

NLWJC - Kagan

Counsel - Box 016- Folder 007

Paula Jones Certiorari Petition [3]

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/21/1996	P5
002. notes	re: Handwritten Notes - President (1 page)	n.d.	P5
003a. memo	David to Amy et al; re: Reply Br. (1 page)	05/21/1996	P5
003b. draft	re: William Jefferson Clinton v. Paula Jones (6 pages)	05/21/1996	P5
004. draft	re: William Jeffreson Clinton v. Paula Jones (16 pages)	05/23/1996	P5
005. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (2 pages)	05/22/1996	P5
006. memo	Elena Kagan to Jack Quinn et al; re: Jones Liitigation (2 pages)	05/22/1996	P5
007. memo	Amy Sabrin to Bob Bennett et al; re: Draft Petition (partial) (1 page)	05/10/1996	P6/b(6)

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [3]

2009-1006-F
jp2026

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

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THE UNIVERSITY OF CHICAGO

THE LAW SCHOOL

MEMORANDUM

Tuesday, May 21, 1996

To: Amy
Elena
Geof

From: David

Re: Reply br.

Here's a draft. My general view about reply briefs is that they should be short (this one is probably too long already) and thematic, rather than slogging through their arguments point by point. Not that I carried out that mission particularly well. Let me know what you think.

The President's submission is straightforward: No incumbent President has ever before been compelled to submit to litigation threatening him with personal liability for damages. The President, and the Nation, should not be subjected to this extraordinary burden until this Court considers of the President's contention, founded on explicit language in this Court's decisions and explicit statements by several of the Framers, that the litigation should be stayed until he leaves office.

Respondent does not identify a single instance in which a court has compelled a sitting President to defend a damages action directed at him personally. Nor does respondent explain why a fractured panel of the court of appeals, rather than this Court, should decide whether a President may be compelled to do so. Instead, respondent's principal contentions are that the litigation of suits like this one will not interfere with the President's conduct of his office (Br. in Op. x); that the separation of powers will be adequately protected even if trial judges can require specific showings by the President that particular aspects of the litigation schedule should be altered (cite); and that the lesson of history is that Presidents may be subjected to litigation in the way respondent seeks (cite). Respondent is wrong at each turn.

1. Respondent's lurid and inaccurate recitation of the allegations in the complaint (Br. in Op. x-x) is evidence, if any is needed, of the wisdom of this Court's observation that "the sheer prominence of the President's office" makes him "an easily identifiable target for suits for civil damages." (cite to *NvF*).¹ In her brief in opposition, respondent repeatedly

¹The brief in opposition asserts matters not alleged in the complaint and makes misstatements about matters of public record. For example, . . . [Amy]

characterizes this case as a "very simple" one in which "[d]iscovery and trial . . . will not be burdensome" (cite). The record in this case, however, reveals that respondent's attorneys in fact have a different approach in mind:

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

C.A. App. 122-23 (quoting xxx).

Respondent, in other words, envisions litigation that not only threatens the President with \$700,000 in damages, but that is specifically calculated both to attack his reputation and to entangle him personally in the "discovery deposition" process. It is difficult to think of a better illustration of how a case that purports to be "uncomplicated" litigation that "would not work any hardship" can in fact be extraordinarily distracting and burdensome to a President.

The dangers of abuse of litigation against an incumbent President are, of course, not limited to this case. Respondent reiterates the panel majority's conception that because a President is immune from liability for his official actions, the "universe of potential plaintiffs" who might sue him while he is in office—for reasons of partisanship, extortion, or publicity-seeking—is "small[]." But of course this is not true. No person becomes President without having been highly prominent, usually for an extended period, in some other capacity 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 litigation as a means of trying to distract, embarrass, or obtain information about a President.

Respondent asserts (Br. in Op. x) that there is no extensive history of litigation being used for this purpose. But there was no history of Presidents being sued for official acts before *Nixon v. Fitzgerald*. See *NvF* cite.² The Court granted certiorari in *Fitzgerald*, and afforded President Nixon an absolute immunity—a vastly stronger protection than we seek here—because it recognized the danger that opportunistic litigation presents to the office of the Presidency. The danger is especially great in the modern setting, where wide-ranging discovery is permitted and the availability of instantaneous, nationwide publicity is routinely used as a tool by litigants—as this case again demonstrates. 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 risks to the Presidency can be managed by allowing trial judges to exercise their discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it will precipitate continual strains between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation

²The Court in *Fitzgerald* attributed this to the fact that *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (check), 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 cite [DAS]. 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 the President cannot be sued for damages while he is in office.

schedule be modified because of the demands of his office. As Judge Ross asked (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?

Respondent repeatedly quotes Judge Beam's soothing formulation of the standard that a trial judge is to apply: a judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired." Pet. App. 25, quoted with emphasis in Br. in Op. 8; see also Br. in Op. x. But the prevailing opinion, written by Judge Bowman, established a much more strict standard: the President may seek relief from a trial judge only if he can show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. And when they reviewed a specific case-management determination made by the trial judge in this case—her decision to stay the trial, which, as we showed in the petition (cite), rested on her specific judgment about the appropriateness of delay on the facts this case—both Judge Beam and Judge Bowman reversed the determination as an abuse of discretion, without any explanation about why her evaluation of the particular facts was mistaken. See Pet. App. xx. Certainly the panel majority, in reversing the district court, did not make the finding that, in Judge Beam's words, a trial would not "even slightly impair[]" the President's ability to carry out his office—a finding that would have been implausible on its face.

The disarray in the court of appeals even on the abstract question of what the appropriate standard should be—and the panel majority's refusal to defer to the actual exercise of discretion by the district court in this case—are in fact symptomatic. They show 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 schedule will affect his ability to carry out the duties of his office.

b. In seeking to support her argument that trial judges can manage litigation in a way that protects the President's constitutional role, respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. But the true lesson of those cases is the opposite of what respondent suggests: those cases show how extremely difficult it is for courts to reconcile the conflicting demands of the judicial process, on the one hand, with the responsibilities of the executive branch, on the other.

