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Paula Jones Case [3]

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003. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Litigators [partial] [page 2 withdrawn in full] (2 pages)	04/05/1996	P5, P6/b(6)
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**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. 95-1050
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

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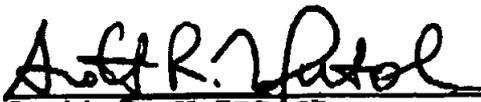
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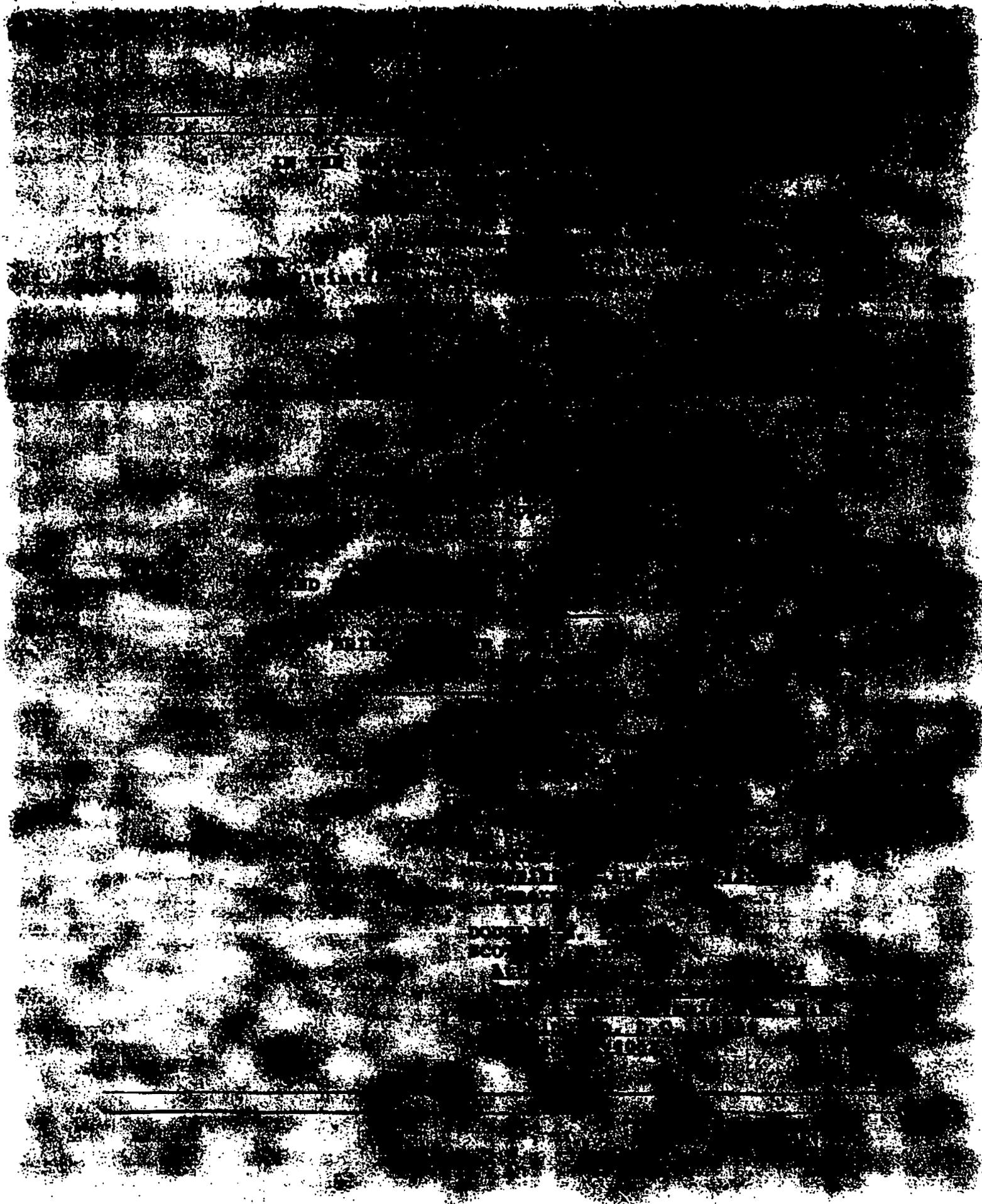


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**IN THE UNITED STATES COURT OF APPEALS
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NOS. 95-1050 & 95-1167

**PAULA CORBIN JONES,
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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, e.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, e.g., 2 Farrand, Records of the Federal Convention of 1787 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law"). 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,

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January 30, 1996

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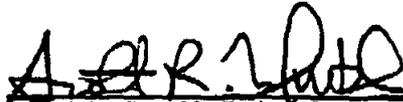
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No. 95-1050 and 95-1167

PAULA JONES

Appellee/Cross-Appellant

vs.

WILLIAM JEFFERSON CLINTON

Appellant/Cross-Appellee

and

DANNY FERGUSON

Defendant.

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

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

Required Statement

We express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Under the Constitution, must private civil suits for damages against a sitting President be deferred until that President leaves office?

2. Under the circumstances of this case, should such a suit be deferred until the President leaves office?

Introduction

This case presents two novel and momentous legal issues: First, whether the Constitution requires that private civil claims for damages against a sitting President be deferred until the close of a President's service in office, and second, even if the Constitution does not require it, whether a court should defer such litigation as a matter of judicial discretion. The district court stayed trial in this case on both constitutional and equitable grounds, but ruled that discovery could proceed, including discovery against the President. The majority of the appellate panel held that the entire litigation should go forward, concluding that deferral was not mandated by the Constitution and that the district court's stay of trial constituted an abuse of discretion. Judge Ross dissented, and would have stayed the case in its entirety.

Thus, four federal judges have considered these issues to date, have written four separate opinions on the subject, and have reached three different results. They all agree, however, that this case raises unique, important and unresolved questions of law. The majority opinion described this as a "novel question," and Judge Beam in his concurrence observed that the President and his amicus "raise matters of substantial concern given the constitutional obligations of the office." Jones v. Clinton, No. 95-1050/1167, slip op. at 3, 17 (8th Cir. Jan. 9, 1996) (hereinafter "Op."). The trial court too was conscious of the fact that "new law is being made" here. Jones v. Clinton, 869 F. Supp. 690, 700 (E.D. Ark. 1994). A case of this novelty and significance cries out for review by the full Court.

The majority's ruling, moreover, rejected not only the President's position, but also that of the Solicitor General, who filed a statement of interest on behalf of the United States. We respectfully submit that the majority misconstrued the constitutional protections from suit for civil damages given to the President by Supreme Court precedent. Additionally, in holding that short of a constitutional mandate to do so, it was an abuse of discretion to stay proceedings involving the President, the majority failed to address Supreme Court pronouncements concerning the deference courts are to accord that Office, and unduly restricted the trial court's discretion.

Finally, the majority opinion provided the trial court with no guidance on how to manage private litigation where the

President is a party, short of requiring the President to choose between performing his official duties and participating in his own defense. In so doing, it opened the door to potential constitutional confrontations between the Executive and the Judiciary -- confrontations that easily could be avoided simply by deferring this litigation. Because the resolution of all these issues could have a crucial impact on the Presidency, the judiciary, and the country at large, President Clinton hereby petitions the Court for rehearing or alternatively seeks a rehearing en banc before the full Eighth Circuit. ✓

Background and Procedural History

On May 6, 1994, Paula Jones filed a civil damages complaint against President Clinton and Arkansas State Trooper Danny Ferguson. The complaint contained four counts against the President, two arising under federal civil rights acts and two based on Arkansas common law. All but one of the claims accrued in 1991, while Mr. Clinton was Governor of Arkansas and before he became President. Trooper Ferguson was named as a co-defendant in two of the counts. The plaintiff sought \$400,000 in compensatory damages and \$300,000 in punitive damages.

President Clinton moved to dismiss the complaint, without prejudice, on the grounds of temporal presidential immunity, and to toll the statute of limitations until he left office, thereby preserving the plaintiff's ability to refile at that time. In the alternative, the President contended that the litigation should be

stayed in its entirety during his service as Chief Executive.¹ The Solicitor General filed a Statement of Interest on behalf of the United States, supporting the President's position that an incumbent Chief Executive should not be required to litigate private civil damages suits such as this.

The district court denied the President's motion to dismiss, and held that discovery could proceed immediately, including discovery against the President.² The trial court found that there was no exigency to the plaintiff's pursuit of damages in this particular case, however, and stayed trial until the President's term of office expired. Such a stay was required by the rationale of Nixon v. Fitzgerald, 457 U.S. 731 (1982), the court reasoned, and was also an appropriate exercise of a trial court's discretion pursuant to Federal Rule of Civil Procedure 40 and the equitable powers of a court to manage its own docket. Jones v. Clinton, 869 F. Supp. 690, 699 (E.D. Ark. 1994). The stay was extended to include trial of the claims against Trooper Ferguson, which the court found were factually inseparable from those against the President. Id.

President Clinton appealed those parts of the lower court's order denying his motion to dismiss and permitting

¹ Additionally, because the allegations involving Trooper Ferguson were closely intertwined with those against the President, the President asserted that any proceedings against the Trooper should be held in abeyance as well.

² Discovery was subsequently stayed pending appeal.

discovery to go forward. Ms. Jones cross-appealed the district court's order staying trial.

On January 9, 1996, a divided panel of this Court rejected the President's appeal. Holding that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts," the panel opinion affirmed the district court's decision denying the motion to dismiss and allowing discovery to proceed. Op. at 16-17. The majority went further, however, and reversed the district court's order staying trial. In a footnote, the panel held that since the Constitution as they construed it did not confer immunity on the President from private civil damages claims, it was an abuse of discretion for the district court to have stayed any part of these proceedings. Op. at 14 n.9. Judge Ross issued a forceful dissent. He would have stayed the case in its entirety, including discovery, pending completion of the President's service. Op. at 26-32 (Ross, J., dissenting).

Argument

REHEARING IS WARRANTED BECAUSE THIS CASE PRESENTS ISSUES OF GRAVE CONSTITUTIONAL DIMENSION AND EXCEPTIONAL PUBLIC IMPORTANCE, AND BECAUSE THE PANEL OPINION MISCONSTRUES IMPORTANT LEGAL PRECEDENTS IN A MANNER DETRIMENTAL TO THE PRESIDENCY AND TO THE DISCRETIONARY AUTHORITY OF COURTS TO STAY PROCEEDINGS.

I. THE MAJORITY'S ANALYSIS OF THE CONSTITUTIONAL ISSUE WARRANTS FURTHER REVIEW.

The first issue presented here is whether the Constitution and its structure implicitly require this lawsuit to be deferred until the President leaves office. In particular, this case presents directly, for the first time in American history, the

question of whether a trial court can or should exercise jurisdiction over a sitting President for purposes of a private civil suit for damages. While no case is directly on point, there are several Supreme Court rulings and historical sources that set out relevant guideposts. We respectfully submit, however, that the majority's analysis of these precedents is flawed in several significant respects, and that the issue requires further review.

A. The Panel Decision Misconstrues *Nixon v. Fitzgerald*.

In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Supreme Court ruled that Presidents cannot be held liable in damages for conduct within the outer perimeter of their official duties. The majority here found that the rationale of *Fitzgerald*, as well as its holding, was limited to suits involving official conduct. By contrast, Judge Ross in dissent concluded that "the language, logic and intent of [*Fitzgerald*], although set in the context of official acts, applies with equal force to the present factual scenario and directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President," even those based on unofficial acts, "must be stayed." Op. at 26 (Ross, J., dissenting).

