</u> |
| 2. NAME: <u>ELENA KAGAN, ESQ.</u> | FIRM: <u>ASST. WHITE HOUSE COUNSEL</u> |
| FACSIMILE No.: <u>202-456-1647</u> | TELEPHONE No.: <u>202-456-7594</u> |

Total number of pages including cover(s): 5

MESSAGE:

ENCLOSED FOR YOUR REVIEW PLEASE FIND A NEW DRAFT OF THE MOTION TO EXTEND THE STAY. THIS DRAFT INCORPORATES DAVID STRAUSS' COMMENTS. WE WOULD LIKE TO HAVE THIS FINALIZED PRIOR TO OUR MEETING THIS AFTERNOON, SO IT CAN BE FEDERAL EXPRESSED THIS EVENING. ACCORDINGLY, YOUR PROMPT COMMENTS WOULD BE APPRECIATED.

Thanks,

Amy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

PAULA CORBIN JONES,	:	
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Appellee/Cross-Appellant	:	
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Strauss's
structure
better*

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Accordingly, we respectfully seek to extend the stay of mandate for another 30 days. Because a 30-day extension would fall on a Saturday, we ask that the stay be set to expire on the following Monday, June 17, 1996.

Respectfully submitted,

By: _____

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. note	Elena Kagan to Jack, Bruce, & Kathy; re: Motion (1 page)	n.d.	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

FAX TRANSMISSION COVER FORM

DATE: ~~4:05~~ - 5/1/96

TIME SENT: 4:05

FROM: LAW SCHOOL FAX PHONE NUMBER: (312) 702-0730

NAME: David Frank

The University of Chicago
The Law School
1111 East 60th Street
Chicago, Illinois 60637

PHONE NUMBER: _____

TO: FAX PHONE NUMBER: (708) 456-1647

NAME: Elene Kagan

ADDRESS: _____

PHONE NUMBER: _____

NUMBER OF PAGES (including this cover form): 7

CONFIRMATION OF RECEIPT DESIRED: YES _____ NO

(THC-"fax"-5/16/91)

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INITIALS: OB DATE: 5/23/10

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004a. memo	David Strauss to Amy Sabrin; re: The Extension Application (2 pages)	05/01/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

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2009-1006-F
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004b. legal brief	re: Paula Jones v. William Jefferson Clinton (4 pages)	05/01/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Thursday Lawyers' Meeting (1 page)	04/30/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
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TO EXTEND THE STAY OF MANDATE

President Clinton, through undersigned counsel, hereby moves to extend the stay of mandate issued by the Court in the above-captioned matter until June 17, 1996.

On April 16, 1996, the Court stayed the mandate for 30 days, until May 16, pursuant to Federal Rule of Appellate Procedure ("FRAP") Rule 41(b). As provided in that rule and in the order, once the President notifies the Court that he has filed a petition with the Supreme Court, the stay would be extended indefinitely until the Supreme Court disposes of the matter.

In issuing this order, the Court implicitly found that the present case satisfies all the criteria for a stay, chief among them that the appellant would suffer irreparable harm if a stay were not granted. In particular, this is a case where pro-

ceeding with the mandate could expunge the very rights President Clinton seeks to vindicate by Supreme Review, and deprive the high Court of a meaningful opportunity to speak to the important issues raised by this case.

Under the Supreme Court rules, a petitioner normally has 90 days to file a petition for writ of certiorari. FRAP Rule 41(b) provides for a stay of mandate for 30 days. The interplay of the Supreme Court rules and Rule 41(b) thus creates an anomaly in cases such as this, in that it requires a petitioner to file earlier than otherwise would be necessary, in order to assure that his rights are fully protected. While President Clinton does not here seek to extend the stay for the full time he otherwise would have had to file a petition in this case, he does seek to extend the stay until Monday, June 17, 1996. Rule 41(b) permits extensions for good cause.