A President who testifies as a witness is involved in only a one-time encounter with the judicial branch. By contrast, a defendant faced with personal liability will be involved throughout the course of the litigation, in every phase. The sources of 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 his financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. Nonetheless, even in the far less problematic context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking and fraught with difficulty, and should be undertaken only in cases of imperative need.

Even when the President is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests—insisting that district courts manage the President's schedule as a defendant in personal damages litigation—pushes the separation of powers well past the breaking point.

3. The brief in opposition evidently 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.³ Of course the President seeks no such thing, and never has. The President has never suggested that he is absolutely immune from liability for unofficial acts, and respondent's elaborate arguments against that proposition (Br. in Op. xx, xx, xx) are simply beside the point, a determined effort to confuse the issue.

Throughout this case, the President has asserted only that the responsibilities of the Presidency warrant deferring this litigation until he leaves office. 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 we seek is "unprecedented," the fact is that even respondent finds herself 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 "solicitude" for the President's special responsibilities.

No court has ever, until now, required that a President submit, as a defendant, to a civil damages action directed at him personally. No court has ever required a President even to testify in a civil case as a witness. It is

³For example, the brief in opposition uses the word "immunity" or its cognates at least 40 times.

even doubtful that a court may enjoin the President in the performance of his official duties—a proceeding that presents much less of a danger of disruption than the kind of litigation respondent pursues. See *Franklin v. Massachusetts*, 505 U.S. 788, 802-30 (1992), citing *Mississippi v. Johnson*, 4 Wall. 475, 498-99 (1867); see also *Franklin*, 505 U.S. at xxx (Scalia, J., concurring).

Respondent asserts (Br. in Op. 19-20) that President Jefferson “lost” the principle for which we contend.⁴ In fact, our history, beginning at least with President Jefferson, has been that in this area—subjecting a sitting President personally to the process of the courts—judicial inroads on the executive branch have been allowed infrequently, only in cases of imperative need, and then only to the most limited extent possible. What respondent seeks—allowing a sitting President to be sued for damages in his personal capacity—would be a massive intrusion, far beyond anything that has ever before been allowed, or even contemplated. To allow such an intrusion, without even so much as this Court’s review, would be utterly unwarranted.

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

⁴In the face of this Court’s demonstration, in *Nixon v. Fitzgerald*, that the Framers contemplated that Presidents would not be subject to suit while in office (see Pet. 10-11, quoting 457 U.S. at 751 n. 31), respondent cites four cases. Three involve Presidential testimony in criminal proceedings. One—*NTEU*—which respondent artfully describes as “holding President amenable to judicial process in a civil case” (Br. in Op. 20 (emphasis in original)) in fact held Even that limited holding is drawn into serious question by *Franklin v. MA*. [Amy?]

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5-7270

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

Major Garrett

~~XXXXXXXXXXXX~~**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 has no 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 reverse side), strongly objecting to the use of **The Soldiers' and Sailors' Civil Relief Act** in his defense.

To add your name as a cosigner, please call Mark Katz at 225-3664, or Bill Fallon 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,

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.

STATEMENT OF ROBERT S. BENNETT

May 22, 1996

Unfortunately, there is a partisan effort to distort an argument made in the President's petition, by taking it out of context.

In our Petition to the Supreme Court, we argued that the relief the President requests in the Paula Jones case -- the temporary deferral of litigation -- is no different than the kind of stays that occur in other kinds of lawsuits. One of several such examples we gave was the Soldiers' and Sailors' Civil Relief Act, which provides for lawsuits against active duty military personnel to be stayed. We added that this act might also extend to Presidents as Commander-In-Chief -- although we have not relied on it in this case.

The attempt by the President's partisan opponents to distort the President's position -- in order to create a political issue -- illustrates precisely why litigation involving incumbent Presidents should be deferred: because it will be abused for partisan purposes.

We made the same analogy -- using the Soldiers' and Sailors' Civil Relief Act as an example -- in the trial court and the court of appeals, by the way. It was not a new argument for the Supreme Court.

No. _____

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**

PETITION FOR A WRIT OF CERTIORARI

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Attorneys for the Petitioner
President William Jefferson Clinton

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 conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988).

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. 1976).

Walter - note various people held not to
be within statute

50 App. USCA § 511

Page 8

Where express purpose of § 501 et seq. of the Appendix was, by means of temporary suspension of certain legal proceedings which might prejudice rights of persons in military service, to enable such persons to devote their entire energy to defense needs of nation, former serviceman was not entitled to protection of § 501 et seq. of this Appendix on basis of claimed constructive military service even if rejection of attempted reenlistment was found to be invalid. *Diamond v. U. S.*, Ct.Cl.1965, 344 F.2d 703, 170 Ct.Cl. 166.

Soldiers' and Sailors' Civil Relief Act of 1918, former § 101 et seq. of this Appendix, did not prevent the forfeiture of an oil and gas lease granted to a soldier for nonpayment of an installment of rent due 12 days after lessee's discharge from the service. *Hickernell v. Gregory*, Tex.Civ.App.1920, 224 S.W. 691.

40. — Employees of independent contractors

An independent contractor's employee who was not actually in any branch of the military service was not entitled to protection of § 501 et seq. of this Appendix when performing work on vessel owned and operated by United States, notwithstanding that employee was performing work on vessel usually done by seamen. *Abbattista v. U S*, D.C.N.J.1951, 95 F.Supp. 679.

41. — Heirs of servicemen

Heirs of deceased were entitled to deduct period of deceased's service in Navy in computing 25-year limitation period against action for trespass to try title. *Easterling v. Murphey*, Tex.Civ.App.1928, 11 S.W.2d 329, error refused.

42. — Merchant seamen

Merchant seaman was not entitled to protection of § 501 et seq. of this Appendix, though subject to court martial jurisdiction. *Osbourne v. U. S.*, C.C.A.2 (N.Y.) 1947, 164 F.2d 767.

Plaintiff having made no effort during the 10 years action was pending to bring it on for trial, its dismissal was not an abuse of discretion, his engagement, from the beginning of the war, as captain of a vessel carrying troops and munitions to Europe, shown by affidavit, not being a service covered by, nor shown in the manner provided in, the Soldiers' and Sailors' Civil Relief Act of 1918, former § 101 et seq. of this Appendix. *Greenwood v. Puget Mill Co.*, Wash.1920, 191 P. 393, 111 Wash. 464.