We respectfully submit that Judge Ross was correct, and that the majority read *Fitzgerald* far too narrowly. In so doing, it fails to recognize that the constitutional concerns discussed in *Fitzgerald* -- the President's acute vulnerability to civil claims, and the impermissible diversion of the President's time and attention if subject to litigation of such claims while in

office -- are equally present whether a suit for civil damages against a President is based on private conduct or official conduct. See 457 U.S. at 752-53. The unofficial nature of the alleged events would not make defending a private suit of civil damages any less of an imposition on the President's constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." Id. at 751.

Because of the significance of the Presidency, moreover, the Supreme Court in Fitzgerald admonished courts generally to refrain from exercising jurisdiction over a President unless there is a constitutionally-based public interest that justifies doing so, and further found that a "merely private suit for damages" -- even one alleging a violation of constitutional rights -- did not rise to that level. Id. at 753-54. The majority opinion here rejects the contention that this passage of Fitzgerald was in any way relevant to this case. Op. at 11.

However, as underscored by Judge Ross's dissent, Fitzgerald states that this balancing test must be performed in any case that involves the Presidency:

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. When judicial action is needed to serve broad public interests -- as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. Youngstown Sheet & Tube Co. v. Sawyer, supra, or to vindicate the public interest in an ongoing criminal prosecution, see United States v. Nixon, supra, -- the exercise of jurisdiction has been held

warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.

Fitzgerald, 457 U.S. at 753-54 (emphasis added) (citations and footnotes omitted).

Like Fitzgerald, this suit involves a "merely private suit for damages," and, we respectfully submit, does not further a broad constitutional interest such as curbing an abuse of presidential authority. Indeed, the Fitzgerald Court specifically concluded that the public's interest in civil damages actions is far weaker than its interest in criminal law enforcement proceedings, a point which the majority did not address. Fitzgerald, 457 U.S. at 754 & n.37. Further review of Fitzgerald's relevancy to the present case is therefore warranted.

B. The Majority's Analysis of the Constitutional Issue Is Permeated by a Misconception of the President's Position.

The only issue in this case is when the plaintiff's case will go forward, not whether it will proceed. The President contends that the public interest in the effective performance of his constitutional duties requires only that the litigation be held in abeyance. He does not assert that under the Constitution he can never be called to account for his private conduct, or cannot be held liable in damages if the facts ultimately warrant. The majority, however, effectively fails to take into account that the constitutional protection the President here asserts is calibrated to protect the public's interest in the Presidency, while preserving the plaintiff's right ultimately to pursue her claims.

Indeed, the majority misframed the constitutional issue as whether a sitting President may entirely escape liability for personal acts: "We have before us in this appeal the novel question whether the person currently serving as President . . . is entitled to immunity from civil liability for his unofficial acts." Op. at 1 (emphasis added). Although the majority later clarifies that the relief the President seeks is actually more narrow, the majority's analysis of the relevant constitutional law is suffused with the notion that the President is seeking to evade liability. For example, the majority states President Clinton seeks to expand the absolute immunity granted to President Nixon in Fitzgerald to unofficial acts. Op. at 9. In fact, President Clinton nowhere suggests or contends that the plaintiff's rights should be extinguished completely, as were Mr. Fitzgerald's. This and similar confusing descriptions of the President's position here further undermine the viability of the panel's analysis.

C. This Case Is Appropriate for Review Because It Represents a Break With the Understanding of the Presidency Held by the Framers of the Constitution.

The majority's ruling also fails to treat the intent of the Framers of the Constitution as discerned by the Supreme Court in Fitzgerald. There, the Court found "historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability," and concluded that "nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. at 751 n.31. Indeed, presidential immunity

from civil suits "has never been seriously questioned until very recently." Id. at 758 n.1 (Burger, C.J., concurring).³

The panel's opinion disregards the historical evidence cited in Fitzgerald. See Op. at 28-29 (Ross, J., dissenting). Such limited attention to the intent of the Framers in answering a constitutional question of first impression is yet another reason why this case is worthy of further review.

II. FURTHER REVIEW IS WARRANTED OF THE PANEL'S SUMMARY CONCLUSION THAT THE TRIAL COURT ABUSED ITS DISCRETION BY STAYING ANY PART OF THESE PROCEEDINGS.

Even if deferral of this litigation were not mandated by the Constitution, President Clinton asserts that it should be stayed in its entirety as a matter of judicial discretion. The majority, however, summarily dismissed this contention in a footnote, asserting without support that unless the Constitution as they construed it required postponing this litigation, it would be an abuse of discretion to stay any part of these proceedings. Accordingly, it overturned the stay of trial ordered by the district court. Op. at 14 n.9.

The majority evidently concluded that the defendant's status as an incumbent President should play no role in a court's

³ In apparent contradiction to Chief Justice Burger's opinion in Fitzgerald, the majority notes that "[a]lthough our Presidents never have been recognized as having any immunity from lawsuits seeking remedies for civil liabilities allegedly incurred by them in their personal dealings, it would appear that few such lawsuits have been filed." Op. at 14. The panel evidently believes that because few suits have been filed against sitting Presidents, there is little need to protect Presidents from such suits. However, we agree with Chief Justice Burger that few suits were filed because it was assumed that Presidents were immune from them.

exercise of discretion to issue a stay. However, the Supreme Court has recognized on many occasions that courts are, in Chief Justice Marshall's words, "not required to proceed against the president as against an ordinary individual." United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). Indeed, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." Fitzgerald, 457 U.S. at 753. Surely these same factors should be considered by a trial court in considering whether to issue a stay here.

The Supreme Court also has stated that as a general matter, a court's

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.

Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). Moreover, under Rule 40 of the Federal Civil Rules of Procedure, district courts are given the power to assign cases for trial.

Even without a constitutional basis for deferring this litigation, a court exercising the discretion recognized in Landis and Rule 40 reasonably could -- indeed would -- conclude that a stay is warranted. Courts often issue stays when the public interest so requires, such as in cases where civil litigation is stayed indefinitely pending resolution of concurrent criminal proceedings, even though conclusion of the criminal proceedings may

take months or years.⁴ The trial court also reasonably could have concluded that it would be a more efficient use of judicial resources to stay trial than to attempt to manage a multi-week jury trial with the constant interruptions and delays that would be necessitated by the defendant's presidential duties, or that it would be extremely unfair to President Clinton to require him to choose between participating in his own defense and the performance of his official duties.

To hold that it was an abuse of discretion for the court to issue any stay here thus fails to take into account the defendant's status as President -- and the public interests that status implicates -- and unduly constricts the district court's otherwise broad authority to stay proceedings.⁵ Accordingly, a fuller and more thorough review of the stay issue is warranted.

III. THE MAJORITY'S OPINION COULD BE READ AS SUPPORTING AN UNPRECEDENTED EXPANSION OF JUDICIAL POWER OVER THE PRESIDENCY.

The majority lays the groundwork for a potential, unprecedented expansion of judicial intrusions into the Presidency. Heretofore, no sitting President has ever been compelled to furnish evidence in a civil case. Nor are we aware of any case -- criminal or civil -- in which an incumbent Chief Executive has been forced

⁴ See Koester v. American Republic Investments, 11 F.3d 818, 823 (8th Cir. 1993); Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979).

⁵ Moreover, by reasoning that this litigation would not necessarily encumber President Clinton's official duties because he could always choose to forego attending depositions and trial or being actively involved in his own defense, Op. at 24 (Beam, J., concurring), the concurrence also fails to take into account Mr. Clinton's status as a citizen.

to testify at trial. Moreover, injunctive relief against a sitting President would be extraordinary. Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992). Yet if the panel's opinion were to stand, all these things could come to pass.

We do not dispute the authority of the courts to interpret the scope of presidential powers and prerogatives. Here, however, we are dealing with a different issue -- the authority of a court to dictate how a particular President spends his time on any given day, and which matters are given priority for a President's time and attention. A court could find it necessary to rule on the validity of a President's asserted basis for requesting a continuance or other relief due to the demands of the Office.

The majority would resolve these concerns by placing the President's activities under the control of the courts:

What is needed, we believe, to avoid a separation of powers problem is not immunity from suit for unofficial actions . . . but judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule. The trial court has broad discretion to control the scheduling of events in matters on its docket.

Op. at 13-14. Thus, whether the President must attend to private litigation matters rather than official duties, and whether he will be required to choose between protecting the country's interest and protecting his own interest in a private lawsuit, are questions to be resolved by "judicial case management," or, to put it more plainly, by federal judges, or possibly in future cases, even elected state judges.

7

Additionally, as Judge Ross points out, the majority provides almost no guidance to trial courts as to how these determinations should be made:

The majority's decision leaves as many questions unanswered as it answers: Must a President seek judicial approval each time a scheduled deposition or trial date interferes with the performance of his constitutional duties? Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? Finally, can a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict?

Op. at 29-30 (Ross, J., dissenting).

By failing to answer these questions, the majority opens the door to future, potentially severe constitutional conflicts between the Executive and the Judiciary. If a court fails to protect the Presidency adequately, the majority would require a President, at personal expense, to petition the appeals court for a writ of mandamus or prohibition, and then perhaps to appeal any adverse decision to the Supreme Court. Op. at 16. As Judge Ross noted, "[t]his suggestion . . . clearly epitomizes the separation of powers conflict inherent in a system that subjects a sitting President personally to the court's jurisdiction for the purpose of private civil litigation." Op. at 29 (Ross, J., dissenting).

The majority thus sets the stage for a series of potential constitutional clashes between the President and the courts, rather than avoiding such confrontations altogether by

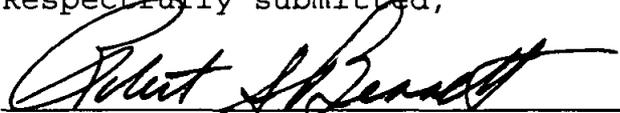
deferring non-exigent civil litigation until a President leaves office. Cf. Franklin v. Massachusetts, 505 U.S. at 828 ("needless head-on confrontations" between district courts and the President are to be avoided) (Scalia, J., concurring). This alarming prospect deserves further consideration by the full court.

Conclusion

This case presents entirely novel and extremely important questions. The resolution of these questions will have serious consequences for the Executive and Judicial Branches as well as for the country at large. This Court therefore should exercise its authority to rehear this case en banc, so that it may reconsider the wisdom of the panel's significant, constitutional holdings.

Respectfully submitted,

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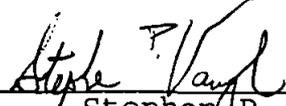
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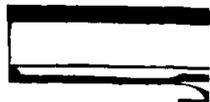
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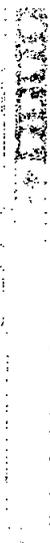
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Sidley & Austin has long had an active appellate practice. Our appellate practice is national in scope, involving lawyers in all four of our domestic offices. Our lawyers have developed significant expertise in the United States Supreme Court, state supreme courts, federal courts of appeals and other appellate forums.

The cases argued in the United States Supreme Court by the firm's lawyers have covered a wide range of legal topics, including constitutional, antitrust, administrative, environmental, tax, civil rights, employment, criminal, and health law. In the last ten terms of the Supreme Court, Sidley & Austin attorneys have briefed 45 cases on the merits, and have argued 37 cases, which were presented by five different lawyers. (A list of all of the cases handled on the merits in the Supreme Court is attached.) Since coming to the firm, Rex Lee, a former Solicitor General of the United States, has argued more than 20 cases and Carter Phillips has argued 10. For the 1995 Term of the U.S. Supreme Court, the firm represents clients in four cases that will be argued after October.