The reason for the President's request is as follows: This case raises novel issues of law with momentous consequences for the Presidency and the Judiciary, which deserve to be briefed carefully and thoroughly, and not in a rushed manner. Moreover, to ensure that these issues are analyzed and briefed in a manner sensitive to all their ramifications for both the Executive and Judicial branches, two attorneys with extensive experience before the Supreme Court have been added to the President's team of lawyers at this stage of litigation. The additional time is

needed to ensure that these new attorneys are able to familiarize themselves fully with the case, the issues and the applicable relevant case law, and to ensure that they and the President's existing counsel have sufficient time to thoroughly and appropriately address these issues in a petition to the high Court.

The cross-appellant's rights would not be altered by this relief. The date by which the petition will be filed under this regime is still earlier than had President Clinton used his full 90 days. Moreover, this court, by granting the original stay, already has found implicitly that the plaintiff's interests would not be significantly impaired by a stay and that whatever impairment there was did not outweigh the harm to the President's interests that would be occasioned by failing to stay the mandate. Moreover, the Court ordered the mandate to be extended automatically upon notification that the President had filed his petition with the Supreme Court, as provided in Rule 41(b). Accordingly, staying the mandate another 30 days with the same provision would not significantly change the plaintiff's situation.

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PRESERVATION

Accordingly, we respectfully seek to extend our term of
mandate for another 30 days. Because a 30-day extension
fall on a Saturday, we ask that the stay be set to expire on the
following Monday, June 17, 1996.

Respectfully submitted,

By:

Robert S. Bennett, Esq.

Carl S. Rauh, Esq.

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

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DUDLEY & COLLIER
309 West Third Street
Little Rock, Arkansas 72202
(501) 375-1111

Counsel to President William J. Clinton

PHOTOCOPY
PRESERVATION

THE WHITE HOUSE
WASHINGTON

Los Angeles

310-443-6176 - (o)

westwood Marquis - (hotel)

310-208-8765

Rm 1040

so-so: don't know
whether can come
back.

Can do by
comb. call.

She has to not
get opportunity -
in order to
make 6/21
conf.

(o) May 16
now (o) with
↓

Cut-off date

May 24. (Fri)

probably
sure to

May 31

June 21. June 28

30 days

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Thursday Lawyers' Meeting (1 page)	04/30/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. memo	Geoffrey Stone to Robert Bennett; re: The Petition (4 pages)	04/26/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. letter	Robert Bennett to Geoffrey Stone & David Strauss; re: Retention as Counsel (partial) (1 page)	04/23/1996	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

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- P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

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SKADDEN, ARPS, SLATE, MEAGHER & FLOM

440 NEW YORK AVENUE, N.W.
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BUDAPEST
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HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

April 23, 1996

Geoffrey R. Stone, Provost
University of Chicago
5801 Ellis Avenue
Chicago, Illinois 60637

David A. Strauss, Professor
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Dear Geoffrey and David:

This is to memorialize our earlier conversations to confirm that you have been retained to serve as "Of Counsel" in connection with our representation of President William J. Clinton in the case of Jones v. Clinton regarding the filing of a certiorari petition and any subsequent pleadings in the Supreme Court of the United States should certiorari be granted.

In this regard, you will consult with us regarding the pleadings which are in the process of being prepared and will, if oral argument is scheduled, assist us in preparing for oral argument.

[2008]

[REDACTED] P6/(b)(6)
[REDACTED] P6/(b)(6) It is understood and agreed that the President, and not this firm, will be responsible for the payment of all fees and expenses. However, as discussed, I will make every effort to seek payment from either the insurance carriers or the Presidential Trust.

Please send your statements for services rendered directly to me and I will process them for payment

Geoffrey R. Stone, Provost
David A. Strauss, Professor
April 23, 1996
Page 2

as soon as the logistics are settled. We will send you
our draft petition shortly.

We look forward to your assistance in this
matter.

Sincerely,



Robert S. Bennett

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

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C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009c. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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RR. Document will be reviewed upon request.

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THE WHITE HOUSE

WASHINGTON

April 16, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *ELC*

SUBJECT: JONES LITIGATION

1. David Strauss mentioned to me that he and Geof (yes, that is how he spells it) should probably get a retention agreement in order to ensure attorney-client privilege. Jack: is this something you should ask Bennett to prepare and handle?

