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Paula Jones Certiorari Petition [1]

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002. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/13/1996	P5
003. notes	re: Handwritten Notes - Amy Sabrin (1 page)	n.d.	P5
004. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/29/1996	P5
005. legal brief	re: Soldiers' & Sailors Civil Relief Act (5 pages)	05/24/1996	P5

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FOLDER TITLE:

Paula Jones Certiorari Petition [1]

2009-1006-F
 jp2024

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

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

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



Office of the Deputy Attorney General
Washington, D.C. 20530

FACSIMILE COVER SHEET

DATE: 5/28/96
TO: Cathy Wallman
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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.

(I)

IN THE SUPREME COURT OF THE UNITED STATES

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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, the United States also participated in In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.), regarding the amenability of a sitting Vice President to a criminal indictment and trial, and (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 should not be allowed to proceed with her suit while he remained in office, but should be permitted to reinstate her suit thereafter.²

¹ (...continued)

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. The United States has also participated in federal and state courts in cases involving the immunity of foreign heads of state. See, e.g., LaFontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994); Anonymous v. Anonymous, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

² A separate immunity issue exists with respect to one of respondent Jones's claims, a libel claim that concerns statements made on the President's behalf after he took office. See Pet. App. (continued...)

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 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

2 (...continued)

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).

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 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 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). As a constitutional matter, the President must attend to his duties as Chief Executive and Commander-in-Chief continuously throughout his tenure, in contrast to the Congress, which is required to assemble only "once in every Year," 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 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 subject to suits for damages based on his official conduct. 457

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.

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 will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims. If the circumstances of a particular
(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 his alleged actions, and her complaint acknowledges that the facts

⁵ (...continued)

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.

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

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.

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. In particular, the Eighth Circuit failed to give sufficient weight to the constitutional concerns identified by this Court in Fitzgerald. Those concerns argue strongly in favor of recognizing a generally applicable constitutional bar against the prosecution of private civil actions against sitting Presidents. See pages ___-___, 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.

In other contexts as well, it has been recognized that the public interest may require a stay of civil litigation. For

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.

example, a postponement or stay may be appropriate during the pendency of administrative proceedings (see, e.g., 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)), bankruptcy proceedings (11 U.S.C. 362; Hill v. Harding, 107 U.S. 631, 634 (1882)), 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, "in order to enable such persons to devote their entire energy to the defense needs of the Nation," 21 U.S.C App. 510. See, e.g., Semler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943); Coburn v. Coburn, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982). The 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. That result is thought 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, rather than postponing review until the current President or a successor is forced to undergo further litigation.

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

Congress of the United States
House of Representatives
 Washington, DC 20515

Dear Colleague:

May 21, 1996

On May 15, 1995, attorneys for President Clinton filed an appeal with the United States Supreme Court seeking to delay the sexual harassment lawsuit filed by Paula Jones, a former Arkansas state employee.

One of the legal arguments used by the President involved **The Soldiers' and Sailors' Civil Relief Act of 1940**, which allows members of the armed forces of the United States to postpone civil litigation while on active duty.

The purpose of the Act is to allow the United States to fulfill the requirements of national defense, by enabling *"persons in the military service..."* to *"devote their entire energy to the defense needs of the Nation."* According to his pleading, *"President Clinton here thus seeks relief similar to that which he may be entitled as Commander in Chief of the Armed Forces."*

This Act is quite clear on who is eligible for relief. Only members of the Army, Navy, Marines, Air Force, and Coast Guard, and officers of the Public Health Service when properly detailed, are eligible. Further, this Act defines the term "military service" to include the period during which one enters "active service" and ends when one leaves "active service."

This ignoble pleading is a slap in the face to the millions of men and women who either are serving on active duty, or have served on active duty in the armed forces of the United States. In 1969, President Clinton ran away from his military obligation, dodging the draft, claiming that he *"loathed the military."* Now, President Clinton by claiming possible protection under **The Soldiers' and Sailors' Civil Relief Act**, makes a mockery of the laws meant to protect the honorable men and women who serve their country in the armed forces of the United States.

In the words of J. Thomas Burch, Jr., Chairman of the National Vietnam Veterans Coalition, *"Bill Clinton was not prepared to carry the sword for his country, but he hesitancy in using its shield if he can get away with it."*

Please join us in sending a letter to President Clinton (see the letter on the next page) strongly objecting to the use of **The Soldiers' and Sailors' Civil Relief Act** defense.

To add your name as a cosigner, please call Mark Katz at 225-3664, or Rachel Krausman at 225-2965 by 12:00 noon on Thursday, May 23, 1996.



BOB STUMP

Chairman

House Committee on Veterans' Affairs



BOB DORNAN

Chairman

Subcommittee on Military Personnel
National Security Committee

(more)

The President
The White House
Washington, DC 20500

Dear Mr. President:

The undersigned Members of the House of Representatives take strong exception to part of your Petition for Writ of Certiorari to the United States Supreme Court in *Clinton v. Jones*. In it, at pages 14-15, you assert the relief you seek in postponing the civil lawsuit against you is similar to that to which you "may be entitled as Commander-in-Chief of the Armed Forces". Certainly, we take no position on the issues being litigated in that case. However, we feel obligated to inform you on behalf of America's veterans that the protections of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. sections 501-25 (1988 & Supp. V 1993), are available only to "persons in the military service of the United States" who are in "Federal service on active duty."

The Act is quite clear and specific about its coverage. The Act's purpose is "to enable the United States the more successfully to fulfill the requirements of the national defense" and to enable members of the military services "to devote their entire energy to the defense needs of the Nation." The Act only applies to members of the Army, the Navy, the Marine Corps, the Air Force, the Coast Guard, and officers of the Public Health Service detailed by proper authority to the Army or the Navy.

Under the Constitution, you are the *civilian* Commander-in-Chief of the Armed Forces. The Founding Fathers wanted to enshrine the principle of civilian control of the military in the Constitution and did so by making the President the civilian Commander-in-Chief of the Armed Forces. You are *not* a person in military service, nor have you ever been.

On the eve of Memorial Day, the most sacred time for honoring our fallen heroes of military service, it is imperative that you rectify this ignoble suggestion that you are now somehow a person in military service. By pursuing this argument, you dishonor all of America's veterans who did so proudly serve. We call upon you to take the honorable course and immediately supplement your Petition for Writ of Certiorari to withdraw your argument regarding the Soldiers' and Sailors' Civil Relief Act.

Sincerely,

MAY-28-'96 MON 12:12 ID:

TEL NO:

To: Secretary Brown (009)
Ed Scott (009)

From: Jim Holley

(80)

Ten-Hut

News for Army, Navy, Air Force and Marine Veterans
From the Republican National Committee

20 May, 1996

WH Seeks Military Cover In Harassment Suit

Washington, D.C. -- Attorneys for Bill Clinton 15 May filed an appeal with the United States Supreme Court seeking a delay in the sexual harassment lawsuit filed against him by Paula Jones, a former Arkansas state employee.