43. — Retired servicemen

A retired Army officer, not being entitled to benefits of § 501 et seq. of this Appendix, was not entitled to have opened default judgment against him for arrears of alimony or to have attorney appointed to protect his interests in absence of any showing of prejudice to him in defense of action, or that he had a legal defense to the proceedings. *Lang v. Lang*, N.Y.Sup.1941, 25 N.Y.S.2d 776, 176 Misc. 213.

Where order staying execution of final judgment was granted under section 501 et seq. of this appendix, but judgment debtor was not a serviceman but only a former or retired serviceman, judgment debtor was not entitled to relief under section 501 et seq. of this appendix and order would be reversed. *Jax Navy Federal Credit Union v. Fahrenbruch*, Fla.App. 5 Dist.1983, 429 So.2d 1330.

44. — Spouses of servicemen

Section 501 et seq. of this Appendix could not be construed to include wife who brought suit in her own name to recover derivatively for damages for injuries suffered by her husband who was covered



50 App. USCA § 511
50 App. U.S.C.A. § 511

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**UNITED STATES CODE ANNOTATED
TITLE 50 APPENDIX. WAR AND NATIONAL DEFENSE
SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940
ACT OCT. 17, 1940, C. 888, 54 STAT. 1178
ARTICLE I—GENERAL PROVISIONS**

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Current through P.L. 104-126, approved 4-1-96

§ 511. Definitions

(1) The term "person in the military service", the term "persons in military service", and the term "persons in the military service of the United States", as used in this Act [sections 501 to 591 of this Appendix], shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term "military service", as used in this Act [said sections], shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service", as used in this Act [said sections], means, in the case of any person, the period beginning on the date on which the person enters active service and ending on the date of the person's release from active service or death while in active service, but in no case later than the date when this Act [said sections] ceases to be in force.

(3) The term "person", when used in this Act [said sections] with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court", as used in this Act [said sections], shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

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1990 Main Volume

(Oct. 17, 1940, c. 888, § 101, 54 Stat. 1179; Oct. 24, 1972, Pub.L. 92-540, Title V, § 504(1), 86 Stat. 1098.)

1996 Interim Update

(As amended Mar. 18, 1991, Pub.L. 102-12, § 9(1), 105 Stat. 39.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

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AMENDMENT NO. Ex. Calendar No.

Purpose:

IN THE SENATE OF THE UNITED STATES Cong. Sess.

S.
ILLR (of Treaty Most Title)

(title) -- AMENDMENT No. 4041

By ... MURKOWSKI, et al.

To ... AMNT. No. 4022

GPO : 1996 O-427-000

INTENDED to be proposed by SENATOR MURKOWSKI, SENATOR WARNER AND SENATOR CHAFFE, ^{SEN. SMITH}

Vis: TO AMNT. # 4022
STRIKE ALL AFTER THE WORD SEC. & INSERT

1 The Congress finds that--

- 2 (1) The Founding Fathers were committed to the principle of civilian control of the military;
- 3 (2) Every President since George Washington has affirmed the principle of civilian control of the military;
- 4 (3) Twenty six Presidents of the United States served in the United States Armed Forces prior to their inauguration and none of them claimed the Presidency represented a continuation of their military service;
- 5 (4) No President of the United States prior to May 15, 1996 has ever sought relief from legal action on the basis of serving as Commander-in-Chief of the United States Armed Forces;
- 6 (5) President Clinton is the subject of a sexual harassment lawsuit filed on May 6, 1994 in Federal District Court in Little Rock, Arkansas involving allegations about his conduct in May, 1991;
- 7 (6) On May 15, 1996, a legal brief filed on behalf of the President of the United States in the United States Supreme Court asserted the President of the United States may be entitled to the protections afforded members of the United States Armed Forces under the Soldiers' and Sailors' Relief Act of 1940 (50 U.S.C. 501 et. al); and
- 8 (7) The purpose of the Soldiers' and Sailors' Civil Relief Act of 1940 is to enable members of the military services "to devote their entire energy to the defense needs of the nation".

18 It is the sense of the Senate that the assumptions underlying this resolution include that the President of the United States should state unequivocally that he is not entitled to and will not seek relief from legal action under the Soldiers' and Sailors' Civil Relief Act of 1940, and that he will direct removal from his legal brief any reference to the protections of the Act.



- presented as illustration

- not being relied on in
this case as a basis for
relief.

has not
or

will not - no intention
of relying

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002. notes	re: Handwritten Notes - President (1 page)	n.d.	P5

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Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Certiorari Petition [3]

2009-1006-F
jp2026

RESTRICTION CODES

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

RR. Document will be reviewed upon request.

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TALKING POINTS -- DISCUSSION DRAFT ONLY

1. The President believes that the duties he owes to the men and women in this nation's military services are among the most serious obligations of his office. He does and has done everything in his power to live up to his responsibilities to them as commander-in-chief.

2. The charges being made by Reps. Dornan and Stump are a deliberate and unfair distortion of legal papers filed on behalf of the President. These Congressmen have never liked the President, and have never accepted him as their commander-in-chief. Their attacks reflect frustration that they can't rewrite the Constitution or have a recount of the last presidential election.

3. The President's attorneys filed a petition on his behalf in the Supreme Court asking for a deferral of a suit brought against him until after his term in office. No President has ever had to cope with the distractions of defending a lawsuit while in office, and the President and his attorneys believe that the Constitution entitles the President -- any President -- to a simple postponement of such litigation so that he can fulfill his constitutional responsibilities.

4. In the petition, the President's attorneys made the point that the law often allows the deferral of suits in order to achieve important public interests. The Soldiers' and Sailors' Act is mentioned in this section of the brief, as one of five examples of legal rules delaying lawsuits for good reason. The Soldiers' and Sailors' Act delays suits against service members so they can give their full attention to their official duties. Similarly, the petition argues, the Constitution entitles the President to a delay of the lawsuit brought against him, so he can give his full attention to his official responsibilities.

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003a. memo	David to Amy et al; re: Reply Br. (1 page)	05/21/1996	P5

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Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Certiorari Petition [3]

2009-1006-F
jp2026

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

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RR. Document will be reviewed upon request.