2. Geof Stone is coming into Washington on Friday, April 26. Does it make sense for us to get together with him? Along with Bennett and Sabrin? Should we fly Strauss in for good measure?

✓
KW or ELC can remember to Amy

*only if we can
go over a draft,
yes?*

~~Call
Craig~~

May 16
—
May 20
—
June 21
backlog?

THE WHITE HOUSE

WASHINGTON

April 16, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EL*

SUBJECT: JONES LITIGATION

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2. Geof Stone is coming into Washington on Friday, April 26. Does it make sense for us to get together with him? Along with Bennett and Sabrin? Should we fly Strauss in for good measure?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Apr-1996 07:37pm

TO: Elena Kagan

FROM: Kathleen M. Wallman
 Office of the Counsel

SUBJECT: Strauss and Stoen

I was copied on a note from Jack to you about a retainer agreement for Strauss and Stone.

Can you please raise this with Amy (unless there is a reason that you want me to do it)?

Your note also mentions that we might meet on the 26th -- I'm for it, too, and think that we should insist on a draft by that date (since filing is due the following week, right?)

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. memo	Elena Kagan to Jack Quinn et al; re: Conversation with Walter Dellinger (1 page)	04/11/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
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Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011a. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011b. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03//11/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

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Withdrawal/Redaction Marker Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011c. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
012. memo	Elena Kagan to Jack Quinn & Kathy Wallman (2 pages)	02/14/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential-commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
013a. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Rex Lee (1 page)	03/05/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
013b. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Rex Lee (1 page)	03/05/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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RR. Document will be reviewed upon request.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
013c. note	re: Handwritten Notes - Rex Lee (1 page)	03/05/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

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THE WHITE HOUSE

WASHINGTON

February 6, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: SG'S BRIEF IN PAULA JONES CASE

Attached is a copy of the Solicitor General's amicus brief in support of the petition for rehearing in Jones v. Clinton. It's really pretty good.

The brief (in my view, correctly) downplays the question whether the President has constitutionally mandated immunity from civil suits involving pre-Presidential conduct. It instead focuses on the question whether a trial court, irrespective of any constitutional "entitlement," should be able to use its discretion over its docket to postpone such litigation. It concludes, based on the "obvious public and constitutional interests in the President's undivided attention to his office," that such an exercise of discretion is entirely appropriate.

The brief notes that the appellate court's decision "invites the filing of politically inspired strike suits by persons who are more interested in obstructing a sitting President than in obtaining private redress." The brief also argues that the appellate court's opinion overstates the importance of the plaintiff's interests in prosecuting her suit without delay.

*Amy Leben
Melissa have copies*

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

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

v.

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

and

DANNY FERGUSON,
Defendant-Appellee.

No. 95-1030

No. 95-1167

**MOTION OF UNITED STATES FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF SUGGESTION OF REHEARING EN BANC**

The United States of America hereby moves for leave to file a brief as amicus curiae in support of the pending suggestion of rehearing en banc in this case. Copies of the amicus brief are being lodged with the Court concurrently with the filing of this motion. The reasons for the motion are as follows:

1. On January 9, 1996, a divided panel of this Court issued a decision (i) affirming the district court's denial of a stay of pretrial proceedings and (ii) reversing the district court's stay of trial proceedings. On January 23, 1996, President Clinton filed a timely motion for rehearing and suggestion of rehearing en banc.

2. The United States has reviewed the panel decision and the rehearing petition filed by President Clinton. Based on that

review, the United States has concluded that the issues addressed by the panel should be reheard by the full Court. The United States has prepared an amicus brief that explains why, in our judgment, rehearing en banc is appropriate.

3. Throughout this litigation, the United States has participated as an amicus curiae to represent the interests of the office of the Presidency. The United States has similarly participated as amicus curiae in past cases involving the interests of the Presidency, such as Nixon v. Fitzgerald, 457 U.S. 733 (1982). The points made in our amicus brief do not merely repeat the views expressed in the President's rehearing petition, but rather address the legal issues from the institutional perspective of the Presidency. The United States therefore believes that this Court's consideration of whether to rehear this case en banc would be assisted by hearing the views of the United States.