Veterans will be interested to know that the legal argument for the appeal is based on the Soldiers' and Sailors' Civil Relief Act of 1940, which allows members of the armed services to postpone civil litigation while they're on active duty.

The Supreme Court Appeal reads, "President Clinton here thus seeks relief similar to that to which he may be entitled as Commander in Chief of the Armed Forces." (New York Times, 16 May, 1996)

The irony of Bill Clinton's defense did not escape the attention of National Vietnam Veterans Coalition Chairman J. Thomas Burch, Jr., who promptly fired off a letter to the editor of The New York Times.

"Bill Clinton was not prepared to carry the sword for his country, but has no hesitancy in using its shield if he can get away with it."

A decision is expected from the court within the month.

Facts From the Foxhole

Bill Clinton's FY 1997 budget for VA medical care proposes \$17.208 billion. The House Republican budget proposes \$17.3 billion. Even a recruit knows this is an increase!

Bill Clinton's budget would also cut VA medical care funding from \$16.9 billion in FY '96 to \$13 billion by FY '00.

Words On Watch

Keep this quote at the top of your duffel bag and pull it out the next time you hear scuttlebutt about "mean spirited" GOP cuts in VA programs.

In his 29 March, 1996, testimony before the full House Veterans Affairs Committee, VA Secretary Jesse Brown said of Bill Clinton's VA budget plan, "The president's out-year number and last year's out-year numbers would devastate the VA."

Mail Call

Vets looking for the straight skinny on VA programs and proposals can get it by writing to Veterans For Dole, 810 1st Street N.E. Suite 300, Washington, D.C. 20002. To enlist in VFD, call 1-800-Bob-Dole. That decodes to 1-800-262-3653. Ask for Ron Miller.

Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness and death."⁶ In this regard the President is like any other litigant, except that a President's litigation, like a President's illness, becomes the nation's problem.

B. The Court Of Appeals Erred In Viewing The Relief Sought By The President As Extraordinary.

The court below appears to have viewed the President's claim in this case as exceptional, both in the relief that it sought and in the burden that it imposed on respondent.⁷ In fact, far from seeking a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)" (Pet. App. 13), the relief that the President seeks -- the temporary deferral of litigation -- is far from unknown in our system, and the burdens it would impose on plaintiffs are not extraordinary.

There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), provides that civil claims by or against military personnel are to be tolled and stayed while they are on active duty.⁸ Such relief is deemed necessary to enable members of the armed forces "to devote their entire energy to the defense

⁶ 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105 (1926), quoted in *Fitzgerald*, 457 U.S. at 763 n.6 (Burger, C.J., concurring).

⁷ For example, the panel majority declared that Article II "did not create a monarchy" and that the President is "cloaked with none of the attributes of sovereign immunity." Pet. App. 6.

⁸ Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to con-

needs of the Nation." 50 U.S.C. app. § 510 (1988). President Clinton here thus seeks relief similar to that to which he may be entitled as Commander-In-Chief of the Armed Forces, and which is routinely available to service members under his command.

The so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. That stay affects all litigation that "was or could have been commenced" prior to the filing of that petition, 11 U.S.C. § 362 (1994), and ordinarily will remain in effect until the bankruptcy proceeding is completed. *Id.*⁹ Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.

It is well established that courts, in appropriate circumstances, may put off civil litigation until the conclusion of a related criminal prosecution against the same defendant.¹⁰ That process may, of course, take several years, and affords the civil plaintiff no relief. The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may

⁹ Indeed, a bankruptcy judge's discretion has been held sufficient to authorize a stay of third-party litigation in other courts that conceivably could have an effect on the bankruptcy estate, even if the debtor is not a party to the litigation and the automatic stay is not triggered. See 11 U.S.C. § 105 (1994); 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994), and cases cited therein.

¹⁰ See, e.g., *Koester v. American Republic Invs.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir.

TALKING POINTS/FACT SHEET ON SUPREME COURT'S DECISION TO GRANT
THE PRESIDENT'S PETITION IN THE PAULA JONES CASE

The President and his attorneys are gratified by the Supreme Court's decision to review the Court of Appeals' decision ("grant cert") in the Paula Jones case.

The Court will consider the President's claim, wrongly rejected by the Court of Appeals, that as a matter of constitutional principle, private civil damages actions against a sitting President should be deferred until the President leaves office. This claim presents an issue of importance to both the Presidency and nation -- precisely the kind of issue the Supreme Court should address.

No President has ever had to cope with the distractions of defending a lawsuit while in office, and the President and his attorneys -- as well as the Department of Justice, which supported the President's request for a stay of the litigation -- believe that the Constitution entitles any President to a simple postponement of litigation so that he can fulfill his constitutional responsibilities. The deferral of litigation for a specified, limited period is quite common in our legal system as a way to protect such important interests.

The Court's decision to consider the case, as is almost always true in Supreme Court practice, is a simple one-sentence order. There is no reasoning given.

Briefing in the case will occur during the summer and early fall. Argument has not yet been scheduled, but is likely to occur in the first few months of the next Supreme Court Term, which begins in October.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/13/1996	P5

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [1]

2009-1006-F
jp2024

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995**

**WILLIAM JEFFERSON CLINTON,
Petitioner,**

vs.

**PAULA CORBIN JONES,
Respondent.**

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

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Attorneys for the Petitioner
President William Jefferson Clinton

QUESTIONS PRESENTED

1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until he leaves office.

2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.

LIST OF PARTIES TO THE PROCEEDING

Petitioner, President William Jefferson Clinton, was a defendant in the district court and appellant in the court of appeals. Respondent Paula Corbin Jones was the plaintiff in the district court and the cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
 OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON,
 Petitioner,

vs.

PAULA JONES,
 Respondent.

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

Petitioner William Jefferson Clinton respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 9, 1996.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 72 F.3d 1354. The court of appeals' order denying the petition for rehearing (Pet. App. 32) is reported at 81 F.3d 78. The principal opinion of the district court (Pet. App. 54) is reported at 869 F. Supp. 690. Other published opinions of the district court (Pet. App. at 40 and 74) appear at 858 F.Supp. 902 and 879 F.Supp. 86.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition for rehearing was filed on January 23, 1996, and denied on March 28, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983

42 U.S.C. § 1985

50 U.S.C. app. § 510

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Fed. R. Civ. P. 40

These provisions are set forth at pages App. 79-85 of the Petitioner's Appendix.

STATEMENT OF THE CASE

Petitioner William Jefferson Clinton is President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed this civil damages action against the President in the United States District Court for the Eastern District of Arkansas. The complaint was premised in substantial part on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under the federal civil rights statutes and two arising under common law, and sought \$175,000 in actual and punitive damages for each of the four counts.¹ Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343.