In the 1994 Term of the Supreme Court, the firm represented clients in three landmark constitutional cases, and in each case the firm's client prevailed by a vote of 5-4. In *United States v. Lopez*, Sidley represented the defendant in arguing successfully that a federal statute that prohibited the possession of firearms within 1000 feet of a school exceeded Congress' authority under the Commerce Clause. In *U.S. Term Limits, Inc. v. Thornton*, the firm represented Congressman Ray Thornton in urging the Court to strike down state adopted term limits imposed upon Members of Congress. Finally, in *Missouri v. Jenkins*, Sidley represented the State of Missouri in successfully arguing that the district court had exceeded its authority in adopting a \$1.5 billion desegregation remedy designed to make the Kansas City public school system attractive enough to bring suburban student into the Kansas City system.

In the previous Term of the Supreme Court, attorneys in the firm argued four cases. In one of those cases, *O'Melveny & Myers v. FDIC*, the Court addressed the most important legal issue arising in litigation involving failed savings and loans. In *O'Melveny*, the firm won a unanimous victory for its client when the Court held that state law governed the claims of the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC) as successors to failed savings and loan associations. In another case, *Turner Broadcasting System, Inc. v. FCC*, the firm successfully represented the Association of Independent Television Stations in a landmark case involving the First Amendment rights of

cable television systems and programmers. Other recent cases argued by Sidley & Austin attorneys in the Supreme Court have involved some of the most pressing constitutional questions of the day, including the permissible scope of school desegregation decrees, the constitutionality of rent control, the constitutionality of California's Proposition 13 tax reform, and the due process standards applicable to punitive damages.

In addition to the Supreme Court cases in which the firm represents a party, the firm also files a significant number of *amicus curiae* briefs. For example, the firm recently has filed amicus briefs on behalf of local government groups, such as the National League of Cities, business groups, such as the Chamber of Commerce, the American Bar Association and various ad hoc coalitions of religious organizations and medical organizations, including the American Medical Association and the American College of Obstetricians and Gynecologists.

Lawyers in the appellate group also have significant experience in urging the United States to support actions taken by the firm's clients in the Supreme Court and in other courts. This important, but often overlooked, aspect of appellate practice involves advocating the client's position before the Department of Justice, including the Office of the Solicitor General, and other federal agencies and departments.

The firm also has a substantial practice in the United States Courts of Appeals and state supreme courts. In recent years, Sidley & Austin attorneys have handled appellate cases in every federal circuit and in the highest courts of many states. These cases have covered a wide range of substantive legal areas, including labor, administrative, insurance, securities, patent, antitrust, tax, civil rights, criminal, environmental, tort and banking law.

Sidley & Austin has a significant number of experienced appellate lawyers who are capable of briefing and arguing any kind of legal issue. Attached is a list and description of some of the firm's attorneys who have devoted a significant amount of time to appellate matters while with the firm.

WASHINGTON, D.C.

Rex E. Lee is a former Solicitor General of the United States and a former Assistant Attorney General in charge of the Civil Division of the Justice Department. Mr. Lee joined Sidley & Austin in 1986 and has argued 21 cases in the United States Supreme Court during his tenure with the firm. In total, Mr. Lee has argued 59 cases in the Supreme Court. Mr. Lee was named President of Brigham Young University in 1989, and changed his status with the firm from partner to counsel. Effective January 1, 1996, Mr. Lee will return to private practice full time and will rejoin the firm as a partner.

Mr. Lee graduated from the University of Chicago Law School and clerked for Justice Byron R. White. He practiced law in Phoenix, Arizona, prior to becoming the founding Dean of the J. Reuben Clark Law School at Brigham Young. During the October 1993 term, Mr. Lee won two cases in the Supreme Court: *Digital Equipment Corp. v. Desktop*

Direct, which involved the collateral order doctrine and *O'Melveny & Myers v. FDIC*, which involved the source of law, state or federal, governing claims by the FDIC against professionals who provided services to failed savings and loans. Mr. Lee also has argued a number of landmark decisions, the most notable of which was *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court struck down on separation-of-powers grounds the one-house veto exercised by Congress.

Carter G. Phillips graduated *magna cum laude* from Northwestern University School of Law. He served as a law clerk to both Judge Robert Sprecher on the United States Court of Appeals for the Seventh Circuit and Chief Justice Warren E. Burger on the United States Supreme Court. Mr. Phillips served as Assistant to the Solicitor General for almost three and one-half years, during which time he argued nine cases on behalf of the federal government in the United States Supreme Court.

Since joining Sidley & Austin, Mr. Phillips has argued ten cases before the Supreme Court. During the October Term, 1993, he argued *TXO Production Corp. v. Alliances Resources, Inc.*, which involved the due process standards applied to punitive damage awards. During the October 1991 term, he successfully argued *Yee v. City of Escondido*, which involved a challenge under the Takings Clause to the city's laws regulating mobile homes. Mr. Phillips briefed and argued *McNally v. United States*, 483 U.S. 350 (1986), in which the Supreme Court struck down the prevailing interpretation of the mail fraud statute that had been used to convict hundreds of public officials, including Governors Mandel and Kerner.

Mark D. Hopson graduated first in his class from Georgetown Law Center where he was the Notes and Comments Editor of the *Georgetown Law Journal*. Following graduation, he served as a law clerk to Judge Thomas F. Hogan of the U.S. District Court for the District of Columbia. Since joining the firm, his practice at Sidley & Austin has been divided between appellate litigation and complex civil and criminal trial litigation. He has argued cases before the Third, Fourth and Sixth Circuits and has participated in trials and other contested proceedings in a number of federal and state trial courts.

Mark Haddad graduated from Yale Law School, where he was Editor-In-Chief of the *Yale Law Journal*. He is a Rhodes Scholar and former law clerk to Justice William J. Brennan, Jr. and Judge Louis H. Pollak. Since joining Sidley & Austin, Mr. Haddad has been principally responsible for preparing briefs and petitions for certiorari in the United States Supreme Court and briefs in the Courts of Appeals for a variety of clients. His primary areas of concentration are antitrust, constitutional, administrative and health care law. He has argued cases before the Fifth and Ninth Circuits and other federal and state trial and appellate courts.

Gene Schaerr joined Sidley & Austin following clerkships on the U.S. Supreme Court (for Chief Justice Warren Burger and Justice Antonin Scalia) and on the U.S. Court of Appeals for the D.C. Circuit (for then-Judge Kenneth Starr). He also served for two years in the White House as Associate Counsel to the President. He is a 1985 graduate of Yale Law School, where he was Editor-in-Chief of the *Yale Journal on Regulation* and Senior Editor of the *Yale Law Journal*. His practice has included a large amount of appellate

litigation (including oral arguments before various state and federal tribunals) as well as civil and regulatory litigation, primarily for clients in the transportation, telecommunications, and energy industries. He currently serves as Chairman of the Judicial Review Committee of the Federal Energy Bar Association.

Joseph R. Guerra graduated first in his class from Georgetown University Law Center. While in law school, he served as an associate editor on the law review and as an intern to the Honorable United States Circuit Judge Harry T. Edwards. Following his graduation, he served as a law clerk to United States District Judge Joyce Hens Green and to Associate Justice William J. Brennan, Jr. Since joining the firm in 1988, he has divided his practice between appellate matters and a variety of complex civil litigation in both federal and state trial courts.

Peter D. Keisler received his B.A. from Yale College and his Juris Doctor degree from Yale Law School, where he served as an officer of the Yale Law Journal. He has served as a law clerk to Judge Robert H. Bork of the United States Court of Appeals for the D.C. Circuit and to Justice Anthony Kennedy of the United States Supreme Court. He also served in the Office of Counsel to the President, first as Assistant Counsel and then as Associate Counsel to the President. Since joining the firm, Mr. Keisler has divided his time between complex civil and regulatory litigation on behalf of AT&T and various appellate matters.

Richard D. Bernstein joined the firm following clerkships for Supreme Court Justice Antonin Scalia and Second Circuit Court of Appeals Judge Amalya L. Kears. His practice with the firm has focused on both trial and appellate litigation, with an emphasis on complex civil litigation. He has argued cases in the Fourth Circuit and in a variety of district courts. Mr. Bernstein graduated with honors from Columbia College and from Columbia Law School, where he was a three-time Kent Scholar and received an award for the best academic performance in his class. He was also an Articles Editor of the *Columbia Law Review*.

Jaye (Janet M.) Letson joined Sidley & Austin following clerkships with the Honorable Alfred T. Goodwin, then Chief Judge of the United States Court of Appeals for the Ninth Circuit, and the Honorable Caleb M. Wright of the United States District Court for the District of Delaware. Ms. Letson graduated from the Yale Law School, where she served as managing editor of the *Yale Journal of International Law*. She has been resident in both the Los Angeles and Washington, D.C. offices of the firm, and her practice has included complex civil litigation and appellate matters.

Bradford A. Berenson joined Sidley & Austin following clerkships with Justice Anthony M. Kennedy of the United States Supreme Court and Judge Laurence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit. He graduated, *magna cum laude*, from the Harvard Law School, where he served as Supreme Court Office Chair on the *Harvard Law Review*. Mr. Berenson received a B.A., *summa cum laude*, from Yale University. His practice includes civil, criminal, and appellate litigation.

Jacqueline Gerson joined Sidley & Austin following clerkships with Justice Anthony M. Kennedy of the U.S. Supreme Court and the Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. She received a B.A. with honors from the University of Washington and a Juris Doctor, with Honors, from the University of Chicago Law School, where she served as an Articles Editor on the Law Review. She was elected to the Order of the Coif and Phi Beta Kappa. Her practice has included general and appellate litigation.

Jeffrey T. Green joined the firm following a clerkship with Fifth Circuit Court of Appeals Judge Jerry B. Smith. His practice at the firm has focused on general and appellate litigation, including criminal investigations. Mr. Green graduated with distinction in all subjects from Cornell University. He received a Master's degree in philosophy from the University of Texas at Austin. He graduated from the University of California at Davis Law School, where he tutored in constitutional law and civil procedure and served as Executive Editor of the *Law Review*.

Adam D. Hirsh joined the firm following a clerkship with Fifth Circuit Court of Appeals Judge W. Eugene Davis. His practice at the firm has focused on general and appellate litigation. Mr. Hirsh was graduated with honors from The University of Chicago Law School, where he served as a Comments Editor on the *Law Review* and was elected to the Order of the Coif. Mr. Hirsh received his undergraduate education at Yale University, where he received his B.A., *cum laude*, and with distinction in Applied Mathematics.

Paul E. Kalb came to Sidley & Austin after graduating from Yale Law School, where he was an editor of the *Yale Law Journal*. His practice at the firm has focused on general and appellate litigation and healthcare law. Prior to attending law school, Dr. Kalb received a Doctor of Medicine (M.D.) degree from the Boston University School of Medicine, and then completed his residency in Internal Medicine at the New York Hospital-Cornell Medical Center and served as an attending physician at Memorial Sloan-Kettering Cancer Center. He also served as a Visiting Instructor at Yale College.