For the foregoing reasons, the Court should grant the United States leave to file an amicus brief in support of the suggestion of rehearing en banc.

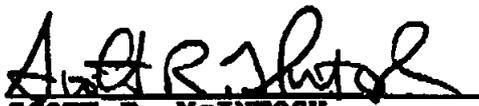
Respectfully submitted,

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January 30, 1996

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 1996, I served the foregoing MOTION OF UNITED STATES FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF SUGGESTION OF REHEARING EN BANC by mailing true copies, first-class postage prepaid, to:

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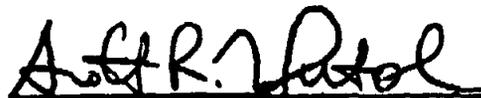
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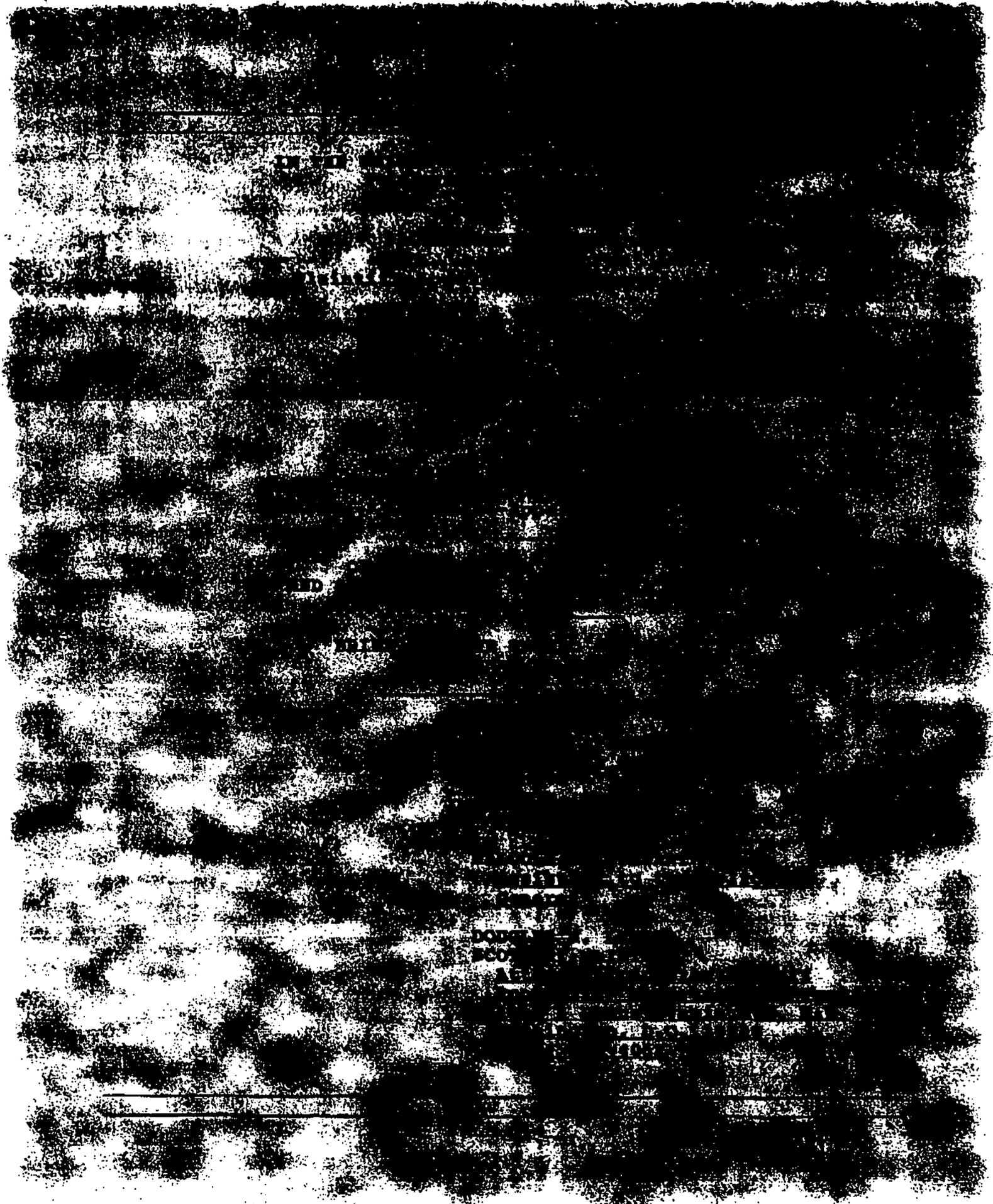