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OA/Box Number: 8285

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

TABLES 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 cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.

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3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105 (1926).....14

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**

PETITION FOR A WRIT OF CERTIORARI

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) (1994).

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 (1994)

42 U.S.C. § 1985 (1994)

50 U.S.C. app. § 510 (1988)

50 U.S.C. app. § 521 (1988)

50 U.S.C. app. § 525 (Supp. V 1993)

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 (1994).

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

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 (1994). 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.

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.

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.

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. 16. He also wrote that

[t]he 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.

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), *cert. denied*, 1996 WL 26287 (Apr. 29, 1996)), Judge Bowman accordingly reversed that stay as an abuse of discretion. Pet. App. 13 n.9.

³ Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 (1994) 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. 16-19. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

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 "[w]ith [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, stating 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. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "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. And 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 -- "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.

Now 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 more private civil damage complaints against incumbent Presidents. Such complaints increasingly would enmesh Presidents in the judicial process, and the courts in the political arena, to the detriment of both.

A. 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." *Fitzgerald*, 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 limited, 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, and accordingly, the President does not seek immunity from liability.⁴ But the second danger to the Presidency emphasized by *Fitzgerald* -- the burdens inevitably attendant upon being a defendant in a lawsuit -- clearly exists here. 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 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added), *quoted in Fitzgerald*, 457 U.S. at 749. Senator Oliver 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 Government.

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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.

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), *quoted in Fitzgerald*, 457 U.S. at 751 n.31. 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 until the end of his term. 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 solving 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 con-

sidering 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 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. 13-15. 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 limits the disruption of his official functions, such as by videotaped deposition.⁵

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).

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 defendant failed to 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).

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 conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988).

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. 1976).

not provide the relief they seek. This process too can take several years. See, e.g., *Ricci v. Chicago Mercantile Exch.*, 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). Such appeals can 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.

C. 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 (1994).¹¹ In asserting that jurisdic-

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);

tion 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 (1994) as a final order, or as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, 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. Pet. App. 5 n.4. This conclusion 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 exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion.

Cheyney State College Faculty 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.

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 discretionary decision to postpone the trial -- unlike review of its decision to reject the President's position that the entire case should be deferred as a matter of law -- 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. The decision to reverse the district court also was incorrect on the merits. As Justice Cardozo explained for this Court in *Landis v. North Am. 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 labeling the district court's order the "functional equivalent" of "temporary immunity", inasmuch as the district court held that the litigation could go forward through all steps short of trial. 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 and circumstances that might warrant a conclusion that the trial court here abused its discretion.

D. 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 defend a private civil damages action. This holding breaches historical understandings that are as appropriate today as ever before.¹² The court in *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

¹² 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 (Mo. 1946). The Kennedy case was filed while he 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).

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 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.

CONCLUSION

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

Respectfully submitted,

Robert S. Bennett
Counsel of Record

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Alan Kriegel
Amy R. Sabrin
Stephen P. Vaughn
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Attorneys for the Petitioner
President William Jefferson Clinton

May 15, 1996

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (2 pages)	05/22/1996	P5

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [3]

2009-1006-F
jp2026

RESTRICTION CODES

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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Counsel's Office
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OA/Box Number: 8285

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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 has no 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 reverse side), strongly objecting to the use of **The Soldiers' and Sailors' Civil Relief Act** in his 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-20-'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.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. memo	Amy Sabrin to Bob Bennett et al; re: Draft Petition (partial) (1 page)	05/10/1996	P6/b(6)

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [3]

2009-1006-F
jp2026

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~~PRIVILEGED AND CONFIDENTIAL~~
SUBJECT TO THE ATTORNEY WORK PRODUCT
AND ATTORNEY-CLIENT PRIVILEGES

MEMORANDUM

May 10, 1996

TO: Bob Bennett Geoffrey Stone
 Carl Rauh David Strauss
 Alan Kriegel Elena Kagan

FROM: Amy Sabrin

Re: Draft Petition

Attached please find the revised draft of the petition for certiorari. I will be in the office on Saturday from 12:30 pm E.D.T. on, to take your comments (or complaints!).

My number there is (202) 371-7699. If you also need to reach me at any time that I am not in the office, feel free to call me at home at (202) 244-3051.

[007]

P6/(b)(6)

[007]

P6/(b)(6)

DETERMINED TO BE AN
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INITIALS: 08 DATE: 3/30/10

Whitewater prosecutor ends by returning focus to defendants

By Hugh Aynesworth
THE WASHINGTON TIMES

LITTLE ROCK, Ark. — The lead prosecutor in the Whitewater trial accused the defense yesterday of "trying to drag" President Clinton into the courtroom and to divert the jury's attention away from the defendants.

W. Ray Jahn also said the government's key witness, David L. Hale, never accused the president of being part of a conspiracy and bank-fraud scheme, and for the first time confirmed that Mr. Clinton is not a co-conspirator in the case.

Today the jury will begin deliberating the case against the defendants, Gov. Jim Guy Tucker and James and Susan McDougal, the former business partners of Mr. Clinton and Hillary Rodham Clinton.

Final arguments in the trial, in its 10th week, concluded yesterday. U.S. District Judge George Howard Jr. will instruct the jurors

this morning and put the case in their hands by noon.

Yesterday, Mr. Jahn, in his rebuttal of the defense attorneys' closing arguments, told the jury, "The president of the United States is not on trial. Why? Because he didn't get a \$300,000 loan, he didn't set up loans . . . he didn't backdate leases, he didn't set up a phony company.

"The defendants are trying to drag the president of the United States into the courtroom," the prosecutor said.

Hale's 1993 accusation that Mr. Clinton and Mr. Tucker pressured him to make fraudulent loans put new life in the Whitewater probe being conducted by the independent counsel's office and congressional Whitewater committees.

Prosecutors never questioned Hale on the stand about the so-called pressure.

Prosecutors had refused to say whether Mr. Clinton's name was on a list of co-conspirators being held under seal by the court. Yesterday,

outside the courtroom, Mr. Jahn said it was not.

The defendants are accused of conspiring with Hale to arrange an \$825,000 loan from Madison Guaranty Savings and Loan, which the McDougals operated, to boost deposits at Hale's small business investment corporation.