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left

¹ The first two counts allege that in 1991, when the President was Governor of Arkansas and respondent a state employee, he subjected respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (1988). A third claim alleges that the President thereby inflicted emotional distress upon respondent. Finally, the complaint alleges that in 1994, while he was President, petitioner defamed respondent through statements attributed to the White House Press Secretary and his lawyer, denying her much-publicized allegations against the President.

Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts. Respondent alleges that Trooper Ferguson approached her on the President's behalf, thereby conspiring with the President to deprive the respondent of her civil rights in violation of 42 U.S.C. § 1985. Respondent also alleges that Mr. Ferguson defamed her in statements about a woman identified only as "Paula," which were attributed to an anonymous trooper in an article about President Clinton's personal conduct published in The American Spectator magazine. Neither the publication nor the author was named as a defendant in the suit.

office, asserting that such a course was required by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed trial until the President's service in office expired, but held that discovery could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is Nixon v. Fitzgerald, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil litigation challenging his official acts as President. While the holding of Fitzgerald did not apply to this case because President Clinton was sued primarily for actions taken before he became President, the court stated that "[t]he language of the majority opinion" in Fitzgerald "is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office." Pet. App. 68-69. The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." Id. Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge stayed the trial "[t]o protect the Office of President . . . from unfettered civil litigation, and

to give effect to the policy of separation of powers." Pet. App. 72.²

The trial court, observing that the plaintiff had filed suit three years after the alleged events, further concluded that the plaintiff would not be significantly inconvenienced by delay of trial. Pet. App. 70. However, it found "no reason why the discovery and deposition process could not proceed," and said that this would avoid the possible loss of evidence with the passage of time. Pet. App. 71.

The President and respondent both appealed.³ A divided panel of the court of appeals reversed the district court's order staying trial, and affirmed its decision allowing discovery to proceed. The panel issued three opinions.

Judge Bowman found the reasoning in Fitzgerald "inapposite where only personal, private conduct by a President is at issue," (Pet. App. 11), and determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App.

² The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found that there was "too much interdependency of events and testimony to proceed piecemeal," and that "it would not be possible to try the Trooper adequately without testimony from the President." Pet. App. 71.

³ Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 and the collateral order doctrine, as articulated in Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) and Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones' cross-appeal. See infra pp. 20-24. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

16. "The Court's struggle in Fitzgerald to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered," he wrote. Pet. App. 9.

Judge Bowman further concluded that it would be an abuse of discretion to stay all proceedings against an incumbent President, asserting that the President "is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion." Pet. App. 16. Ruling that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the stay of trial issued by the district court, (Pet. App. 5 n.4) (citing Kincade v. City of Blue Springs, Mo., 64 F.3d 389, 394 (8th Cir. 1995)), Judge Bowman accordingly reversed that stay as an abuse of discretion. Pet. App. 13 n.9.

In reaching these conclusions, Judge Bowman put aside concerns that the separation of powers could be jeopardized by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial. He stated that any separation of powers problems could be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13.

Judge Beam "concur[red] in the conclusions reached by Judge Bowman." Pet. App. 17. He stated that the issues presented "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. Pet. App. 17. He also acknowledged that "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" is a matter of "major concern." Pet. App. 21. He expressed his belief, however, that this litigation could be managed with a "minimum of impact on the President's schedule." Pet. App. 23. This could be accomplished, he suggested, by the President's choosing to forgo attending his own trial or becoming involved in discovery, or by limiting the number of pre-trial encounters between the President and respondent's counsel. Pet. App. 23-24. Judge Beam stated that he was concurring "with [the] understanding" that the trial judge would have substantial latitude to manage the litigation in a way that would accommodate the interests of the Presidency. Pet. App. 25.

Judge Ross dissented, concluding that the "language, logic and intent" of Fitzgerald "directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term." Pet. App. 25. Judge Ross observed that "[n]o other branch of government is entrusted to a single person," and determined that "[t]he burdens and demands of civil litigation can be expected . . . to divert [the

President's] energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result . . . would impair the integrity of the role assigned to the President by Article II of the Constitution." Pet. App. 26.

Judge Ross also stated that private civil suits against sitting Presidents "create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes." Pet. App. 28. At the same time, he reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Accordingly, Judge Ross would allow litigation to proceed against a sitting President only if a plaintiff could "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

The court of appeals denied the President's request for a rehearing en banc, with three judges not participating and Judge McMillian dissenting. Judge McMillian said the majority's holding had "demean[ed] the Office of the President of the United States." Pet. App. 32. He wrote that the panel majority "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed

filing for at least three years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary national importance, which was resolved erroneously by the court of appeals. For the first time in our history, a court has ordered a sitting President to submit, as a defendant, to a civil damages action directed at him personally. We believe that absent exceptional circumstances, an incumbent President should never be placed in this position. But surely a President should not be placed in this position for the first time in our history on the basis of a decision by a fragmented panel of a court of appeals, without this Court's review.

The decision of the court below is erroneous in several respects. It is inconsistent with the reasoning of Nixon v. Fitzgerald and with established separation of powers principles. The panel majority's suggested cure for the separation of powers problems its own ruling creates -- "judicial case management sensitive to . . . the demands of the President's schedule" (Pet. App. 13) -- is worse than the disease: it gives a trial court a general power to set priorities for the President's time and energies. The panel majority also grossly overstated the supposedly extraordinary character of the relief that the President seeks. The deferral of litigation for a specified, limited

period is far from unknown in our judicial system, and it is routinely afforded in order to protect interests that are not comparable in importance to the interests the President advances here.

This is the appropriate time for the Court to address these issues. If review is declined, the President would have to undergo discovery and trial while in office, which would eviscerate the very interests he seeks to vindicate. Moreover, if the decision below is allowed to stand, federal and state courts could be confronted with a multiplicity of private civil damage complaints against incumbent Presidents, which increasingly would enmesh Presidents in the judicial process, and the courts in the political arena, to the detriment of both.

I. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Separation Of Powers.

1. The President "occupies a unique position in the constitutional scheme." Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). Unlike the power of the other two branches, the entire "executive Power" is vested in a single individual, "a President," who is indispensable to the execution of that authority. U.S. CONST. art. II, § 1. The President is never off duty, and any significant demand on his time necessarily imposes on his capacity to carry out his constitutional responsibilities.

Accordingly, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." Fitzger-

ald, 457 U.S. 753. Indeed, "[t]his tradition can be traced far back into our constitutional history." Id. at 753 n.34. The form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit against him until he leaves office -- is modest. It is far more modest, for example, than the absolute immunity that Fitzgerald accorded all Presidents for actions taken within the scope of their presidential duties.