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2 Farrand, Records of the Federal Convention of 1787
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The Federalist No. 69 (C. Rossiter ed. 1961) 6

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

NOS. 95-1080 & 95-1167

PAULA CORBIN JONES,

Plaintiff-Appellee/Cross-Appellant

v.

WILLIAM JEFFERSON CLINTON,

Defendant-Appellant/Cross-Appellee,

and

DANNY FERGUSON,

Defendant-Appellee.

**ON PETITION FOR REHEARING
AND SUGGESTION OF REHEARING EN BANC**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

STATEMENT

This Court has before it a petition for rehearing and suggestion of rehearing en banc filed by the President of the United States. The United States has participated in this case as an amicus curiae to protect the interests of the institution of the Presidency. In that capacity, we now submit this brief in support of the suggestion of rehearing en banc. For the reasons set forth below, the United States believes that the legal issues presented by this appeal are sufficiently important, and the resolution of those issues by the divided panel sufficiently questionable, to warrant consideration by the full Court.

1. The central issue in this appeal is one of first impression in the federal courts: whether a sitting President should be compelled to defend himself during his term of office against a private civil action based on pre-Presidential conduct. In the view of the United States, he should not. Courts enjoy the general power to stay their proceedings, see Landis v. North American Co., 299 U.S. 248 (1936), and that power normally should be exercised in favor of staying the litigation until the completion of the President's term. A stay would prevent the litigation from interfering with the President's discharge of his constitutional duties under Article II, while preserving the plaintiff's ultimate ability to have his or her claims resolved on the merits. See generally Op. 26-32 (Ross, J., dissenting). The rule we suggest is not an inflexible one: in the exceptional case where a plaintiff will suffer irreparable injury without immediate relief, and it is evident that prompt adjudication will not significantly impair the President's ability to attend to the duties of his office, a stay properly may be withheld. Ordinarily, however, the obvious public and constitutional interests in the President's undivided attention to his office will demand a stay.

The panel rejected this view, on the ground that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Op. 16-17. As Judge Ross's dissent shows, that holding rests on a reading of Supreme Court precedent and constitutional history that is debatable at best. See id. at 26-27. In particular, the majority's reasoning does not give adequate weight to the consti-

tutional concerns identified by the Supreme Court in Nixon v. Fitzgerald, 457 U.S. 731 (1982). Fitzgerald holds that "[t]he President occupies a unique position in the constitutional scheme" (457 U.S. at 749); that the President should not be diverted from attending to the duties of his "unique office" by "concern with private lawsuits" (id. at 749, 751); and that where the public interest in the President's attention to his official responsibilities conflicts with a private litigant's interest in obtaining redress for legal wrongs, the private interest must yield. Id. at 754 n.37. Those principles argue strongly in favor of recognizing a generally applicable constitutional bar against the prosecution of private suits against sitting Presidents.

But even if the majority's constitutional analysis were correct on its own terms, that is not the end of the matter. The issue in this case is not confined, as the majority seems to have thought, to whether the Constitution ex proprio vigore renders the President "immune" from civil actions during his term of office. Instead, the question is whether the constitutional and practical demands of the Presidency should lead a court to exercise its undoubted authority over its docket to postpone the litigation. The majority opinion fails to come to terms adequately with that question.