This allowed Hale to get a 3-to-1 match of money from the Small Business Administration, which he said he loaned back to the defendants and their political friends — including Mr. Clinton.

In his own summation yesterday, Bobby McDaniel, Mrs. McDougal's attorney, contended that his client is guilty of no crime, had never intended to break any laws and had been charged only because of Hale's lies.

"Susan was just the cobblestone on David Hale's road to leniency," said Mr. McDaniel, referring to the ex-judge who in return for a lighter sentence on several felonies became the linchpin of the current case.

As did attorneys for Mrs. McDougal's co-defendants, Mr. McDaniel focused his final argument on Hale, a onetime friend of the defendants who admittedly committed more egregious fraud than the three on trial.

He reminded jurors how Hale had lied on two occasions under oath, and that he testified that after a heart attack several years ago, he had "looked death in the eyes."

"And he still kept lying," Mr. McDaniel charged. "He had lies on his lips as he looked death in the eyes."

In concluding his rebuttal, Mr. Jahn recalled part of a phrase from Ecclesiastes 3, which W.H. "Buddy" Sutton, Mr. Tucker's attorney, used in his summation Tuesday.

"He left part of it out," said Mr. Jahn. "There is a time to be silent and a time to speak. The only voice here is a voice of guilty."

The Washington Times
THURSDAY, MAY 16, 1996 *

Clinton asks high court to stall suit

REUTERS NEWS AGENCY
Attorneys for President Clinton appealed to the Supreme Court yesterday to delay the sexual-harassment case against him by former Arkansas state employee Paula Corbin Jones until after he leaves office.

They argued that litigation of a private civil lawsuit must be deferred until the president leaves office "in all but the most exceptional cases."

U.S. District Judge Susan Webber Wright is not expected to let the case progress until hearing whether the nation's highest court grants or denies review. Clinton attorney Amy Sabrin said. Such high court action might be taken before the current court term ends in late June or early July.

"This case presents a question of extraordinary national importance which was resolved erroneously by the court of appeals," Mr. Clinton's attorneys said in the 21-page appeal asking the justices to hear the case.

"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," according to the appeal signed by Robert Bennett and other Clinton attorneys.

"We believe that absent exceptional circumstances, an incumbent president should never be placed in this position," they said.

Mrs. Jones, a low-level state employee at the time, contends she was approached by a state trooper in 1991 during a state trade show at a Little Rock hotel and asked to come up to the governor's suite. She says she went to the room and engaged in small talk with Mr. Clinton before he exposed his genitals and asked her to perform a sex act.

Mr. Clinton denies the incident occurred. Mrs. Jones passed a 1994 lie-detector test in which she described Mr. Clinton's so-called "genital defect," according to the Virginia polygraph examiner who tested her.

In the appeal, Mr. Clinton's attorneys argued that it would be appropriate for the nation's highest court to intervene now "to protect the interests of the presidency."

If the Supreme Court rejects the appeal, Mr. Clinton would have to submit to discovery, the legal term for pre-trial gathering of information, and to a trial while in office, they said.

"Moreover, if the decision below is allowed to stand, federal and state courts could be confronted with more private civil damage complaints against incumbent presidents," the lawyers said.

Attorneys for Mrs. Jones have vowed to move quickly in urging the Supreme Court to reject the appeal.

Senate leader's exit calls for decisions in Kansas

By Nancy E. Roman
THE WASHINGTON TIMES

Sen. Bob Dole's surprise decision to relinquish his Senate seat to pursue his presidential candidacy has thrown Kansan politics into a tailspin just six months before the election.

Kansas' GOP Gov. Bill Graves will appoint a short-term replacement, possibly by next week. A person will be chosen in the November election to fill out the final two years of Mr. Dole's term.

That means Kansas voters will choose two senators this fall. Sen. Nancy Landon Kassebaum announced her retirement last year.

Nearly everyone in the state GOP's who's who is being mentioned as a possibility for the appointment. The list includes Kim Wells, past state chairman of the party, state Sen. Dick Bond of Kansas City and Mr. Graves.

"I expect the governor to ap-

point himself," said Mary Alice Lair, national committeewoman. She said the pro-choice first term-er expects a formidable re-election fight from pro-life forces in two years.

"To me, senator would be a more sure thing every six years," said Mrs. Lair.

Mike Matson, spokesman for the governor, said Mr. Graves has ruled out appointing himself, and refused to speculate further about whom he would appoint.

Three of the state's four GOP congressmen surfaced as possibilities — Reps. Jan Meyers, Pat Roberts and Sam Brownback.

Mr. Brownback is the only delegation member to say publicly he wants the appointment. The 39-year-old fiscal conservative represents a wheat-growing district in the eastern part of the state.

If Mr. Graves chooses him, he creates a problem of finding a candidate to replace Mr. Brownback.

"We've really been caught by surprise on this whole thing," said one Republican official.

Democrat John Frieden is running against Mr. Brownback. The 53-year-old, said to have \$200,000 of his own money available, could be a tough opponent for a Republican seeking an open seat.

The filing deadline for congressional candidates in Kansas is June 10. The primaries are Aug. 6.

The winner of the Dole seat would be sworn in after the election results are certified by the secretary of state's office, usually about two weeks after the general election. This would give that person about two months' seniority over whomever is elected to replace Mrs. Kassebaum.

Appointment of Mrs. Meyers, 67, might disrupt the party least. The mild-mannered congresswoman was elected in 1984 and is chairman of the Small Business Committee. She is not running for

re-election, and her selection would leave the rest of the GOP plans for the state unscathed.

Mr. Roberts, of Dodge City, is favored in his campaign for the seat held by the departing Mrs. Kassebaum. The congressman declined to speculate about who would receive the appointment.

GOP officials have already recruited Jerry Moran, a state senator with a reputation for effective fund-raising to run for Mr. Roberts' House seat.

No Democrat has filed in that race although there has been speculation that John Divine, IBM executive and former mayor of Salina, will contest the seat.

"In terms of Democratic prospects in the House, today's announcement means that Kansas has moved from a great state for us to an outstanding opportunity," said Rep. Martin Frost, chairman of the Democratic Congressional Campaign Committee.