Richard D. Klingler joined Sidley & Austin following clerkships with Supreme Court Justice Sandra Day O'Connor and the Honorable Kenneth W. Starr, former Judge of the Court of Appeals for the District of Columbia Circuit. His practice principally involves appellate litigation and administrative law (emphasizing energy and telecommunications law). Mr. Klingler graduated from Stanford Law School, where he served as Senior Articles Editor of the *Stanford Law Review*. He received a B.A. in jurisprudence from Oxford University as a Rhodes Scholar and an A.B. from Stanford University. He was elected to the Order of the Coif and Phi Beta Kappa.

David L. Lawson joined Sidley & Austin following a clerkship with the Honorable Stephen Williams of the United States Court of Appeals for the District of Columbia Circuit. His practice principally involves general and appellate litigation (emphasizing telecommunications and states' rights). Mr. Lawson graduated from the University of Chicago Law School, where he was elected to the Order of the Coif. He received his M.B.A. from the Southern Methodist University, and his B.S. degree from the University of Oklahoma.

Daniel Meron joined the firm following clerkships with Justice Anthony M. Kennedy of the United States Supreme Court and Judge Laurence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit. Mr. Meron graduated, *magna cum laude*, from Harvard Law School, where he served as co-chair of the Articles Office of the *Harvard Law Review* and won the Ames Moot Court competition as an oralist. He received a B.A. in Government, *magna cum laude*, from Harvard College, and a Ph.D., a.b.d., in Social Thought from the University of Chicago. His practice focuses on telecommunications law and appellate litigation.

Nathan C. Sheers joined Sidley & Austin after clerking for the Honorable Samuel A. Alito, Jr., of the U.S. Court of Appeals for the Third Circuit. He graduated from Columbia Law School where he was a three-time Stone Scholar. Mr. Sheers also served as head articles editor of the *Columbia Law Review*. His practice at the firm includes civil, criminal, and constitutional litigation.

Griffith L. Green joined Sidley & Austin following clerkships with Justice Antonin Scalia of the United States Supreme Court and Judge J. Michael Luttig of the United States Court of Appeals for the Fourth Circuit. He graduated with high honors from the University of Chicago Law School, where he served on the *Law Review* and was elected to the Order of the Coif. Mr. Green received his B.A., *magna cum laude*, from the University of Pennsylvania, where he was elected to Phi Beta Kappa. His practice includes civil, criminal, and appellate litigation.

Joan L. Larsen joined Sidley & Austin following clerkships for Justice Antonin Scalia of the United States Supreme Court and for Judge David B. Sentelle of the United States Court of Appeals for the D.C. Circuit. She earned a J.D., *magna cum laude*, from Northwestern University School of Law where she was Articles Editor for the *Law Review* and was elected to the Order of the Coif. Ms. Larsen received her B.A. with highest honors from the University of Northern Iowa. Her practice includes civil, criminal, and appellate litigation.

Stephen F. Smith joined the firm following clerkships for Supreme Court Justice Clarence Thomas and for Judge David B. Sentelle, of the United States Court of Appeals for the District of Columbia Circuit. He graduated from Dartmouth College and the University of Virginia School of Law, where he served as Articles Editor on the *Virginia Law Review*. He was elected to the Order of the Coif and awarded the highest academic award conferred by the Law School upon a member of the graduating class. His practice includes general and appellate litigation matters.

David B. Toscano joined Sidley & Austin after clerking for Southern District of New York Judges Kenneth Conboy and Michael B. Mukasey, and for Justice Ruth Bader Ginsburg of the United States Supreme Court. He graduated from Princeton University and Columbia Law School. His practice has included general and appellate litigation.

Paul J. Zidlicky joined Sidley & Austin following clerkships with Chief Justice William H. Rehnquist of the United States Supreme Court and Judge Frank J. Magill of the United States Court of Appeals for the Eighth Circuit. He received a B.S. from Brown University and a Juris Doctor, with High Honors, from the George Washington University National Law Center, where he served as Senior Managing Editor of the *Law Review* and was elected to the Order of the Coif. His practice has included general and appellate litigation.

CHICAGO

Howard J. Trienens joined Sidley & Austin in 1949 upon his graduation from the Northwestern University School of Law. He served as law clerk to Chief Justice Vinson of the United States Supreme Court from 1950-52. He returned to Sidley & Austin in 1952 and became a partner in 1956. For many years he served as Chairman of the firm's Executive Committee.

Mr. Trienens has argued eight cases before the U.S. Supreme Court and numerous cases before the nation's federal appellate courts and before the Illinois Supreme Court. He has been involved in much of the nation's important regulatory, antitrust, and commercial litigation over the past 30 years. As Vice President and General Counsel of AT&T from 1980 until 1986, Mr. Trienens successfully defended before the Court the restructuring of the Bell System and AT&T that arose from the Department of Justice's antitrust suit. In 1983, he persuaded the Seventh Circuit to overturn a \$1.8 billion antitrust judgment that MCI had obtained against AT&T. At the time, this was the largest judgment in U.S. history. In 1992, Mr. Trienens successfully represented the Chicago Cubs, in both the federal district court and the Seventh Circuit, in their suit against the Commissioner of Major League Baseball to enjoin the ordered divisional realignment of the National League.

Mr. Trienens has served as Chairman of the Board of Trustees of Northwestern University since 1986. He has served as a director of R.R. Donnelley & Sons Co. and G.D. Searle & Co. Mr. Trienens is a member of the American, Illinois, Chicago and New York Bar Associations, the Association of the Bar of the City of New York, and the American College of Trial Lawyers.

Jack R. Bierig is a partner in the Health Law Practice Group in Sidley & Austin's Chicago office. Concentrating in counseling and litigation for professional associations and their members, Mr. Bierig's practice concerns a variety of healthcare issues ranging from antitrust to healthcare reform legislation. His principal clients include: American Medical Association, College of American Pathologists, Commission on Office Laboratory Accreditation, Healthcare Financial Management Association and the American Academy of Periodontology.

Mr. Bierig is the author of numerous articles for various publications, including *Antitrust Health Care Chronicle*, *The Health Lawyer*, *Pathologist*, *American Bar Association*

Journal, and the *Loyola Law Journal*. He recently contributed a chapter, "Antitrust for Physicians," for the *Physician's Survival Guide*, jointly published by the American Medical Association and the National Health Lawyers Association. Mr. Bierig received an A.B. from Brandeis University and a Juris Doctor from Harvard Law School.

David W. Carpenter has argued before the United States Supreme Court, has briefed more than 20 cases before the Supreme Court, and has briefed and argued numerous cases in federal courts of appeals and state appellate courts.

Mr. Carpenter is AT&T's principal appellate attorney. He handles antitrust and regulatory matters for AT&T in federal courts of appeals and the Supreme Court. He also has represented AT&T in employment-law matters in the Supreme Court, including arguing and winning *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1988). Mr. Carpenter also has handled appellate matters for numerous other clients, including the Entergy System, the American Medical Association, G.D. Searle & Company, and the Chicago Cubs.

Mr. Carpenter earned a B.A. in Philosophy from Yale College in 1972 and a Juris Doctor degree from Boston University in 1975. Mr. Carpenter is a former law clerk to Supreme Court Justice William J. Brennan, Jr., and to Chief Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit. He joined Sidley & Austin in 1978 and has been a partner since 1982.

Thomas W. Merrill is Professor of Law at Northwestern University School of Law and Counsel to the firm. He served as Deputy Solicitor General at the U.S. Department of Justice from 1987-90, where he oversaw the government's Supreme Court practice in the civil area and argued 12 cases before the Supreme Court. He concentrates in constitutional law questions related to business regulation, including preemption, the Commerce Clause, the Takings Clause, the First Amendment, Due Process, and Equal Protection.

Professor Merrill graduated from Grinnell College in 1971 and from Oxford University, where he was a Rhodes Scholar, in 1973. He received his Juris Doctor degree from the University of Chicago School of Law in 1977. Professor Merrill served as law clerk for David Bazelon, Chief Judge of the D.C. Circuit, in 1977-78 and law clerk for Harry Blackmun, Associate Justice of the U.S. Supreme Court, in 1978-79.

Constantine L. Trela has been a partner in the Chicago office since 1986. Since joining the firm, Mr. Trela has litigated at the trial and appellate levels, with particular emphasis on financial, intellectual property, and commercial disputes. Mr. Trela has handled cases in the United States and Illinois Supreme Courts, the U.S. Courts of Appeals for the Second, Third, Fifth, Seventh, Eighth, Eleventh, District of Columbia, and Federal Circuits, and state appellate courts. Mr. Trela is also one of the Coordinators of the firm's national appellate resource group.

Mr. Trela received his Bachelor of Arts degree in economics, with highest distinction, from Northwestern University in 1976, where he was a member of Phi Beta Kappa. He

attended Northwestern's School of Law as a John Henry Wigmore Scholar. He received his law degree, *magna cum laude*, from Northwestern in 1979, served as Editor-in-Chief of the *Northwestern University Law Review* and was elected to the Order of the Coif.

Before joining Sidley & Austin, Mr. Trela was law clerk to Judge Robert A. Sprecher of the United States Court of Appeals for the Seventh Circuit and to Justice John Paul Stevens of the Supreme Court of the United States. Mr. Trela joined Sidley & Austin in 1981.

Jeffrey R. Tone has been a partner in the Chicago office since 1986. He concentrates on securities litigation, primarily on behalf of accounting firms. His appellate work has involved not only securities litigation but also antitrust, products liability, common law issues, constitutional claims, breach of contract, and other areas of law. Mr. Tone has participated in appeals on behalf of various clients in the United States Supreme Court, the Second, Seventh, and Tenth Circuits, the Illinois Appellate Court, and the Illinois Supreme Court.

Mr. Tone is a *summa cum laude* graduate of the University of Illinois College of Law. He clerked for Justice John Paul Stevens of the United States Supreme Court in 1980-81 and for Judge Prentice H. Marshall in the Northern District of Illinois in 1978-1980. He joined Sidley & Austin in 1981.

D. Cameron Findlay received a B.A. with highest distinction from Northwestern University, where he graduated first in his class, an M.A. (Oxon.) with first class honors from Oxford University, and a J.D. *magna cum laude* from Harvard Law School. Following law school, Mr. Findlay served as a law clerk for Judge Stephen F. Williams at the United States Court of Appeals for the District of Columbia Circuit and for Justice Antonin Scalia at the United States Supreme Court.

Following his clerkships, Mr. Findlay served for four years in the Administration of President George Bush, first at the Department of Transportation as Counselor to the Secretary and then at the White House as Deputy Assistant to the President and Counselor to the Chief of Staff.

Mr. Findlay's practice includes litigation and antitrust counseling for firms in the electric, telecommunications, and transportation industries, complex commercial and financial litigation, and appellate litigation.

David D. Meyer is an associate in the Chicago office. He received his B.A. degree with highest honors from the University of Michigan, where he also received his J.D., *magna cum laude*, and served as Editor-in-Chief of the *Law Review*. Following clerkship with Justice Byron R. White of the United States Supreme Court, and with Chief Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit, Mr. Meyer served as a legal adviser to Howard M. Holtzman, a member of the Iran-United States Tribunal in The Hague, The Netherlands.

James B. Speta is an associate in the Chicago office. He received his B.A. degree from the University of Michigan. Mr. Speta also received his Juris Doctor from the University of Michigan Law School where he was elected to the Order of the Coif and served as Editor-in-Chief of the *Michigan Law Review*. Following law school, Mr. Speta served as law clerk to Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia.