The panel majority appears to have been led astray by the concept of Presidential "immunity." The majority opinion reasons that Presidential immunity "is not a prudential doctrine fashioned by the courts," but rather is a rule that applies, "if at all, only because the Constitution ordains it." Op. 16; see also id.

at 7 (official immunity "is not to be granted as a matter of judicial largesse"). As a general matter, that is simply not correct.¹ But even if immunity from liability had to be constitutionally grounded, the "immunity" asserted by the President in this case is fundamentally different. No one has suggested that the President is immune from liability for pre-Presidential conduct. What is at issue here is simply a question of timing: when, not whether, the President must participate in judicial proceedings based on allegations concerning his private conduct. On that score, a court enjoys inherent authority to control the progress of cases on its docket, regardless of whether there is a constitutional imperative for it to do so. See, e.g., Landis, supra.

The panel majority acknowledged that the district court has "broad discretion in matters concerning its own docket." Op. 14 n.9. Nonetheless, the majority held that exercising that discretion in favor of a stay here constitutes reversible error. Op. 14 n.9. The majority reasoned that because (in its view) the President "is not constitutionally entitled" to "temporary immunity," it was "an abuse of discretion" for the district court to grant a stay on equitable grounds. Ibid.

¹ The Supreme Court has not confined official immunity to cases where "the Constitution ordains it" (Op. 16). To the contrary, the Court has stated that "the doctrine of official immunity from § 1983 liability * * * [is] not constitutionally grounded." Butz v. Economou, 438 U.S. 478, 497 (1978) (emphasis added). The Court has looked to common law immunity rules, rather than to the Constitution, as the benchmark for official immunity in Section 1983 actions. See, e.g., Pierson v. Ray, 386 U.S. 547 (1967).

That reasoning, we submit, is a non sequitur. Rarely, if ever, are parties "constitutionally entitled" to postpone litigation. But it hardly follows that the lack of a constitutional "entitlement" makes granting a stay an abuse of discretion. To the contrary, courts enjoy broad authority to stay civil proceedings in order to accommodate public and private interests that would be unfairly prejudiced by immediate litigation. For example, courts may stay civil actions in order to accommodate related criminal prosecutions -- not because the Constitution compels a stay, but simply because the public interest calls for one. See, e.g., United States v. Mellon Bank, N.A., 545 F.2d 869 (3rd Cir. 1976); 2 Beale & Bryson, Grand Jury Law and Practice § 8:07 (1986). The panel majority disregards this long-recognized authority.

The majority opinion is thus significant not only for the importance of the questions it addresses, but also for the extreme character of the answers it adopts. The panel decision, it must be emphasized, does not merely hold that courts are not required to stay private civil suits against a sitting President. Instead, the panel holds that courts are prohibited from staying such suits.

This holding is difficult to fit together with the surrounding legal landscape. For example, the available evidence strongly indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting

President.² The panel's decision thus gives greater priority to private civil actions than criminal law enforcement proceedings would be entitled to. Yet as the Supreme Court noted in Fitzgerald, "there is a lesser public interest in actions for civil damages than * * * in criminal prosecutions." 457 U.S. at 754 n.37.

The panel's holding is similarly at odds with the public policies reflected in the Soldiers' and Sailors' Civil Relief Act ("SSCRA"), 50 U.S.C. App. §§ 501 et seq. Section 201 of that Act requires federal and state courts to grant a stay in any suit involving "a person in military service," if the court determines that "the ability of the plaintiff to prosecute the action or the defendant to conduct his defense [would be] materially affected by reason of his military service." 50 U.S.C. App. § 521. If the court makes the necessary finding regarding the impact of military service on the litigation, Section 201 mandates a stay of proceedings regardless of the effect of the stay on other litigants. See, a.g., Sealer v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943); Coburn v. Coburn, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982). The policy considerations that underlie the SSCRA apply with far greater force to a civil action that threatens to impair the

² See, a.g., 2 Farrand, Records of the Federal Convention of 1787 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law"). In In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

attention to duty of the President, who is the Commander in Chief. U.S. Const. Art. II, § 2. Yet far from adopting a comparable rule in favor of staying civil actions against sitting Presidents, the panel has adopted precisely the opposite rule.