The panel majority concluded that because the Fitzgerald holding was limited to civil damages claims challenging official acts, the President should receive no form of protection from any other civil suits. This conclusion is flatly inconsistent with the reasoning of Fitzgerald. The Court in Fitzgerald determined that the President was entitled to absolute immunity not only because the threat of liability for official acts might inhibit him in the exercise of his authority (id. at 752 & n.32), but also because, in the Court's words, "the singular importance of the President's duties" means that "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Id. at 751.

The panel majority ignored this second basis for the holding of Fitzgerald. The first basis of Fitzgerald -- that the threat of liability might chill official Presidential decision

making -- is, of course, largely not present here.⁴ But in this case the President does not seek immunity from liability. He seeks protection only from the second danger to the Presidency emphasized by Fitzgerald -- the burdens inevitably attendant upon being a defendant in a lawsuit. The court of appeals simply disregarded this "unique risk[] to the effective functioning of government."

2. As the Fitzgerald Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. See 457 U.S. at 751 n.31. Justice Story stated that "[t]he president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." 3 J. STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (quoted in Fitzgerald, 457 U.S. at 749) (emphasis added). Senator Ellsworth and then Vice President John Adams, both delegates to the Constitutional Convention, also agreed that "the President, personally, was not . . . subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of

⁴ The President reserved the right below to assert at the appropriate time, along with certain common law immunities, the defense of absolute immunity to the defamation claim that arose during his Presidency.

Government." JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed., 1890)
(quoted in Fitzgerald, 457 U.S. at 751 n.31).

President Jefferson was even more emphatic:

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

10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905). As the Court said in Fitzgerald, "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. 751 n.31.

3. The panel majority minimized the separation of powers concerns that so troubled the Framers. It ruled that these problems can never be addressed by postponing litigation against the President. Pet. App. 16. Instead, the panel majority's solution was "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. Rather than solve the separation of powers problems raised by allowing a suit to go forward against a sitting President, the panel's approach only exacerbates them.

The panel majority envisioned that, throughout the course of litigation against him, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet.

App. 16. If the President disagreed with a decision of the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16. In other words, under the panel's approach, a trial court could insist, before considering a request by the President for adjustment in the litigation schedule, that the President provide a "specific, particularized" explanation of why he believed his official duties prevented him from devoting his attention to the litigation at that time. The court would then be in the position of repeatedly evaluating the President's official priorities -- precisely what Jefferson so feared.

This approach is an obvious affront to the complex and delicate relationship between the Judiciary and the Presidency. Neither branch should be in a position where it must approach the other for approval to carry out its day-to-day responsibilities. Even if a trial court discharged this mission with the greatest judiciousness, it is difficult to think of anything more inconsistent with the separation of powers than to put a court in the position of continually passing judgment on whether the President is spending his time in a way the court finds acceptable.

4. The panel majority similarly attempted to downplay the demands that defending private civil litigation would impose on the President's time and energies. Pet. App. 12-14. The concurring opinion in particular likened the defense of a personal damages suit to the few instances when Presidents have testified as witnesses in judicial or legislative proceedings. Pet.

App. 22-23. This notion is implausible on its face; there is no comparison between being a defendant in a civil damages action and merely being a witness. Even so, Presidents have been called as witnesses only in cases of exigent need, and only under carefully controlled circumstances designed to minimize intrusions on the President's ability to carry out his duties.

A sitting President has never been compelled to testify in civil proceedings. Presidents occasionally have been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (Fitzgerald, 457 U.S. at 754) and the defendant's Constitutional right to compulsory process (U.S. CONST. amend. VI; United States v. Burr, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)) -- factors that are, of course, not present here. But even in those compelling cases, as Chief Justice Marshall recognized, courts are 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). Instead, courts have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that does not disrupt his official functions, such as by videotaped deposition.⁵

⁵ See, e.g., United States v. McDougal, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House); United States v. Poindexter, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (videotaped deposition); United States v. North, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena because defen- (continued...)

In any event, there is an enormous difference between being a third-party witness and being a defendant threatened with financially ruinous personal liability. This is true even for a person with only the normal business and personal responsibilities of everyday life -- which are, of course, incalculably less demanding than those of the President. A President as a practical matter could never wholly ignore a suit such as the present one, which seeks to impugn the President's character and to obtain \$700,000 in putative damages from the President personally. "The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money, as many former public officials have learned to their sorrow." Fitzgerald, 457 U.S. at 763 (Burger, C.J., concurring).

Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness and death."⁶ In this regard the President is like any other litigant, except that a President's litigation, like a President's illness, becomes the nation's problem.

Jan. T. id. p. 10 ⁵(...continued)

show that President's testimony would support his defense), aff'd, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991); United States v. Fromme, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

⁶ Lectures on Legal Topics, Assn. of the Bar of the City of New York 105 (1926).

II. The Court of Appeals Erred In Viewing The Relief Sought By The President As Extraordinary.

The court below appears to have viewed the President's claim in this case as exceptional, both in the relief that it sought and in the burden that it imposed on respondent.⁷ In fact, far from seeking a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)" (Pet. App. 13), the relief that the President seeks -- the temporary deferral of litigation -- is far from unknown in our system, and the burdens it imposes on plaintiffs are not at all extraordinary.

There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & supp. 1996), provides that civil claims by or against military personnel are to be tolled and stayed while they are on active duty.⁸ Such relief is deemed necessary to enable members of the armed forces "to devote their entire energy to the defense needs of the Nation." 50 U.S.C. App. § 510. President Clinton here thus seeks relief no differ-

⁷ For example, the panel majority declared that Article II "did not create a monarchy" and that the President is "cloaked with none of the attributes of sovereign immunity." Pet. App. 6.

⁸ Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. § 521.

ent than that which would be available to members of the armed forces under his command.

The so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. That stay affects all litigation that "was or could have been commenced" prior to the filing of that petition, 11 U.S.C. § 362, and ordinarily will remain in effect until the bankruptcy proceeding is completed. Id.⁹ Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure of office.

It is well-established that courts, in appropriate circumstances, may put off civil litigation until the conclusion of a related criminal prosecution against the same defendant.¹⁰

⁹ Indeed, a bankruptcy judge's discretion has been held sufficient to authorize a stay of third-party litigation in other courts that conceivably could have an effect on the bankruptcy estate, even if the debtor is not a party to the litigation and the automatic stay is not triggered. See 11 U.S.C. § 105; 2 COLLIER ON BANKRUPTCY ¶ 105.02 (MB 15th ed. 1994), and cases cited therein.

¹⁰ See, e.g., 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); United States v. Mellon Bank, N.A., 545 F.2d 869 (3d Cir. 1976).

That process may, of course, take several years, and affords the civil plaintiff no relief.

Under the abstention doctrine established by Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), district courts must stay certain litigation and must require plaintiffs - - who have a right to pursue their federal claims in federal court -- to institute separate proceedings in state court. Pullman abstention can precipitate delays of six or eight years or longer in federal litigation. See, e.g., Spector Motor Services, Inc. v. O'Connor, 340 U.S. 602, 603-04 (1951) (nine-year delay).