Susan A. Weber is an associate in the Chicago office. Her practice focuses on appellate, communications and general litigation on behalf of AT&T, the American Medical Association and other clients. A former law clerk to Justice Byron White of the Supreme Court of the United States and to Judge James Sprouse of the U.S. Court of Appeals for the Fourth Circuit, she joined Sidley & Austin in 1992. Ms. Weber earned a B.A. in Journalism, *summa cum laude*, from Drake University, an M.B.A. with distinction from the State University of New York at Buffalo in 1989, and a Juris Doctor degree, *summa cum laude*, from SUNY at Buffalo in 1989. She also worked as a reporter, photographer and newscast producer for various television stations from 1976 to 1986.

NEW YORK

James D. Arden is a litigation partner in the New York office. He joined the firm in 1985 after serving a clerkship with Hon. Lee P. Gagliardi of the U.S. District Court, Southern District of New York, from 1983-85. He earned a B.A. in History, the Arts and Philosophy from Yale College in 1980 and a Juris Doctor from Yale in 1983.

Steve M. Bierman is a partner in the New York office. He received his B.A. degree, with honors, from the University of Pennsylvania. Mr. Bierman received his Juris Doctor from Georgetown University Law Center where he served as Editor of the *Georgetown Law Journal*.

Alan M. Unger is a partner in the New York office. Since joining the firm, Mr. Unger has been principally involved in antitrust, securities and complex commercial litigation. Recently, he has also represented one of the firm's clients in connection with a wide-ranging white collar criminal investigation undertaken by the United States Attorney's Office in the Southern District of New York.

Mr. Unger earned an A.B. degree in 1975 from the State University of New York at Buffalo, where he was a member of *Phi Beta Kappa*, and he graduated, *cum laude*, from the University of Michigan Law School in 1978.

Elizabeth M. Sacksteder is a partner in the New York office. Ms. Sacksteder graduated *summa cum laude*, Phi Beta Kappa, from Princeton University in 1980. She received her Juris Doctor from Yale Law School where she was Articles Editor for the *Yale Law Journal*. Following law school, Ms. Sacksteder clerked for Judge Eugene H. Nickerson of the United States District Court for the Eastern District of New York.

Katherine L. Adams is an associate in the New York office. Ms. Adams graduated *magna cum laude*, with honors, from Brown University in 1986. She received her J.D. in 1990 from the University of Chicago where she was a member of the Order of the Coif. Following law school, Ms. Adams served as a law clerk for Associate Justice Sandra Day O'Connor. Ms. Adams also clerked for Associate Justice Stephen Breyer while he was Chief Judge of the First Circuit. Prior to joining Sidley & Austin, Ms. Adams was an attorney with the Appellate Section of the Environment and Natural Resources Division of the Environment and Natural Resources Division of the U.S. Department of Justice.

LOS ANGELES

James M. Harris is a partner in the Los Angeles office. He was distinguished by the Order of the Coif and was Editor-in-Chief of the *University of Chicago Law Review* from 1975-76. He wrote "Titles I & IV of the LMRDA: A Resolution of the Conflict of Remedies," for the *University of Chicago Law Review* in 1975. He received his A.B. from Brown University and his Juris Doctor degree from the University of Chicago, *cum laude*, in 1976. Mr. Harris is a member of the American, California State, and Los Angeles County Bar Associations.

Richard Schauer, of counsel with Sidley & Austin, joined the firm in 1984. He served on the Superior Court of California from 1965 to 1982, and also served as Presiding Justice on the California Court of Appeal from 1982 to 1984.

Mr. Schauer graduated from Occidental College in 1951 with a B.A., and received his Juris Doctor from the University of California at Los Angeles. He acted as Editor-in-Chief of the *University of California, Los Angeles Law Review* and was elected to the Order of the Coif.

Catherine M. Valerio Barrad came to Sidley & Austin following a clerkship with the Honorable Douglas Ginsberg of the U.S. Court of Appeals for the D.C. Circuit after graduating, *magna cum laude*, from Northwestern University School of Law where she was elected to the Order of the Coif. Ms. Valerio Barrad received her M.B.A. from the Anderson Graduate School of Management, and her B.A. from the University of California at San Diego.

Steven A. Ellis received his Juris Doctor from the University of California, Berkeley where he was elected to the Order of the Coif, and he graduated with an A.B. from Harvard University. Following a clerkship with the Honorable Douglas Ginsberg of the United States Court of Appeals for the D.C. Circuit, Mr. Ellis was Associate Counsel, Office of the Iran/Contra Independent Counsel.

Robert Holland joined Sidley & Austin following a clerkship with Ninth Circuit Court of Appeals Judge James Browning. He received his Juris Doctor from Boalt Hall School of Law at the University of California where he was elected to the Order of the Coif. Mr. Holland graduated, *summa cum laude*, from the University of California at Irvine.

Joel K. Liberson graduated, *cum laude*, from Loyola Law School. Mr. Liberson has a C.P.A. and received his NASD Series 7 and 63 securities certification while he served as a financial consultant at Merrill Lynch. He joined Sidley & Austin following a clerkship with Judge Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit.

Thomas A. McWatters III came to Sidley & Austin following clerkships with United States Court of Appeals for the Ninth Circuit Judge Charles Wiggins, and Judge James Harvey of the United States Court for the Eastern District of Michigan. He graduated, *magna cum laude*, from Taylor University.

ARGUED SUPREME COURT CASES FROM 1986-1994

1994 Term

United States v. Lopez. Case Won.
115 S.Ct. 1624.

U.S. Term Limits, Inc. v. Thornton, No. 93-1456, 93-1828. Case Won.

Missouri v. Jenkins, No. 93-1823. Case Won.

1993 Term

Department of Revenue of Oregon v. ACF Industries. Case Lost.
114 S.Ct. 843.

Turner Broadcasting System, Inc. v. FCC. Case Won.
114 S.Ct. 2445.

Digital Equipment Corp. v. Desktop Direct, Inc. Case Won.
114 S.Ct. 1992.

O'Melveny & Myers v. FDIC. Case Won.
114 S.Ct. 2048.

MCI Telecommunications Corp. v. AT&T Co. Case Won.
114 S.Ct. 2223.

1992 Term

Reiter v. Cooper, Case Won.
113 S.Ct. 1213.

CSX Transportation, Inc. v. Easterwood. Case Won in part; Lost in part.
113 S.Ct. 1732.

United States v. Olano. Case Lost
113 S.Ct. 1770

TXO Production Corp. v. Alliance Resources Corp. Case Lost.
113 S.Ct. 2711.

1991 Term

Freeman v. Pitts. Case Won.
112 S.Ct. 1430.

NOPSI v. New Orleans. Case Won.
112 S.Ct. 411.

National Railroad Passenger Corp. v. Boston & Maine Corp.

(State of Vermont). Case Won.
112 S.Ct. 1394.

Willy v. Coastal Corporation. Case Won.
112 S.Ct. 1076.

Yee v. City of Escondido. Case Won.
112 S.Ct. 1522.

Nordlinger v. Hahn. Case Won.
112 S.Ct. 2326.

1990 Term

Arcadia, Ohio v. Ohio Power Co. Case Won.
111 S.Ct. 415.

Mobil Oil Exploration v. United Distribution Cos. Case Won.
111 S.Ct. 615.

Blatchford v. Village of Noatak. Case Won.
111 S.Ct. 2578.

1989 Term

University of Pennsylvania v. EEOC. Case Lost.
493 U.S. 182.

California v. American Stores Co., et al. Case Lost.
495 U.S. 271.

Davis, et ux v. United States. Case Lost.
495 U.S.

English v. General Electric Co. Case Lost.
496 U.S. 72.

1988 Term

National Collegiate Athletic Association v. Jerry Tarkanian. Case Won. 488 U.S. 179.

Washington Legal Foundation v. Department of Justice. Case Won.
489 U.S. 1006.

City of Canton v. Harris. Case Won.
489 U.S. 378.

Lorance, et al. v AT&T Technologies, Inc., et al. Case Won.
490 U.S. 900.

New Orleans Public Service, Inc. v. Council of the City of New Orleans, et al. Case Won. 491 U.S. 350.

1987 Term

Karcher v. May. Case Lost.
484 U.S. 72.

Schneidewind, et al. v. ANR Pipeline Co., et al. Case Won.
485 U.S. 293.

Mississippi Power & Light v. Mississippi Ex Rel. Moore, Attorney General of Mississippi, et al. Case Won. 487 U.S. 354.

1986 Term

O'Connor, et ux. v. United States. Case Lost.
479 U.S. 27.

R. J. Reynolds Tobacco Co. v. Durham County, North Carolina. Case Won. 479 U.S. 130.

Keystone Bituminous Coal Assn., et al. v. DeBenedictis, Secretary, Pennsylvania Department of Environmental Resources, et al. Case Lost. 480 U.S. 470.

Atchison, Topeka & Santa Fe Railroad Co. v. Buell. Case Lost.
480 U.S. 557.

Burlington Northern Railroad Co., et al. v. Brotherhood of Maintenance of Way Employees, et al. Case Lost. 481 U.S. 429.

Citicorp Industrial Credit, Inc. v. Brock, Secretary of Labor. Case Lost. 483 U.S. 27.

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, et al. v. Amos, et al. Case Won. 483 U.S. 327.

McNally v. United States. Case Won.
483 U.S. 350.

1985 Term

AT&T Technologies, Inc. v. Communications Workers of America, et al. Case Won.
475 U.S. 643.

Bowen, Secretary of Health and Human Services v. American Hospital Association, et al. Case Won. 476 U.S. 610.

Nantahala Power & Light Co., et al., v. Thornburg, Attorney General of North Carolina, et al. Case Won. 476 U.S. 953.

WILMER, CUTLER & PICKERING

2445 M Street, N.W.
Washington, D.C. 20037-1420
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Handwritten: to system
Handwritten: TW

Date: April 11, 1996

For: Hon. Jack Quinn

Facsimile Number: 202/456-6279

Company: White House Counsel

Main Number: 202/456-2632

From: Lloyd Cutler

COMMENTS:

We are beginning to send a communication of 3 pages (including this cover sheet). If transmission is interrupted or of poor quality, please notify us immediately by telephone at (202) 663-6712.