Dole at last shines in network lights

By Sean Piccoli
THE WASHINGTON TIMES

Senate Majority Leader Bob Dole yesterday stole away Washington's collective breath and — for the moment — pumped fresh oxygen into his gasping presidential campaign.

By announcing he will leave Congress after 35 years to pursue the White House as "a citizen, a Kansan, just a man," Mr. Dole staged a daring act of political rebirth and got it televised live by ABC, CBS and NBC, as well as CNN and C-SPAN.

Whatever happens in November, observers called his announcement a political and theatrical smash.

"This is the official launch, but this is also one of those rare moments in politics: a truly memorable, defining moment," said Mary Matalin, a CNBC talk-show host and former GOP strategist. "Campaigns are always trying to create them, but you can't. They either are or they aren't. And this one was. It was a blockbuster."

It got blockbuster treatment: The Kansas Republican, whose announcement interrupted the midday babble of soap operas and talk shows, led the nightly network newscasts.

'Defining moment' dominates on TV

Acknowledging the hurdles he faces, Mr. Dole said in his speech, "The press does not lean our way."

But reporters were rapt yesterday: It was arguably the most widely and immediately reported event in the troubled Dole campaign, which faces a deficit of 15 to 20 percentage points in presidential opinion polls.

"It was an important event by any standard," said Bill Wheatley, NBC's vice president for news. "Here's a man who spent well over a generation in the Senate leaving that post, which he thought would be a help in his presidential campaign and found it was a hindrance."

NBC broke the news several hours before the news conference.

Mr. Dole more than justified the coverage, delivering a dramatic farewell to Congress.

"For a man who's not supposed to be able to make a speech ... I would say it's the best speech Bob Dole has ever made," CBS political reporter Bob Schieffer told anchor Dan Rather. "It was a boffo performance."

It provided a striking contrast. "Dole won his primary battles almost by default, in dribs and

drabs, and there was no galvanizing moment," said Frank Sesno, CNN's Washington bureau chief. "This was the closest he came to that unveiling as a candidate, only this one was born of desperation."

Some who did not watch the announcement but heard the news agreed it had an almost revelatory quality.

"I think his doing it is a very shrewd and smart move," Washington novelist Christopher Buckley said. "And what I think he's done is relaunch his campaign in a very dramatic way. ... We may now have a horse race."

William Greider, an author and political writer for Rolling Stone magazine, said: "This gives him the space to define himself free of Newt Gingrich and the right wing and everybody else, and whether he makes that convincing or not, we'll see. But I think that's pretty smart."

Miss Matalin, who joined and quit the Dole camp in the space of a day, turned off by Republican criticism of her appointment, had nothing but praise for the candidate yesterday.

"It was also a spectacular set of remarks," she said. "This was a speech that was so comprehensively, consistently good that even at seven seconds — that's the typical network sound bite — you couldn't get a bad cut out of it."

**ed Defense Bill Is an Election Year
(Washn)By Norman Kempster= (c)
Angeles Times=**

GTON Setting up an election-year confrontation
ment Clinton, the House Wednesday passed a \$267
nse authorization bill loaded with such hot-button
as a revival of the ban on homosexuals in the
ary, a requirement to discharge HIV-infected service
ersonnel and a prohibition on the sale of skin magazines at
base stores.

The White House said Clinton would veto the bill unless
it is toned down in the Senate.

The bill, approved by a 272-153 vote that largely
followed party lines, adds \$13 billion to Clinton's budget
request of the Defense Department, most of it for
additional aircraft, ships, submarines, tanks and
precision-guided munitions that the Pentagon says are not
needed, at least not now.

The Senate version of the bill, approved earlier this
month by the Armed Services Committee, also authorizes
\$267 billion in spending, but either rejects or ignores
most of the controversial social issues contained in the
House measure.

With both the House and Senate measures authorizing \$13
billion increases in the Pentagon budget, the legislation
draws a vivid line between the defense policies of the
White House and the Republican-led Congress.

Republicans, joined by about one-third of the Democrats
in the House, rejected Clinton's plan to reduce total
defense spending by about \$10 billion during the fiscal
year that starts next Oct. 1. They argued that the
administration was trying to cut too deeply into the
country's post-Cold War military capacity.

Although the House bill is about \$3 billion higher than
the current year's budget, it amounts to a 1.5 percent
reduction when the numbers are adjusted to discount the
effects of inflation.

"The Russia of today is not the Russia of 1992," said
Rep. Gerald Solomon, R-N.Y. "The reformers of that
country have long since been purged."

In its report on the bill, the House International
Relations Committee warned that the nation faces threats
from China and an increasingly unstable Russia as well as
rogue nations like Iran and North Korea. The committee
said the United States must be prepared to cope with ethnic
violence in places such as Bosnia and Somalia.

But the House clouded the fiscal debate between the
White House and Capitol Hill by approving a string of
social provisions, many of them sponsored by Rep. Robert
Dornan, R-Calif., that give Clinton ample reasons to veto
the legislation without having to address the spending
priorities.

(Optional add end)

The bill reverses Clinton's "don't ask, don't tell"
policy of allowing homosexuals to serve in uniform
provided they keep quiet about their sexual orientation,
by reinstating a flat ban on gay troops. It would require
the services to discharge personnel infected with the HIV
virus that causes AIDS. And it prohibits post exchanges
and other on-base stores from selling Playboy, Penthouse
and other publications containing "sexually explicit
material."

The measure also renews a provision, contained in
previous defense authorization bills, prohibiting overseas
military hospitals from performing abortions except in
cases of rape or incest or when the mother's life is at
stake.

The Senate committee's version of the bill does not
address gays in the military or the sale of sex magazines.
And, explicitly rejecting language in the House measure,
it requires the Pentagon to treat HIV-positive personnel
in the same manner as others with medical conditions that
prevent them from being sent overseas. The Senate bill
joins the House in restricting abortions in military
hospitals.

Once the Senate approves its version of the bill,

differences will be resolved in a House-Senate conference
committee.