The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may not provide the relief they seek. This process too can take several years. See, e.g., Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 306-07 (1973). And public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). That will routinely delay litigation for a substantial period.

We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is

somehow placing himself "above the law," or that holding this litigation in abeyance would impermissibly violate a plaintiff's entitlement to access to the courts. More specifically, these examples demonstrate that what the President is seeking -- the temporary deferral of litigation -- is relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

III. The Panel Majority Erred In Asserting Jurisdiction Over, And Reversing, The District Court's Discretionary Decision To Stay The Trial Until After President Clinton Leaves Office.

1. Respondent cross-appealed to challenge the district court's order to stay trial. Ordinarily, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 n.11 (1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. See 28 U.S.C. § 651.¹¹ In asserting that jurisdiction existed for her cross-appeal, the respondent did not seek such a writ or contend that the stay was appealable under 28 U.S.C. § 1291 as a final order, or as a "collateral" order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). Instead,

¹¹ Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." See, e.g., Boushel v. Toro Co., 985 F.2d 406, 408 (8th Cir. 1993); Cheyney State College v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, it is not applicable here, where the district court's order clearly contemplated further proceedings in federal court. See Boushel, 985 F.2d at 408-09.

respondent asserted, and the panel majority found, that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. 5 n.4.

In Swint v. Chambers County Comm'n, 115 S. Ct. 1203 (1995), this Court ruled that the notion of "pendent appellate jurisdiction," if viable at all, is extremely narrow in scope (see id. at 1212), and is not to be used "to parlay Cohen-type collateral orders into multi-issue interlocutory appeal tickets." Id. at 1211. The panel majority sought to avoid Swint by declaring that respondent's cross-appeal was "inextricably intertwined" with the President's appeal.¹² Pet. App. 5 n.4. This conclusion, however, is incorrect.

The question of whether the President is entitled, as a matter of law, to defer this litigation is analytically distinct from the question of whether a district court may exercise its discretion to stay all or part of the litigation. The former question raises an issue of law, to be decided based on the President's constitutional role and the separation of powers principles we have discussed; the latter is a discretionary determination to be made on the basis of the particular facts of the case. Moreover, the legal question of whether a President is entitled to defer litigation is one on which the district court's determination is entitled to no special deference; a court's

¹² See supra n.2.

exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion.

The district court, in deciding to postpone trial in this case, explicitly invoked its discretionary powers over scheduling (Pet. App. 71 (citing Fed. R. Civ. P. 40 and "the equity powers of the Court")), and based its decision not only on the defendant's status as President -- certainly a relevant and valid factor -- but also on a detailed discussion of the particular circumstances of this case:

This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident . . . and desperately needs to recover . . . damages It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

Review of the district court's decision to postpone the trial -- unlike review of its decision to reject the President's position that the entire case should be deferred -- must address these particular facts of this case. Thus the respondent's cross-appeal raised issues that, far from being "inextricably

intertwined" with the President's submission, can be resolved separately from it. The panel majority's expansion of the court of appeals' jurisdiction over this interlocutory appeal was in error.

2. In any event, the decision to reverse the district court was also incorrect on the merits. As Justice Cardozo explained for this Court in Landis v. North American Co., 299 U.S. 248 (1936), a trial judge's decision to stay proceedings should not be lightly overturned: "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Id. at 254-55. Indeed, the Court in Landis specifically stated that "[e]specially in cases of extraordinary public moment, the plaintiff may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Id. at 256.

The panel majority justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. It is unclear what the panel meant by labelling the district court's order the "functional equivalent" of "temporary immunity", inasmuch as the district court

denied the President a significant part of the relief he sought. But it is entirely clear that the panel majority, in its sweeping and conclusory ruling, did not begin to conduct the kind of careful weighing of the particular facts that might warrant a conclusion that the trial court here abused its discretion.

IV. The Court Should Grant Review Now To Protect The Interests Of The Presidency.

This is the only opportunity for the Court to review the President's claim and grant adequate relief. If review is declined at this point, the case will proceed in the trial court, and the interests the President seeks to preserve by having the litigation deferred -- interests "rooted in the constitutional tradition of the separation of powers" -- will be irretrievably lost. Fitzgerald, 457 U.S. at 743, 749. Should the President prevail on the merits below, this Court will not even have the opportunity to provide guidance for future cases.

Now, a court for the first time in history has held that a sitting President is required to litigate private civil damages claims. This holding breaches historical understandings that are as appropriate today as ever before.¹³ The court in

¹³ Heretofore, there have been no private civil damages suits initiated or actively litigated while the defendant was serving as President. While there are recorded private civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all were underway before the defendant assumed office. The first two were dismissed by the time the defendant became President; after each took office, the dismissal was confirmed on appeal. See New York ex rel. Hurley v. Roosevelt, 179 N.Y. 544 (1904); DeVault v. Truman, 194 S.W.2d 29 (1946). The Kennedy case was filed while he

(continued...)

Fitzgerald specifically anticipated the threat posed by suits of this kind. Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion). In these circumstances, the fact that there is "no historical record of numerous suits against the President" -- as there was no comparable record before Fitzgerald (*id.* at 753 n.33) -- provides no reassurance at all that this case will be an isolated one.

There is no question that the issues raised by this case will have profound consequences for both the Presidency and the Judiciary. The last word on issues of this importance should not be a decision by a splintered panel of a court of appeals -- a decision that we believe is inconsistent with the precedents of this Court and with the constitutional tradition of separation of powers. The Court has recognized that a "special solicitude [is] due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743. The Court should grant review now, to protect those prerogatives.

¹³(...continued)

was a candidate, and was settled after President Kennedy's inauguration, without any discovery against the Chief Executive. See, Bailey v. Kennedy, No. 757200, and Hills v. Kennedy, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960).

CONCLUSION

For the foregoing reasons, we respectfully request that the President's petition for writ of certiorari be granted.

Respectfully submitted,

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No. 95-1853

IN THE
Supreme Court of the United States
 October Term, 1995

WILLIAM JEFFERSON CLINTON,
Petitioner,

vs.

PAULA CORBIN JONES,
Respondent.

On Petition For A Writ Of Certiorari
 To The United States Court Of Appeals
 For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The President's submission is straightforward: No President has ever before been compelled to submit to a civil damages action, directed personally against him, during his term in office. A decision with such serious ramifications for the Presidency and the nation should not be allowed to stand without this Court first considering the President's contention, founded on language in the Court's decisions, as well as statements by the Framers, that such lawsuits must in all but the most exceptional cases be deferred until the President leaves office.