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Supreme Court Litigation

In Supreme Court litigation, briefed and/or argued the following cases:

1. United States v. General Motors (Los Angeles Dealers), (October Term, 1965)
2. State of Wisconsin, Petitioner v. Milwaukee Braves, Inc., et al., Respondents, No. 659 (October Term, 1966)
3. Baltimore and Ohio Railroad Company v. United States, (October Term 1966) (Argued) WON
4. Red Lion Broadcasting Co., Inc., et al., Petitioners v. Federal Communications Commission, Respondent, No. 600 (1967 Term)
5. United States and Federal Communications Commission, Petitioners v. Radio Television News Directors Association, et al., Respondents, No. 717 (October Term, 1968)
6. Columbia Broadcasting System, Inc., et al. v. Democratic National Committee, et al., Nos. 71-863, 71-864, 71-865 and 71-866
7. State of Washington, et al., Plaintiffs v. General Motors Corp., et al., Defendants, No. 45 (October Term, 1971) (Argued) WON
8. Morgan v. MVMA, et al., No. 73-394
9. Rail Act Cases, No. 74-165, 166, 167, 168 (Argued) WON*
10. Buckley, et al. v. Valeo, et al., Nos. 75-436 and 75-437 (Argued) WON*
LNC
ISSUE
11. Bangor Punta Corp., Nicholas M. Salgo and David W. Wallace v. Chris Craft Industries, No. 75-355 (Argued) WON
12. Continental TV, Inc., et al. v. GTE Sylvania, Inc., No. 76-15

13. State Farm Mutual Automobile Insurance Company v. Department of Transportation, No. 81-2220; National Association of Independent Insurers v. National Highway Traffic Safety Administration, No. 81-2221; Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, Nos. 82-354, 82-355 and 82-398 (Argued) **LOST**
14. NAACP v. Claiborne Hardware Co., No. 81-202 (Argued) **WON***
15. Bowsher, et al. v. Synar, et al., Nos. 85-1377, 85-1378 and 85-1379 (Argued) **LOST***
16. Rankin v. McPherson, No. 85-2068 (Argued) **WON***

*Constitutional issue

Withdrawal/Redaction Marker Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators [partial] [pages 2 and 3 withdrawn in full] (3 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 [3]

2009-1006-F
jp2023

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]

THE WHITE HOUSE

WASHINGTON

March 11, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM:

ELENA KAGAN *EK*

SUBJECT:

SUPREME COURT LITIGATORS

[002]

P5, P6/(b)(6)

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Litigators [partial] [page 2 withdrawn in full] (2 pages)	04/05/1996	P5, P6/b(6)

COLLECTION:

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

FOLDER TITLE:

Paula Jones Case [3]

2009-1006-F
jp2023

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]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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THE WHITE HOUSE

WASHINGTON
April 5, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM:

ELENA KAGAN *EK*

SUBJECT:

SUPREME COURT LITIGATORS

[003]

P5, P6/(b)(6)

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Procedures (1 page)	04/05/1996	P5

COLLECTION:

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

FOLDER TITLE:

Paula Jones Case [3]

2009-1006-F
jp2023

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]

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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]

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005. notes	re: Handwritten Notes - John Roberts/Hogan (4 pages)	n.d.	P5

COLLECTION:

Clinton Presidential Records
Counsel's office
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FACSIMILE TRANSMITTAL SHEET

FROM: Amy Sabrin DATE: Apr 2, 1996
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Please deliver the following pages to:

1. NAME: <u>Prof. Eugene Gressman</u>	FIRM: <u>UNC Law School</u>
FACSIMILE No.: <u>919-962-1277</u>	TELEPHONE No.: <u>919-962-3688</u>
2. NAME: <u>Lloyd Cutler/John Pickering</u>	FIRM: <u>Wilmer, Cutler & Pickering</u>
FACSIMILE No.: <u>202-663-6363</u>	TELEPHONE No.: <u>202-663-6000</u>
3. NAME: <u>Jack Quinn</u>	FIRM: <u>The White House</u>
FACSIMILE No.: <u>202-456-6279</u>	TELEPHONE No.: <u>202-456-2632</u>

Total number of pages including cover(s): 6

MESSAGE: Here is a draft of the Motion to accompany the Memorandum which you have already reviewed. We intend to finalize this by the close of business today, if you have any additional comments. We will add Prof. Gressman's name before it is finalized, if he is agreed.

Elena / KW ●

① we need to check this guy out
 ② we need to consider these matters — Thanks
 JQ

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

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

**PRESIDENT CLINTON'S
RULE 41(b) MOTION FOR A STAY OF MANDATE**

As provided in Federal Rule of Appellate Procedure 41(b), President William Jefferson Clinton hereby moves for a stay of the Court's mandate for 30 days to permit him to file a petition to the United States Supreme Court for a writ of certiorari, and upon notice to this Court that said petition has been filed, for continuation of the stay until such time as the Supreme Court finally disposes of this matter.

As reasons for said motion, in addition to those set forth in the accompanying Memorandum in Support, the President states as follows:

On March 28, 1996, this Court issued an order denying the President's Petition for Rehearing and Suggestion for Rehearing En Banc, with Judge McMillian issuing a strong dissent. Pursuant to Fed. R. App. P. 41(a), this Court's mandate is scheduled to issue on April 4, 1996.

A stay is warranted because this is an extraordinary case raising constitutional issues of profound consequence to the Presidency and the Judiciary. The President intends to ask the Supreme Court to consider whether, pursuant to the Constitution, separation of powers and the public interest, an incumbent Chief Executive must and should be spared the burdens of private civil damages litigation. If the litigation is not stayed before the high Court has an opportunity to rule on these issues, the interests that the President seeks to preserve by Supreme Court review would be irreparably injured. Moreover, there is a reasonable probability that the Supreme Court will agree to consider the historic and significant issues raised by the President's appeal, and a fair prospect that a majority could vote to reverse. United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980)).

Specifically, permitting this litigation to go forward would obliterate the very right the President seeks to vindicate through appeal -- the public's right to have the President's full time, attention and energy devoted to the execution of his unique constitutional duties. The petition would be rendered nugatory and this interest irretrievably damaged if the stay were not issued. For this reason, in cases such as this, where the defendant asserts an immunity from the burdens of litigation, courts often have recognized that the litigation should be stayed pending completion of all appeals. See, e.g., Harlow v.

Fitzgerald, 457 U.S. 800, 818 (1982) ("until this threshold immunity question is resolved, discovery should not be allowed"). The irreparable nature of the threatened injury is all the more serious in this case, because it involves the public's constitutionally-based interest in the undistracted performance of the President's duties. See Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. ____, 114 S.Ct. 1992, 1997 (1994) (citing Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982)).

Second, because this case raises serious issues of constitutional law, separation of powers and inter-branch comity which have not been, but should be settled by the Supreme Court, it is a very likely a candidate for Supreme Court review. See Supreme Court Rule 10(c). All the judges who have considered this case have commented on the fact that it raises unique, important and hitherto unresolved questions of federal law. Most importantly, before the panel's ruling, no court had ever compelled a sitting President to stand trial in a private civil damages suit. The serious implications of this unprecedented holding, and the fact that the majority's ruling rejected not only the President's position but that of the Solicitor General as well, indicate very strongly that the Supreme Court will grant the President's petition.

Finally, there is a fair prospect that a majority of the Supreme Court could vote to reverse. Evidence of this may be found in the history of this Court's own experience with this case -- the numerous opinions that resulted, the forceful

dissents, the Court's lengthy consideration of the Petition for Rehearing and Suggestion for Rehearing En Banc. This, and the unprecedented nature of the panel's holding, demonstrate there is a reasonable possibility that the Supreme Court could disagree with the panel, agree with the dissenters, and vote to reverse. This therefore is precisely the kind of appeal that justifies a stay. See United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J. in chambers)).

WHEREFORE, for the reasons set forth in the accompanying Memorandum, the President respectfully requests that this Court grant his Motion for a Stay of Mandate pending application to the Supreme Court for a writ of certiorari, and upon notification that the petition has been filed, continue the stay until such time as the Supreme Court disposes of this matter, as provided for in Rule 41(b).

Respectfully submitted,

By:

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Counsel to President William J. Clinton

Jack -
In case you
missed this.
Elena

Rehnquist Blasts Poor Preparation For Arguing Cases

'Insouciance Offends the Court,' Chief Justice Asserts in Speech

By Joan Biskupic
Washington Post Staff Writer

Chief Justice William H. Rehnquist recently skewered big shot lawyers who seize an opportunity to present oral arguments before the Supreme Court but who have taken little part in preparing written briefs and developing the legal underpinnings of a case.

In a speech last week, Rehnquist took issue with "the advocate who seems actually unfamiliar with his client's brief."

"It may be the attorney general of a state, the senior partner of a law firm, the head of some department, who has done none of the work on the case in the lower courts but who is either too busy or too slipshod to truly digest the brief from which he is arguing," Rehnquist said.

"This sort of insouciance offends the court and can do nothing but harm to the client's cause."

Rehnquist, who has been on the court since 1972 and its chief justice for 10 years, focused on the quality of oral arguments (or lack thereof) in remarks he gave Friday at the American Bar Association's 10th annual appellant advocate institute luncheon.

Oral argument is the most public forum for the justices and the lawyers presenting the nation's most important cases. There is a strict decorum—of title, courtesy and timing (half hour each side). But the substantive demands are even greater.

"You don't have to be a Clarence Darrow or John W. Davis to successfully argue a case before us," Rehnquist said. "But you do have to be prepared. . . . [Y]ou must expect hypothetical questions posing slightly different factual situations from yours, and be prepared to answer them. . . . You should also know from reading the recent decisions which of the present members of the court are apt to be sympathetic to your position, and which unsympathetic.

"You should recognize that questions coming from members of the court whom you have reason to feel are unsympathetic to your position will not be designed to advance your cause, but will be more likely to be designed to expose perceived shortcomings or fallacies in your reasoning. . . . You are dealing with a court consisting of nine justices, and a concession or answer that pleases one may displease another. You must not shy away from giving answers which the questioner will not like, and you should never give an answer just to please the questioner."

Rehnquist also took a stab at some of his more loquacious colleagues.

He told of a chief justice in Canada who "had developed the practice during oral argument, when he felt that his colleagues were asking too many questions, of simply tapping his pencil on the bench, whereupon the questions ceased at least for the moment."

Said Rehnquist, "I have occasionally wished that I had similar authority in our court."

Where There's Smoke, There Can Be Deadly Consequences

By Don Phillips
Washington Post Staff Writer

MIAMI—Someone noticed smoke coming from the plane's lavatory. The pilot, at first skeptical, began an emergency descent as the smoke grew thicker and flames began to lick at the ceiling in the rear of the DC-9's passenger cabin. Flight attendants handed out wet towels to passengers to help them breathe.

This is not a description of what happened on ValuJet Flight 592, but of Air Canada Flight 797 on June 2, 1983, traveling to Montreal from Dallas. The plane made an emergency landing in Cincinnati, but by the time it got on the ground and those who could had stumbled out of the cabin, 23 of the 46 people who had been aboard were dead.

It is possible that something similar happened on the ValuJet plane May 11, that smoke incapacitated the crew as the DC-9 plunged into the Florida Everglades and killed all 110 people on board.

The ValuJet crew radioed air traffic controllers that there was smoke

in the cockpit, and debris pulled from the murk shows evidence of soot to the rear of the cockpit and in the cargo hold.

Investigators yesterday also revealed the first evidence of substantial smoke in the passenger cabin, a heavily sooted metal railing from a passenger seat.

Wherever the smoke comes from, it presents the same dangers, even if it comes from a smoldering fire and not open flames.

Smoke can contain toxic gases from smoldering cabin materials, hazardous cargo or passenger luggage. Burning nylon, for example, can produce deadly hydrogen cyanide.

The Air Canada fire was the genesis of almost all of today's commercial aircraft fire safety rules, including requirements for track lighting on the cabin floor, lavatory smoke detectors, automatic fire extinguishers, crew fire training and seat cushion flammability standards.

The fire began in the lavatory of the Air Canada flight and apparently burned for 15 minutes before the

crew noticed smoke. There were no lavatory smoke detectors in those days.

As flight attendants handed out wet towels—an action the National Transportation Safety Board said saved some lives—smoke, toxic fumes and heated gases collected along the ceiling, then began to seep downward.

By the time the plane landed and the emergency exits were opened, smoke and fumes had blocked visibility to about three feet from the floor. A flash fire consumed the plane about a minute after the landing.

Investigators never pinpointed the exact cause of the fire, but they believed it began with an electrical short circuit in a toilet flush motor.

The FAA had resisted safety board recommendations for major fire safety upgrades, but that changed with Air Canada 797. New rules were adopted in 1986 and strengthened in 1988.

Although the potential for danger is obvious, a crash caused by fire or smoke aboard an aircraft in flight is

relatively rare. A study by former safety board investigator Rudolph Kapustin, distributed by the Flight Safety Foundation, said that in the 30 years after the dawn of the jet age in 1962, fire was the principal factor in about 4 percent of accidents or major incidents.