**Clinton Said to Have No Links to Plot (Little
Rock)By Sara Fritz= (c) 1996, Los Angeles
Times=**

LITTLE ROCK, Ark. A Whitewater prosecutor said
Wednesday that President Clinton played no active role in a
conspiracy case alleged against his former investment partners,
James B. and Susan McDougal, and Arkansas Gov. Jim Guy
Tucker.

The statement by W. Ray Jahn, an assistant to
Whitewater independent counsel Kenneth W. Starr, is as
close as the prosecution has come to clearing Clinton of
any involvement in the alleged scheme. Jahn emphasized,
however, that he was only referring to the alleged crimes
at issue in the current trial.

Tucker and the McDougals are the first defendants to
stand trial as a result of the independent counsel
investigation of the president's activities in the
mid-1980s in Arkansas. After hearing 10 weeks of testimony,
the jury is expected to begin deliberating Thursday.

Although the president was not charged in the case,
David Hale, the chief prosecution witness, testified
during the trial that Clinton was a part of the
conspiracy. He said that he was pressured by then-Gov.
Clinton in the mid-1980s to make a loan to the McDougals
that was part of the alleged fraud.

Jahn clearly was seeking to distance Clinton from the
case in his closing arguments before the jury, apparently
to minimize the impact of the president's testimony, heard
on tape in the courtroom last week. In his testimony,
Clinton denied any recollection of the events alleged by
Hale.

The prosecutor did not dispute Clinton's testimony but
instead noted instances in which the president disagreed
with the defendants who sought his testimony.

"The president took no active role in regard to the
activities involved here," Jahn told reporters outside
the courtroom when he was asked to elaborate on his
closing argument.

(Optional add end)

He noted that testimony by Clinton and Hale conflicted
particularly on the issue of whether they had met with
McDougal at

a land sales office in late 1985. Hale said that Clinton
asked him to make the loan to the McDougals at this
meeting; the president said he has no recollection of any
such meeting.

Jahn told the jury that the disagreement between the
two men is not important to the case since the president
is not on trial for being a part of the conspiracy. The
defense contends that the conflict undermines Hale's
credibility.

The president's supporters applauded Jahn's statement,
arguing that it exonerates Clinton of any wrongdoing in
the Whitewater case. "He (Jahn) cut distance between
David Hale and the president," observed Bobby McDaniel,
attorney for Susan McDougal. "It's time to put David
Hale's lies about Bill Clinton aside and get on with it."

Yet Jahn emphasized that he was not talking about any
evidence that might have been gathered by Starr against
the president in other matters. He said that only Starr
could speak for the independent counsel's office on this
question.

PHOTOCOPY
PRESERVATION

Clinton's Lawyers Appeal to Supreme Court Over Jones Case(Washn)By David G. Savage=(c) 1996, Los Angeles Times=

WASHINGTON In a last-ditch move to block further action in a pending sexual harassment case, President Clinton's lawyers appealed to the Supreme Court Wednesday and urged the justices to rule that a chief executive need not answer to a civil suit.

"For the first time in our history, a court has ordered a sitting president to submit, as a defendant, to a civil damages suit directed at him personally. We believe that absent exceptional circumstances, an incumbent president should never be placed in this position," attorney Robert S. Bennett told the Supreme Court.

He asked the justices to review a 2-1 ruling by a federal appeals court in St. Louis that said Clinton as president has no immunity from suits that arise from his private acts.

The plaintiff, Paula Corbin Jones, alleges the then-Arkansas governor crudely propositioned her in a Little Rock, Ark., hotel room in 1991 and that his aides later called her a liar to cover up the incident. She seeks \$700,000 in damages.

In his 21-page appeal, Bennett invokes Thomas Jefferson, John Marshall and Judge Learned Hand speaking of the importance of the presidency and the separation of powers.

Unfortunately, none of these venerable authorities spoke directly about a president being sued for damages over his private behavior since the issue has not arisen before.

Bennett argues that a busy chief executive should not be "threatened with financially ruinous personal liability" while he works to carry out his official duties. He says he agrees Clinton is not off-limits to private damage suits, only that they must wait until the president leaves office.

In the past, the Supreme Court has said a president must answer to criminal charges, but not to civil damages suits arising out of his "official acts." The justices have never ruled on whether a sitting president has immunity from responding to a suit over his private acts.

(Optional add end)

Recently, lawyers on both sides have kept their eyes on the election-year calendar.

If the justices agree late next month to hear the case of Clinton vs. Jones, it will be argued in the fall, with no ruling until 1997. If the justices reject the appeal, lawyers for Jones say they will move soon to have Clinton answer questions under oath.

"We will file our response by Friday," said Jones' lawyer Joseph Cammarata. "We think the only presidential immunity is for official conduct."

Last week, the appeals court refused Bennett's request to extend the deadline for filing an appeal in the Supreme Court. Typically, the justices consider an appeal about three weeks after the response arrives. Lawyers for Jones said they would respond quickly in hopes of getting action on the appeal before the justices recess for the summer.

Starr Disputes Report on Whitewater Evidence Gathering (Washn)(c) 1996, Los Angeles Times=

WASHINGTON Independent counsel Kenneth Starr said Wednesday that the Los Angeles Times was in error last month when it reported that he views the Whitewater trial in Arkansas as a way to obtain evidence against President Clinton.

In a letter released to reporters, Starr said an article in The Times April 13 was "seriously inaccurate" when it described his deputy, W. Hickman Ewing Jr., as saying the prosecutor hopes to persuade defendants in the trial to give incriminating evidence against the president.

Starr also complained that the Clinton administration

has been "trumpeting" the newspaper article as that his investigation is biased.

The Times said it would look into the matter.

"We believe our story of April 13 was accurate," Washington bureau chief Doyle McManus said. "We certainly look at Mr. Starr's complaint and see if it warranted in any way."

McManus said the paper was locating a recording of Ewing's month-old comments to recheck the accuracy of the quotes. Starr aides said they did not have a recording, but relied on notes taken by a staff member and on Ewing's memory.

HUD Moves to Avert Financial Crisis on Rental Subsidies(Washn)By Ralph Vartabedian=(c) 1996, Los Angeles Times=

WASHINGTON The Clinton administration is attempting to solve a looming \$18 billion financial crisis involving federal rent subsidies on low-income apartments, but the proposed fix might end up costing taxpayers several billion dollars, federal officials said Wednesday.