Respondent does not -- indeed, cannot -- identify a single instance in which a court has compelled an incumbent President to defend a damages action directed at him personally. Nor does respondent explain why a fragmented panel of the court of appeals, rather than this Court, should decide the extraordinarily important constitutional question of whether a President may be compelled to do so. Instead, respondent's principal contentions are (i) that this is a "one-of-a-kind case" that can be litigated without interfering with the President's conduct of his office (Br. in Op. 8); (ii) that separation of powers principles permit a trial judge to require, review -- and sometimes reject -- specific showings by the President that a matter of state is sufficiently significant to justify altering the litigation schedule (Br. in Op. 12-14); (iii) that *Nixon v. Fitzgerald*, by providing Presidents with absolute immunity from liability for conduct within the "outer perimeter" of official duties, somehow precludes deferral of this litigation (Br. in Op. 16-18); and (iv) that this nation's historic traditions pose no bar to subjecting an incumbent President to civil damages litigation (Br. in Op. 19-20). Respondent is wrong at each turn.

1. This case is evidence, if any is needed, of the wisdom of the Court's observation in *Nixon v. Fitzgerald* that "the

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sheer prominence of the President's office" makes him "an easily identifiable target for suits for civil damages." 457 U.S. 731, 752-53 (1982). Respondent's brief in opposition characterizes this lawsuit as a "very simple dispute about what happened in a very short encounter between two people in a room," and one in which "[d]iscovery and trial . . . will not be burdensome." Br. in Op. at 10. The record, however, reveals that respondent's attorneys in fact intend to use this case as a vehicle for a far-reaching inquiry:

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

C.A. App. 122-23 (Tr. of ABC's *Nightline* (Dec. 28, 1994)). Respondent's counsel also stated that they will "exhaustively pursue" this line of inquiry with other witnesses, and may seek to compel an unprecedented physical examination of the President. C.A. App. 117-18 (Tr. of CNN's *Daybreak* (Dec. 29, 1994)).

Respondent, in other words, envisions litigation that not only threatens the President with \$700,000 in damages and seeks to impugn his reputation, but that is specifically calculated to entangle him in the "discovery deposition" process. In addition, the district court found that discovery could not be conducted on even the claims against the President's co-defendant "without the heavy involvement of the President through his attorneys." Pet. App. 76. The inevitable consequence of such purportedly "uncomplicated" litigation (Br. in Op. i) will be substantially to divert the President from his Article II responsibilities.

That danger, though present throughout this nation's history, has been enhanced by the practices of modern litigation,

It takes but a single lawsuit of this kind, in *Fitzgerald's* words, to "distract a President from his public duties, to the detriment of not only the President . . . but also to the Nation that the Presidency was designed to serve." 457 U.S. at 753. That danger is especially great in the modern setting, where wide-ranging discovery is permitted and instantaneous, nationwide publicity is routinely used as a tool by litigants.

^{Moreover,} The dangers of abuse of litigation against an incumbent President are, of course, not limited to a single case. Respondent reiterates the panel majority's conception that "the universe of potential plaintiffs" who might sue an incumbent President -- for reasons of partisanship, extortion, or publicity-seeking -- is "small[.]" Br. in Op. at 11 (quoting Pet. App. 15). But no person becomes President without having been highly prominent for an extended period in the public or private sector. If the Court allows this case to proceed, it is difficult to believe that other potential litigants, encouraged by the spectacle, will not come forward in this or future Administrations, to use a lawsuit to distract, harass or obtain personal information about a President by "alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of pretrial motion." Pet. App. 27 (Ross, J. dissenting).

Respondent asserts that there is no extensive history of litigation against a sitting President being used for this purpose. Br. in Op. at 11. But there was no history of Presidents being sued for official acts before *Nixon v. Fitzgerald*. See 457 U.S. at 753 n.33.¹ The Court nonetheless granted certio-

¹ The Court in *Fitzgerald* attributed this to the fact that *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which permitted damages actions against federal officials for violations of the Constitution, was of relatively recent vintage. But of course common law tort actions have long been available against federal officials, as Justice Harlan noted in *Bivens*. See 403 U.S. at 400 n.3, 409 (Harlan, J. concurring). The more likely explanation for the absence of suits against the President is that -- as we showed in the petition -- it has simply been universally understood that

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4

rari in *Fitzgerald*, and afforded President Nixon an absolute immunity -- a much broader protection than is sought here -- because it recognized the danger that opportunistic litigation presents to the office of the Presidency. 457 U.S. at 753. The risk of opportunistic litigation is no less in a case of this kind than it was in *Fitzgerald*, and this Court's review is no less warranted here.

2.a. Respondent embraces the panel majority's view that the risk such litigation poses to the Presidency can be managed by allowing trial judges to exercise discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it will precipitate repeated confrontations between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation schedule be modified because of the demands of his office. As Judge Ross asked below (Pet. App. 29):

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? . . . [C]an 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?

The brief in opposition seeks to create the impression that trial judges will be highly deferential to the demands of the Presidency. It repeatedly quotes Judge Beam's formulation, according to which a trial judge may "reschedul[e] any

the President cannot be sued for damages while he ~~is~~^{is} in office. See *Fitzgerald*, 457 U.S. at 758.

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obtain

proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25, quoted in Br. in Op. 8, 12. But that is not the standard established by the prevailing opinion below, which stated that the President could seek relief from a trial judge only if he could show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16.

--and sometimes highly inductive--

Moreover, under either standard, once trial judges are vested with discretion, they inevitably will exercise it in different ways. While some may be deferential to the President, others surely will not be. And the affront to the separation of powers inheres in the very fact that a trial judge is empowered to review the President's official responsibilities (to determine whether he should instead devote his attention to a private civil action.

in order

One need look no further than this case to see the pitfalls in authorizing courts to review such matters. Here, the district court made a specific case-management determination, based on the particular facts of this case, that the trial should be stayed until the President leaves office. Pet. App. 70-71. The panel majority, notwithstanding its purported reliance on the discretion of trial judges, promptly reversed the stay as an abuse of discretion, without even explaining why the district court's evaluation of the facts was mistaken. Pet. App. 13 n.9.

This clash between the district court and the court of appeals -- and the disagreement within the court of appeals even as to the appropriate legal standard -- is symptomatic. It shows that the separation of powers cannot reliably be protected by requiring the President to make ad hoc showings about how specific aspects of the litigation will affect his ability to carry out his official duties. It also underscores the need for this Court to review this important issue.

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b. In arguing that courts can oversee Presidential involvement in civil damages litigation, respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. Br. in Op. 12-13. The lesson of those cases, however, is the opposite of what respondent suggests: they show how difficult it is for courts to reconcile the demands of the judicial process with the responsibilities of the executive branch.