Not only is the panel's holding debatable as a legal matter, but it is highly troubling as a practical one. However unintentionally, the panel decision invites the filing of politically inspired strike suits by persons who are more interested in obstructing a sitting President than in obtaining private redress. It is hardly reassuring that, as the majority opinion notes, "few such lawsuits have been filed." Op. 14. Prior to this case, no federal court had ever held that such suits could go forward during the President's term of office. Now, this Court has held not only that they may go forward but that they must. The consequences of that unprecedented holding, both for the office of the Presidency and for the American people, are potentially severe.³

2. The panel decision is also problematic in its handling of the other interests involved in this case. The majority opinion and Judge Beam's concurrence express concern for the possible adverse impact of delay on the plaintiff in this case and on plaintiffs as a class. The United States does not suggest that

³ The majority opinion reasons that the "universe of potential plaintiffs" who might bring suit against a sitting President for his private actions is relatively small. Op. 15. We respectfully disagree. Every President in this century has held one or more prominent positions before ascending to the Presidency. In each case, the inevitable result is a large class of persons with whom the President has had prior social, professional, or business dealings that could give rise to litigation.

the potential consequences for plaintiffs are irrelevant. But in several important respects, the majority and the concurrence overstate those consequences.

The majority opinion suggests that delaying litigation until the President leaves office would infringe on the plaintiff's constitutional right of access to the courts. Op. 10. But a stay affects only the timing of the litigation, not whether the plaintiff receives her day in court. As a result, the plaintiff's asserted constitutional interest in access to the courts is unaffected. We note in this regard that while the Bill of Rights guarantees the right to a speedy trial in criminal cases, it conspicuously lacks a similar guarantee for civil litigation.⁴

The concurring opinion cites the risk that testimony may be lost because of the death or incompetence of witnesses during the pendency of a stay. Op. 18. But as the United States noted in its amicus brief in this Court, and as the district court itself recognized when it granted a stay of discovery pending appeal, there is no reason why the parties cannot make arrangements to preserve evidence when necessary. Cf. Fed. R. Civ. P. 27(a),

⁴ The concurring opinion is similarly mistaken when it suggests that staying the litigation would infringe on the plaintiff's Seventh Amendment right to trial by jury. Op. 18. The Seventh Amendment concerns who will decide contested issues of fact, not when such issues will be decided. In the words of the Fifth Circuit, "[n]othing in the seventh amendment requires that a jury make its findings at the earliest possible moment in the course of civil litigation; the requirement is only that the jury ultimately determine the issues of fact * * * ." Woods v. Holy Cross Hospital, 591 F.2d 1164, 1178 (5th Cir. 1979) (emphasis in original); see also Capital Traction Co. v. Hof, 174 U.S. 1, 23 (1899) (Seventh Amendment "does not prescribe at what stage of an action a trial by jury must * * * be had").

27(c) (perpetuation of testimony). Moreover, even if there were concrete reasons to think that evidence might be lost in the absence of discovery -- and no such reasons are evident in this case -- that risk would hardly justify reversing the district court for staying trial, as distinct from pretrial, proceedings.

In sum, the panel decision in this case addresses issues of considerable significance to the Presidency and the public, and disposes of those issues in ways that are both legally and practically problematic. Before a sitting President is compelled for the first time in the Nation's history to stand trial as a defendant in a private lawsuit, review of these issues by this Court en banc is called for.

CONCLUSION

For the foregoing reasons, the cross-appeals in this case should be reheard by the Court en banc.

Respectfully submitted,

DREW S. DAYS, III
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January 30, 1996

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
014. notes	re: Handwritten Notes - Mandate (partial) (1 page)	n.d.	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F
jp2022

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Harry - Wed. taught

P6/(b)(6)

8:00

[014] Harry

P6/(b)(6)

Kathy

P6/(b)(6)

Mandate issued 7 days
after denied.
Be ready by mid-April

~~MANDATORY~~