It is not known exactly what the Flight 592 crew members did after they noticed smoke, but DC-9 pilots and trainers said they likely would have immediately grabbed the "sweep-on" oxygen mask hanging behind them, designed to be donned quickly with one hand.

The cockpit also must have one portable oxygen bottle and mask, and there must be one for each flight attendant in the cabin, according to FAA regulations.

Identifying the source of the smoke would have been the next step. One pilot said smell is important—a smoking air conditioner has an oily smell, while an electrical fire smells like burning insulation. Air-conditioning smoke usually is the easiest to handle: shut down the air conditioning.

Electrical fires are much more difficult because aircraft contain hundreds of electrically operated systems. Pilots may have to resort to trial-and-error methods, shutting down various systems one by one to see if the problem clears up.

Clearing smoke from the plane is another matter, and one classic solution may be extremely frightening to passengers: descend rapidly while depressurizing the cabin, causing passenger oxygen masks to pop out. Then, open aircraft air outflow valves and open sliding cockpit windows to create a draft.

According to Elizabeth Yoest, the FAA's deputy director of aircraft certification services, all aircraft are certified to clear smoke from the cockpit in less than three minutes. The three-minute rule assumes, however, that the source of the smoke has been eliminated.

There still is debate over cargo fire suppression systems and retrofitting of older aircraft with the latest fire-retardant interiors.

The FAA has rejected the safety board's calls for automatic cargo

hold fire extinguishing systems and detection systems for cargo hold. Instead, the FAA ordered that all cargo holds be lined with material that would contain any fire that might be expected to occur.

The Association of Flight Attendants and other safety groups also have complained that the FAA's final rule in 1998 did not require retrofitting older aircraft with the newest fire-retardant materials.

Under the FAA rule, the most stringent standards affected only aircraft manufactured after Aug. 19, 1990, unless an older aircraft interior is totally replaced. Most aircraft interiors are refurbished and the equipment reinstalled, rather than totally replaced, according to a 1993 General Accounting Office report.

The GAO estimated that at the current rate of aircraft retirements, the entire commercial airline fleet would not meet all standards until 2018. But the GAO said that requiring total refurbishment by 1999 would cost the airlines dearly—\$2.5 billion in 1993 dollars.

No. 95-1853

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a private civil action for damages against the President of the United States, based on alleged pre-Presidential conduct, should be permitted to go forward during the President's term of office.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

This is a private civil action for damages against the President of the United States based on alleged pre-Presidential conduct. The decision below compels the President to participate in discovery and defend himself at trial. The United States has a fundamental interest in protecting the Office of the President and the powers and duties vested in that Office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be compelled to take part in judicial proceedings.¹

¹ The United States has participated in other cases that have presented related issues of Presidential participation in judicial proceedings. The United States participated as amicus curiae in Nixon v. Fitzgerald, 457 U.S. 731 (1982), which involved the President's immunity from civil actions for damages based on the President's conduct in office. Similarly, in In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.), which involved the amenability of a sitting Vice President to a criminal indictment and trial, the United States also addressed the

(continued...)

STATEMENT

1. In May 1994, respondent Paula Corbin Jones filed a complaint in the United States District Court for the Eastern District of Arkansas. The complaint named as defendants petitioner William Jefferson Clinton, the President of the United States and former Governor of Arkansas, and Danny Ferguson, an Arkansas state trooper. Respondent alleged that then-Governor Clinton had sexually harassed her in May 1991, and that she was thereafter subjected to retaliation and libel relating to the episode. Respondent asserted claims under 42 U.S.C. 1983 and 1985, and under the common law of Arkansas. She sought \$75,000 in compensatory damages and \$100,000 in punitive damages for each claim.

In August 1994, the President filed a motion to dismiss the suit without prejudice or, in the alternative, to stay the suit. The President contended that he was immune during his term of office from private civil litigation arising out of pre-Presidential conduct. The President asserted that respondent

¹(...continued) ... amenability of a sitting President to prosecution. In addition, the United States participated as amicus curiae in United States v. Poindexter, 732 F. Supp. 142 (D.D.C. 1990), regarding the amenability of former President Reagan to a criminal subpoena relating to the Iran-Contra affair, and in United States v. McDougal, No. LR-CR-95-173 (E.D. Ark.), regarding the subpoena issued to President Clinton. The United States has participated as well in federal and state courts in cases involving the immunity of foreign heads of state. See, e.g., LaFontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994); Anonymous v. Anonymous, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

should not be allowed to proceed with her suit while he remained in office, but should be permitted to reinstate her suit thereafter.²

The United States filed a statement of interest pursuant to 28 U.S.C. 517. The United States argued that, except in unusual circumstances, the President should not be compelled to defend himself during his term of office against private suits based on pre-Presidential conduct. The United States further submitted that this case presents no unusual circumstances that would warrant allowing the litigation to proceed during the President's term. The United States recommended that the court stay the proceedings, rather than dismiss the suit, in order to avoid any possible statute of limitations problems.

In December 1994, the district court entered an order denying the President's motion to dismiss but partially granting the President's alternative motion for a stay. Pet. App. 54-77. The district court sought guidance from Nixon v. Fitzgerald, 457 U.S. 731 (1982), in which this Court recognized absolute Presidential immunity for acts "within the 'outer perimeter' of [the President's] official responsibility." Id. at 756. Relying on the Court's reasoning in Fitzgerald, the district court concluded that the President is entitled to "temporary or limited immunity from trial" during his term of office for claims based on his unofficial

² A separate immunity issue exists with respect to one of respondent Jones's claims, a libel claim that concerns alleged statements made on the President's behalf after he took office. See Pet. App. 9 n.7. Neither the district court nor the court of appeals has addressed whether the statements at issue come within the scope of the President's immunity under Nixon v. Fitzgerald, 457 U.S. 731 (1982).

acts. Pet. App. 70. The district court also based the stay on its equitable power over its docket and on Rule 40 of the Federal Rules of Civil Procedure. *Id.* at 71. The court held, however, that discovery could proceed "as to all persons including the President himself." *Ibid.*

2. The President and respondent filed cross-appeals from the district court's order. On January 9, 1996, a divided panel of the Eighth Circuit affirmed the denial of the President's motion to dismiss, reversed the grant of a partial stay, and remanded with instructions to allow the suit to proceed. Pet. App. 1-31.

The majority framed the issue as whether the President "is entitled to immunity from civil liability for his unofficial acts." Pet. App. 3. The court held that the President "is entitled to immunity, if at all, only because the Constitution ordains it." *Id.* at 16. The majority then determined that the Constitution does not grant the President immunity from private suits based on the President's unofficial acts. *Ibid.* It reasoned that the President's immunity under Fitzgerald for acts within the "outer perimeter" of his official duties represents the full extent of Presidential immunity under the Constitution. *Id.* at 8-9. The court acknowledged that the district court had also predicated its stay on its "broad discretion in matters concerning its own docket," but held that it was an abuse of discretion for the district court to grant the stay in the absence of a constitutionally mandated immunity. *Id.* at 13 n.9. Judge Ross dissented, taking the position that private actions for damages

5

against a sitting President based on the President's unofficial acts should be stayed until the completion of the President's term "unless exigent circumstances can be shown." *Id.* at 25.

ARGUMENT

The decision below prohibits trial courts from staying private civil suits against the President of the United States during the President's term of office. In the view of the United States, that decision is fundamentally mistaken. When a private litigant invokes judicial processes to pursue claims against a sitting President, the court ordinarily should exercise its power to postpone the litigation until the President leaves office. By compelling Presidents to defend themselves against personal liability during their term of office, the Eighth Circuit's holding creates serious risks for the institution of the Presidency. Given the practical importance of this issue to the responsibilities of the Presidency, and given the shortcomings in the Eighth Circuit's reasoning, review by this Court is warranted.

1. a. At issue here is when, not whether, the President may be required to defend himself against claims based on his unofficial acts. Resolution of that issue implicates the basic and well-established judicial power to stay civil proceedings. Over a half-century ago, in Landis v. North American Co., 299 U.S. 248, 254 (1936), this Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." The Court

6

recognized in Landis that "[o]ccasions may arise when it would be a 'scandal to the administration of justice' * * * if power to coordinate the business of the court efficiently and sensibly [by staying proceedings] was lacking altogether." Id. at 255. In the view of the United States, the established authority of trial courts to stay proceedings should be exercised, except in extraordinary circumstances, to defer private suits against a sitting President during his term of office.

Whenever a litigant seeks to invoke the processes of the courts against the President, "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." Fitzgerald, 457 U.S. at 753. To be sure, the separation-of-powers doctrine "does not bar every exercise of jurisdiction over the President of the United States. But * * * a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." Id. at 753-754. When the President is forced to defend himself in his personal capacity during his term of office, "the dangers of intrusion on the authority and functions of the Executive Branch" are both real and obvious. The substantial burdens borne by individual defendants in civil litigation, especially litigation seeking to impose personal financial liability, require little elaboration. When those burdens are imposed on the President of the United States, they can be expected to impinge on the President's discharge of his constitutional

duties, by forcing him to divert his energy and attention to the task of protecting himself against personal liability. As a result, they implicate interests that are both public and constitutional in nature.

As this Court noted in Fitzgerald, "[t]he President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." 457 U.S. at 749, 750. The President is the sole repository of the "executive Power" created by Article II of the Constitution. Id. at 749-750. Under Article II, the President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "the enforcement of federal law * * *; the conduct of foreign affairs * * *; and the management of the Executive Branch." Id. at 750.

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

functions when he "is unable to discharge the powers and duties of his office," testifies to the unique nature of the Presidency and the incessant demands on its occupants.

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

On several occasions, sitting Presidents have given testimony as witnesses in federal criminal cases by means of depositions and interrogatories, while declining to attend, or being excused from attending, court to testify in person. See generally Rotunda, Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote, 1975 U. Ill. L. Forum 1; United States v. McDougal, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (order providing for President's videotaped deposition testimony in Whitewater prosecution). We know of no instance, however, in which a sitting President has been compelled to furnish evidence in connection with a civil proceeding. In any event, the burdens of participating in a civil suit as a defendant are far different, both in degree and in kind, from the burdens imposed on a witness, and the risk of wrongfully motivated efforts to entangle the President in those burdens is far greater. As a result, the historical examples of sitting Presidents' giving evidence as witnesses in criminal cases

do not suggest that the President may appropriately be forced to defend himself against personal liability during his term of office.³

b. This Court's decision in Fitzgerald casts light on the constitutional implications of subjecting the President to the burdens of civil litigation. As noted above, the Court held in Fitzgerald that the President is entitled to absolute immunity from claims for damages "for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. The Court characterized that immunity from liability as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." Id. at 749.⁴

In according the President absolute immunity, the Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were

³ The production of evidence at a criminal trial has constitutional dimensions, since the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." See United States v. Nixon, 418 U.S. 683, 711 (1974). A plaintiff in a civil action can assert no comparable constitutional entitlement. Cf. 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").

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

subject to suits for damages based on his official conduct. 457 U.S. at 751-754. To expose the President to suits for damages based on his official actions, the Court reasoned, could deprive him of "the maximum ability to deal fearlessly and impartially with the duties of his office." *Id.* at 752 (internal quotation marks omitted). The Court observed that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. In his concurring opinion, Chief Justice Burger also noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763 (Burger, C.J., concurring).