A President who testifies as a witness is involved in a one-time encounter with the judiciary. By contrast, a defendant faced with personal liability will be involved in every phase of the litigation. The opportunities for tension and conflict between the President and the courts thus increase exponentially. Moreover, a President who is a third-party witness ordinarily faces little risk to his reputation or financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. The burdens and distractions that ensue inevitably will be far more intrusive than when the President is a witness.

Nonetheless, even in the far less burdensome context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking² and should be undertaken only in cases of compelling need.³ Even when

² See, e.g., *United States v. Poindexter*, 732 F. Supp. 142, 148-50, 155-59 (D.D.C. 1990) (court limited defendant to written interrogatories and videotaped deposition, and reviewed questions to be asked in advance); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (permitting presidential testimony only by way of videotaped deposition conducted at the White House, supervised by the trial court via videoconferencing to avoid abuses, after which only directly relevant portions would be shown at trial).

³ See, e.g., *Poindexter*, 732 F. Supp. at 147 (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more per-

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the President is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests -- giving a trial court the power to manage the President's priorities to accommodate personal damages litigation -- pushes the separation of powers past the breaking point.

Finally, even in cases where only testimony or evidence has been sought from a President, this Court repeatedly has drawn a clear line between criminal proceedings -- where a compelling public interest is involved -- and civil damages proceedings. See *Nixon v. Fitzgerald*, 457 U.S. at 754 & n.37; *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974). The fact that Presidents on occasion appear as witnesses in criminal proceedings, therefore, does not support the conclusion that a President is required to participate in a private civil damages action in any capacity -- and certainly not as a defendant.

3.a. The brief in opposition attempts to create the impression that the President seeks to be held absolutely immune from liability for actions he took while he was not President. The President seeks no such thing, and respondent's elaborate arguments against that proposition (Br. in Op. i, 9, 15-18, 20-22) are simply a determined effort to confuse the issue. Rather, throughout this case, the President has asserted that the responsibilities of the Presidency warrant a stay of litigation until he leaves office. He does not seek to extinguish the respondent's rights to pursue her claims, does not seek to evade accountability, and remains subject to the risk of damages.

suasive source of evidence than alternatives that might be suggested") (footnote omitted); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (compelled testimony of former President in a criminal proceeding must be justified by a "sufficient showing . . . that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

And while respondent, like the panel majority, engages in overblown rhetoric to the effect that the President is seeking to place himself "above the law" and that the relief he seeks is "unprecedented," even respondent is forced to concede the validity of the underlying principle for which we contend. She acknowledges that the President is not like any other litigant, and that the courts must show "deference" and must accommodate the President's unique responsibilities. Br. in Op. 12-14.

b. Respondent and the panel majority suggest that *Fitzgerald* affirmatively rejected the President's position here. Pet. App. 8-9, 10-11; Br. in Op. at 16, 23. This suggestion is, to say the least, odd: in *Fitzgerald*, even the plaintiff, although seeking to hold then-former President Nixon liable in damages, conceded in his brief that litigation against a sitting President could be stayed⁴ -- reflecting the universal understanding, until this case, that a President cannot be subjected to personal damages litigation during his term of office. The issue in *Fitzgerald* was whether a President enjoys absolute immunity from liability for all his official acts. The Court decided that the President, alone among all public officials, is entitled to this exceptional protection. That conclusion is fully consistent with our view that a President who is sued for acts outside the scope of his office is entitled to the much more limited relief of temporary insulation from litigation. Indeed, as we showed in the petition, a crucial aspect of the Court's reasoning in *Fitzgerald* was that personal damages litigation can divert a President from his official duties.⁵

⁴ Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1783 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

⁵ The respondent suggests that the President is entitled to the relief sought here only if provided for in an act of Congress. Br. in Op. 11. We disagree. The relief sought here is required by the singular nature of the President's constitutional duties, and by principles of separation of powers. *Fitzgerald*, 457 U.S. at 749. The President does not rely on, or claim

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Respondent (Br. in Op. 9, 16) makes much of Chief Justice Burger's statement in *Fitzgerald* that "[t]he doctrine of absolute immunity does not extend beyond [official] actions," -- a statement with which we of course agree. 457 U.S. at 761 n.4. (Burger, C.J., concurring); see also *id.* at 759. Respondent does not mention that Chief Justice Burger also said that "[t]he need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties," and cautioned that "litigation processes . . . can be and are used as mechanisms of extortion." *Id.* at 763.

4. Respondent asserts (Br. in Op. 19-20) that President Jefferson "lost" his argument that subjecting Presidents to a Court's jurisdiction undermines the separation of powers. In fact, our history -- beginning at least with President Jefferson and extending through the *Burr* cases, the *Fitzgerald* case, and *United States v. Nixon* and its progeny -- teaches that subjecting a sitting President personally to the process of the courts is something that should be done only in cases of imperative need, and then only to the most limited extent possible. See *Fitzgerald*, 457 U.S. at 753-54.⁶

any relief under, the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. app. §§ 501-525 (1988 & Supp. V 1993)), or any other legislation.

⁶ In the face of this Court's demonstration in *Fitzgerald* that the Framers contemplated that Presidents would not be subject to suit while in office (457 U.S. at 751 n.31), respondent cites four cases. Br. in Op. 20. Three involve the entirely different question of whether a President can be required to be a witness in a criminal proceeding. See *supra*, p. 6-7. The fourth, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1973) (en banc) ("NTEU"), is inapposite and of questionable vitality, and in any event supports our position. In *NTEU*, the President was sued for injunctive relief in his official capacity, and was not required to defend the litigation personally. The court of appeals stated that it had the authority to mandamus President Nixon to perform a ministerial duty, but refrained from exercising that authority "in order to show the utmost respect to the office. . . and to avoid, if at all possible. . . any clash between the judicial and executive branches." The court proceeded by way of declaratory judgment instead. 492 F.2d at 616. Contrary to respondent's

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No court has ever, until now, required a sitting President to defend a civil damages action directed at him personally. In fact, no court has ever required a President to testify in a civil case as a witness. What respondent seeks -- allowing a sitting President to be sued for damages in his personal capacity -- would be an intrusion far beyond anything that has ever before been allowed, or even contemplated. To permit such an intrusion, without even so much as this Court's review, is utterly unwarranted.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

suggestion, *NTEU* demonstrates that courts go to great lengths to avoid entangling the President in their jurisdiction. Moreover, even the viability of the opinion expressed in *NTEU* -- that a President could be enjoined -- is in doubt, in view of the more recent discussion of that issue in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). See *id.*, 505 U.S. at 802-03 (plurality opinion of O'Connor, J.) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-99 (1867)); *id.* at 826 (Scalia, J., concurring).

11

Respectfully submitted,

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Attorneys for the Petitioner
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THE WHITE HOUSE

WASHINGTON

June 18, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *ek*

SUBJECT: JONES LITIGATION

The Clerk of the Supreme Court told David Strauss that (1) the Jones petition was on the conference list for last Friday and (2) it will be taken up again this Friday.

The possibilities are that (1) one or more Justices wanted to postpone the vote on cert for a week or (2) the Court decided to deny cert and one or more Justices are writing a dissent from the denial. (It is almost unheard of for a Justice to write a dissent from the grant of cert; that is a theoretical, but not a real possibility.)

THE WHITE HOUSE

WASHINGTON
June 17, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

Some ambiguous news on the Paula Jones front.

It seems that the case was on the Court's list for consideration at the Friday, June 14 conference. The Court today issued orders (granting or denying cert) in most of the cases considered at that conference. It did not, however, issue any order in the Jones case.

The worst-case scenario is that the Court has decided to deny cert, but could not issue the order because someone is writing a dissent from the denial.

The best-case scenario is that one or more Justices asked to postpone consideration of the cert petition, possibly until next week (but it is still uncertain whether there will be a conference next week), possibly until next Term (i.e., the first week in October).

David Strauss is going to call Frank Larson (the Clerk of the Court) later today and see what (if anything) he can find out.

Let me know what you hear ASAP
many thanks
EK

THE WHITE HOUSE

WASHINGTON

June 17, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

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David Strauss is going to call Frank Larson (the Clerk of the Court) later today and see what (if anything) he can find out.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. notes	re: Handwritten Notes - Amy Sabrin (1 page)	n.d.	P5

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Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Certiorari Petition [1]

2009-1006-F
jp2024

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]
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RR. Document will be reviewed upon request.

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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(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]

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

30-May-1996 09:41am

TO: Stephen R. Neuwirth
FROM: Patricia F. Lewis
Office of Press Secretary

SUBJECT: Veterans Roundtable

The President is doing a roundtable with veterans organizations Monday and we're pulling together the briefing information.

Do you have q's and a's on the Commander-in-chief lawsuit?

Thanks.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/29/1996	P5

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Elena Kagan
OA/Box Number: 8285

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Politics and the Press

Every once in a while, a more or less ordinary citizen finds himself in a position to see first-hand the workings of our political system. I recently found myself in that position. It was enlightening.

I am one of several lawyers representing the President of the United States in the Supreme Court in the Paula Jones sexual harassment case. The President's argument in the case is that the litigation should be deferred until he leaves office in order to preserve the constitutional principle of separation of powers.

Although this question has never expressly been decided by the Supreme Court, the Court has indicated in related contexts that courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint," and that "the diversion of" the President's "energies by concern with private lawsuits would raise unique risks to the effective functioning of government."

The Framers of our Constitution were acutely aware of these concerns. As Thomas Jefferson observed:

The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other. . . . But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the

several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

Relying on this and similar expressions of concern, the Supreme Court has observed that "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens."

The lower court judges in this case divided sharply on the question. Some rejected the President's position and concluded that the separation of powers concerns can be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule"; others accepted the President's position and concluded that private civil suits against sitting Presidents should be deferred because they "create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes." The case is now pending before the Supreme Court of the United States.

This brings me to my point. One of the challenges to the President in this case is to demonstrate that the relief he seeks -- deferral of litigation to serve an important public purpose -- is no stranger to the law. To show this, the President's petition to the Supreme Court lists five examples of situations in which the law defers litigation in this manner. The examples come from bankruptcy law, administrative law, the intersection of civil and criminal

law, the law of immunity, and the Soldiers' and Sailors' Civil Relief Act of 1940 (which provides that civil claims against military personnel are to be deferred while they are on active duty). The discussion of these analogies covers two pages in a petition that is 21 pages in length. The reference to the Soldiers' and Sailors' Civil Relief Act consists of a single paragraph. The Act is cited, not because the President is seeking relief under the Act (he is not), but because the Act, like the other examples cited in the petition, demonstrates that relief of the sort the President seeks is not at all uncommon in the law.

It was therefore with more than a little surprise that I learned that Representative Robert Dornan had taken to the floor of Congress to attack the President for allegedly claiming that the litigation in this case should be deferred under the Soldiers' and Sailors' Relief Act. I was surprised, not because such a claim by the President would be implausible (he is, after all, the Commander in Chief), but because he hadn't made the claim at all. To the contrary, from the very beginning of this litigation the President has eschewed any protection he may be entitled to under the Act. His claim at every point has been that his right to defer this litigation is based, not on legislation that Congress could withdraw at will, but on the fundamental constitutional principle of separation of powers, a principle that has "deep roots in our traditions" and that the President has an obligation to preserve. Surely, the record would quickly be set right.

Wrong. Within hours of Dornan's speech the issue was the subject of extensive coverage on the network news, it was the topic of debate on Crossfire and similar programs, and it spread quickly to the news and editorial pages of newspapers across the nation. The press echoed

Representative Dornan's characterization of the matter, despite repeated efforts of the White House to state the facts, and despite the fact that the petition is a public document, readily available to the press, and thus easy to check either to verify or to refute Dornan's assertion. But this was a good story. Why let the facts get in the way?

The complex interaction of press and politics was made exquisitely evident when the Republican National Committee produced a television ad vilifying the President for allegedly invoking the protection of the Act. The ad states: "[The President is] trying to avoid a sexual harassment lawsuit claiming he is on active military duty. . . . Newspapers report that Mr. Clinton claims as Commander in Chief he is covered under the Soldiers' and Sailors' Relief Act of 1940. . . ." Note how the ad attributes the claim, not to the President's petition, but to what "newspapers report." Although the Republican National Committee probably had figured out the truth by the time it produced the ad, it could happily ignore the truth by citing the press.

I want to make clear that this is not an attack, in particular, on the Republicans. I have little doubt that this is a two-way street. It is, however, an attack on politics, politicians and the press. Rather than try to understand the truth, politicians leap to take advantage of any opportunity. Rather than try to clarify and to enlighten the public, the press serves itself. I suppose there are no surprises here. But the American people deserve better.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

**1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005**

Telephone No.: (202) 371-7000

Facsimile No.: (202) 393-8760

FACSIMILE TRANSMITTAL SHEET

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

DATE: May 24, 1996
FLOOR/OFFICE No.: _____

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

Please deliver the following pages to:

1. NAME: ELENA KAGAN, ESQ.
FACSIMILE No.: 456-1647

FIRM: _____
TELEPHONE No.: 456-7594

2. NAME: KATHY WALLMAN, ESQ.
FACSIMILE No.: 456-6279

FIRM: _____
TELEPHONE No.: _____

Total number of pages including cover(s): 2

MESSAGE: THIS HAS BEEN INSERTED IN THE BRIEF AS A FOOTNOTE ON P. 10, AFTER THE WORDS "REPEATEDLY THROUGHOUT THE LAWSUIT."

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. legal brief	re: Soldiers' & Sailors Civil Relief Act (5 pages)	05/24/1996	P5

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Elena Kagan
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2009-1006-F
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