When the President is sued for actions wholly unrelated to his official responsibilities, Fitzgerald's concern for ensuring "fearless[] and impartial[]" Presidential decisionmaking is not directly implicated. The more general concerns underlying this Court's holding, however, apply with equal force. Fitzgerald recognizes that "[t]he President occupies a unique position in the constitutional scheme," 457 U.S. at 749; that the President should not be diverted from attending to the national welfare by "concern with private lawsuits," *id.* at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs, *id.* at 754 n.37. As explained above, the President would be faced with a "diversion of

his energies by concern with private lawsuits," id. at 751, if he were compelled to defend himself against a private damage action during his term in office. That diversion would "raise unique risks to the effective functioning of government." Ibid. Fitzgerald indicates that the judicial system should not lend itself to such risks.

c. When a sitting President is sued for conduct unrelated to his official actions, the demands of the Presidency do not require absolute immunity from liability. Rather, those demands may be accommodated by the more limited alternative of postponing the litigation until the President leaves office. Deferring litigation until the expiration of the President's term is sufficient to forestall the "intrusion on the authority and functions of the Executive Branch," Fitzgerald, 457 U.S. at 754, that would result if the President were required to divert his attention to the task of defending himself against personal liability. At the same time, deferring the suit preserves the plaintiff's right to seek relief for a meritorious claim. It affects only when, not whether, the President must answer the allegations; it merely delays, rather than defeats, the vindication of the plaintiff's private legal interests. It is thus far less burdensome for plaintiffs than the immunity recognized in Fitzgerald.⁵

⁵ Somewhat different concerns might be raised by private actions for equitable relief, such as suits to enjoin ongoing unlawful conduct unrelated to the President's official duties. But when a plaintiff seeks only damages for alleged past misconduct, delay is unlikely to vitiate the relief. And there is no reason to expect, at least as a general matter, that postponing litigation
(continued...)

The rule we suggest is not an absolute one. In the exceptional case where a plaintiff will suffer irreparable injury without immediate relief, and where prompt adjudication will not significantly impair the President's ability to attend to the duties of his office, a stay need not issue. Absent such a showing, however, the public and constitutional interests in the President's undivided attention to his office demand a stay.⁶

d. The circumstances of this case do not support a departure from the general rule outlined above. To the contrary, this case well illustrates the potential burdens that private litigation would impose on the President's discharge of his official duties.

The President is the principal defendant in this case, and the suit seeks to subject him to hundreds of thousands of dollars in personal liability. Respondent's claims focus overwhelmingly on

⁵ (...continued)

will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims. If the circumstances of a particular case suggest an unusual risk that specific evidence will be lost -- for example, if the case will require the testimony of an extremely ill witness -- arrangements can be made to preserve that evidence without allowing a more general commencement or resumption of the litigation. Cf. Fed. R. Civ. P. 27 (perpetuation of testimony). Postponing adjudication of private damage actions will therefore rarely defeat a plaintiff's ability ultimately to obtain meaningful relief.

⁶ Where the public and constitutional interest in the President's unimpaired attention to his duties conflicts with the purely private interest of a plaintiff in obtaining immediate relief, the private interest must yield. Cf. Fitzgerald, 457 U.S. at 754 n.37 (President has absolute immunity for claims relating to official actions even though "absolute immunity may impose a regrettable cost on individuals whose rights have been violated"). As a result, even where a plaintiff can show that his or her interests would be prejudiced, a stay should issue unless the court further determines that allowing the litigation to proceed would not impair the President's attention to the demands of his office.

his alleged actions, and her complaint acknowledges that the facts surrounding those claims are hotly contested. The President's testimony presumably would be central to the resolution of the underlying factual controversy. The case therefore threatens to place highly burdensome demands on his time and energy. If the President were required to defend himself against respondent's claims during his term of office, he would necessarily be forced to divert his attention from the demands of the Presidency.

In contrast, immediate resolution of respondent's claims is unnecessary to protect her interests. The complaint does not disclose any need for immediate relief. Respondent seeks damages for past actions, not relief against ongoing or future harms. Delaying an award of damages until after the President's term of office (if any award were determined to be due) would not appreciably affect the value of that relief. Moreover, as the district court pointed out, respondent waited three years from the time of the President's alleged actions before filing suit. There accordingly is no reason to believe that time is now of the essence. Nor is there any reason to believe that a stay will jeopardize respondent's ability to marshal evidence on her behalf.⁷ In sum, the specific circumstances of this case

⁷ Respondent characterizes this case as "a very simple dispute," involving "only a handful of potentially important witnesses." Br. in Opp. 10. Given the nature of respondent's claims, the principal witnesses presumably are President Clinton and respondent herself. There is no reason to expect that either party will be unable to give testimony after the President leaves office.

reinforce the general rationale for postponing civil suits against sitting Presidents.

2. The Eighth Circuit rejected this analysis, holding instead that the district court had committed reversible error in granting the President even a partial stay of proceedings during his term of office. The Eighth Circuit's reasoning is seriously flawed.

a. The court of appeals concluded that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. That conclusion rests on a reading of constitutional history and precedent that is, at best, highly debatable with respect to the conduct of litigation against the President during his term of office. In particular, the Eighth Circuit failed to give sufficient weight to the constitutional concerns identified by this Court in Fitzgerald. See pages 9-11, supra; see also Pet. App. 25-31 (Ross, J., dissenting).

In any event, even if the Eighth Circuit were correct that the Constitution ex proprio vigore does not render the President "immune" from civil actions during his term of office, that conclusion would not resolve the case. The question remains whether the constitutional and practical demands of the Presidency should lead a court to postpone such litigation until the President leaves office. The court of appeals acknowledged that a trial court has "broad discretion in matters concerning its own docket," but nonetheless held that the district court had committed reversible error by exercising that discretion in favor of a

partial stay. Pet. App. 13 n.9. The court reasoned that a sitting President is entitled to immunity from civil suits, "if at all, only because the Constitution ordains it." *Id.* at 16. Because it believed that the President is not "constitutionally entitled" to "temporary immunity," the court of appeals concluded that it was an abuse of discretion for the district court to grant a stay on equitable grounds. *Id.* at 13 n.9.

That line of reasoning is fundamentally misconceived. To begin with, official immunity is not confined, as the Eighth Circuit thought, to cases in which "the Constitution ordains it." See, e.g., *Butz v. Economou*, 438 U.S. 478, 497 (1978) ("the doctrine of official immunity from § 1983 liability * * * [is] not constitutionally grounded") (emphasis added); *Pierson v. Ray*, 386 U.S. 547 (1967); *Fitzgerald*, 457 U.S. at 747 ("Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history, " and "[t]his Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government."). A fortiori, no constitutional mandate is required for the more limited kind of "immunity" at issue in this case, which defers rather than denies the plaintiff's opportunity to pursue her claims in court. A court enjoys inherent authority to control the progress of cases on its docket, and it properly may exercise that authority to accommodate public and private interests that would be unfairly prejudiced by

immediate litigation, regardless of whether it is constitutionally required to do so.

b. The court of appeals concluded that sitting Presidents can be shielded adequately from the burdens of civil litigation, without a stay, through "judicial case management." Pet. App. 13. That conclusion is, in our view, unduly optimistic. As a defendant, the President has a direct financial stake in the outcome of the litigation and an obligation to marshal his defenses. If the litigation is allowed to proceed during his term of office, the President will inevitably be required to devote significant energy, expense, and attention to it, even if the court regulates the timing and extent of discovery and Presidential testimony. The Eighth Circuit's own conception of the future district court proceedings, in which the President must resort to repeated "motions for rescheduling, additional time, or continuances," *id.* at 16, belies the notion that "case management" can meaningfully protect the President from the need to attend to the litigation.

c. The Eighth Circuit's decision is also problematic in its analysis of the other interests involved. The majority and concurring opinions suggest that delaying litigation until a sitting President leaves office would infringe on a constitutional right of the plaintiff to have access to the courts. Pet. App. 10, 17, 20-21. The causes of action asserted here, however, are based on statutes (42 U.S.C. 1983 and 1985) or state common law, and therefore may be subjected to limitations and procedures designed

to protect countervailing public interests. Moreover, 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 is preserved. In this regard, we note that while the Bill of Rights guarantees the right to a speedy trial in criminal cases (U.S. Const., Amend. VI), it lacks a similar guarantee for civil litigation.⁸

d. The court of appeals' decision is sharply at odds with the surrounding legal landscape. For example, the available evidence indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting President.⁹ The court of appeals' decision thus gives greater priority to private civil actions than criminal law enforcement proceedings would receive. Yet as this 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.

⁸ The concurring opinion is similarly mistaken in suggesting (Pet. App. 17) that a stay of the litigation would infringe on the plaintiff's Seventh Amendment right to trial by jury. The Seventh Amendment concerns who will decide contested issues of fact, not when such issues will be decided. See 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").

⁹ See, e.g., 2 Farrand, Records of the Federal Convention of 1787 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (Hamilton) (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.

In other contexts as well, it has been recognized that the public interest may require a stay of civil litigation. For example, a postponement or stay may be appropriate during the pendency of administrative proceedings (see, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 n.13 (1979); Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 306-307 (1973)), criminal proceedings (see, e.g., 21 U.S.C. 881(i); Koester v. American Republic Invs., 11 F.3d 818, 823 (8th Cir. 1993); 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)), arbitration proceedings (Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 20 n.23 (1983)), bankruptcy proceedings (11 U.S.C. 362; Hill v. Harding, 107 U.S. 631, 634 (1882); cf. Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 585 (1989) (FSLIC receivership)), or state court proceedings (Heck v. Humphrey, 114 S. Ct. 2364, 2373 n.8 (1994); Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964)). Similarly, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 501 et seq., provides for federal and state courts to grant stays in suits involving persons in military service in specified circumstances, 50 U.S.C. App. 521. See, e.g., Semler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943); Coburn v. Coburn, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982).¹⁰ The

¹⁰ Although we understand that the President does not claim relief under this statute, see Reply Br. 8 n.5, it demonstrates -- like the other examples cited in text -- that reasons of public policy may in certain circumstances require postponement of civil litigation.

postponement of litigation under any of these doctrines or statutory schemes may be lengthy, sometimes as long or longer than a President's term in office. Congress and the courts have thought this result justified, however, because of the weight of the countervailing public policies supporting a stay.

The constitutional demands of the Office of President require the full measure of the President's attention and energy so long as he serves. We submit that the need to avoid substantial distractions from the President's constitutional duties is compelling, and is clearly of sufficient magnitude to require a stay of civil litigation against the President, absent unusual circumstances not present here. Due regard for the institution of the Presidency under our constitutional structure calls for the Court to resolve this issue now.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1996

THE WHITE HOUSE

WASHINGTON

June 26, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *Ek*

SUBJECT: JONES LITIGATION

1. Our merits brief is due on August 8.
2. David Strauss is putting together an outline for the brief, which he will fax to Jack, as well as to Bennett, within the next few days.
3. We should think (quickly) about whether we want any amicus briefs other than one from legal scholars. David ~~suggested~~, for our consideration only: (1) a brief from members of Congress, making the case that our position is in the interest not just of the President, but of effective national government; (2) a brief from members of the defense bar, emphasizing how (and how often) litigation can be used to harass those in the public eye; and/or (3) a brief from some conservative think tank committed to a strong executive, demonstrating that this is not a partisan issue.

A problem with (1) is that if only Democrats joined, the brief would increase the partisan feel of the case. A problem with (2) and (3) is that getting such a brief might be difficult -- and our efforts to do so might become public.

Ek
Let's discuss
with Jack
re: get
JD
discuss
with
ones