Housing and Urban Development Secretary Henry Cisneros acknowledged for the first time Wednesday that owners of nearly 1 million low-income housing units could default on \$18 billion worth of federally backed mortgages if the government does not increase already inflated subsidies on those units or take other steps to address their problems. An estimated 2.5 million low income Americans live in the affected housing units.

Increased subsidies, which currently cost the government about \$5 billion a year, appear unlikely at a time when Congress is attempting to balance the federal budget. Instead, HUD is under pressure to cut spending on subsidies.

An alternative remedy backed by Cisneros would have the federal government make direct payments to the mortgage holders for the low-income housing, thereby reducing the loans to levels that could be supported by smaller federal subsidies and avoiding defaults on the loans, which are insured by the Federal Housing Administration.

The plan could save the government billions of dollars in losses by avoiding a financial meltdown in low-income housing markets. But it could attract criticism on grounds that the government is bailing out urban slumlords.

"It's a Catch 22 problem, but we're doing something about it," Cisneros said.

The plan depends on Tax Code changes that would allow property owners to get the bailouts without having to pay federal income taxes on the government assistance, further fueling controversy in dealing with the problem.

Cisneros said the agency is nearing agreement with Congress on his approach.

"It is the most serious financial issue that we face, and that is why we are offering a solution, because it gets worse if it is unattended," Cisneros said. "The subsidies become very large. It overwhelms most of HUD's other programs if left unattended. But we are very close to having a joint approach to this with the Congress."

But Rep. Jerry Lewis, R-Calif., chairman of the House Appropriations subcommittee that controls the HUD budget, sharply disputed that the Clinton administration is near agreement with Congress, and said he isn't convinced that HUD's plan will work.

"I don't think any light has been focused on what some might say is a bailout for slumlords," Lewis said. "The committees haven't even begun to examine this."

(Begin optional trim)

Over the long term, Cisneros believes that reduced subsidies would more than offset the cost of the bailout. The economics of the plan are supported by an audit completed for HUD last week by the accounting firm Ernst & Young. Cisneros said the Clinton administration is making the first attempt to solve a problem that has been ignored for years by its predecessors.

Indeed, the roots of the problem go back more than 15

Clinton Lawyers Ask Court To Delay Harassment Suit

By LINDA GREENHOUSE

WASHINGTON, May 15 — Telling the Justices that the question was one of "extraordinary national importance," lawyers for President Clinton filed a Supreme Court appeal today seeking to delay all proceedings in a sexual harassment suit until Mr. Clinton leaves office.

The petition represented the last step in what has so far been a losing effort to put off a civil damage suit brought against the President by a former Arkansas clerical employee, Paula Corbin Jones, whose allegation that Mr. Clinton made crude sexual advances to her in 1991 in a hotel room in Little Rock, Ark., has raised the prospect that a trial could become an embarrassing election-year sideshow.

The Court is likely to act on the appeal within the next month. If the Justices turn it down, pretrial proceedings could begin as early as this summer. If the Court agrees to hear the case, the proceedings would be delayed for months.

Mr. Clinton, who was Governor of Arkansas at the time of the alleged advances, has vigorously denied the accusation by Ms. Jones and has said he cannot remember meeting the former state employee, who is seeking \$700,000 in damages.

In January, a panel of the United States Court of Appeals for the Eighth Circuit, in St. Louis, ruled that there was no basis for deferring either a trial or pretrial proceedings until Mr. Clinton left the White House. The Constitution "did not create a monarchy" when it established the office of the Presidency, Judge Pasco M. Bowman 2d said in the appeals court's 2-to-1 decision.

Earlier, Judge Susan Webber Wright of Federal District Court in Little Rock had ruled that while the trial should be deferred, lawyers for Ms. Jones could begin interviewing witnesses, including Mr. Clinton, to preserve their testimony while memories were still fresh.

Supreme Court precedents give Presidents absolute immunity from civil suits arising from actions they take while in office. The Court has never addressed the question of how a lawsuit growing out of actions an incumbent President took before reaching the White House should be handled. In the appeal filed today, Mr. Clinton's lawyers, while emphasizing that they are seeking only a delay of the trial and not immunity from liability, argue that the concerns the Court expressed in granting immunity for a President's official actions also apply to Mr. Clinton's unusual situation.

"The President is never off duty, and any significant demand on his time necessarily imposes on his capacity to carry out his constitutional responsibilities," the petition said.

Noting that "a sitting President has never been compelled to testify in civil proceedings," the petition quotes Jefferson as warning that the President's independence would be threatened "if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties."

Earlier this month, Mr. Clinton testified as a defense witness, by means of a deposition videotaped at the White House, in a criminal trial related to the Whitewater investigations. The petition drew a distinction

between criminal cases, in which Presidents have occasionally testified "in order to preserve the public's interest in criminal law enforcement and the defendant's constitutional right to compulsory process," and civil cases, where temporary deferrals are not uncommon and the burdens that delays place on plaintiffs "are not extraordinary."

The petition said the appeals court had made the mistake of regarding Mr. Clinton's request for delay as "exceptional," while in fact, delays are fairly routine in some kinds of civil litigation. Suits against a debtor who has filed for bankruptcy are delayed indefinitely, the petition noted, and a Federal law, the Soldiers' and Sailors' Civil Relief Act of 1940, ordinarily requires postponement of civil litigation against members of the armed services while they are on active duty. "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 petition said.

Mr. Clinton is represented in his Supreme Court appeal, *Clinton v. Jones*, No. 95-1853, by Robert S. Bennett and several other lawyers from the Washington office of the New York law firm Skadden, Arps, Slate, Meagher & Flom, as well as two law professors from the University of Chicago, David A. Strauss and Geoffrey R. Stone. Mr. Stone is also provost of the university.

Lawyers for Ms. Jones are expected to file their response to the petition within a few days, thus speeding the timetable for the Court's consideration. If they waited the full 30 days that the Court's rules allow, the Justices might not be able to take up the case until after the Court's summer recess, and a stay granted by the appeals court until Supreme Court review is completed would remain in effect.

THE NEW YORK TIMES
THURSDAY, MAY 16, 1996

Political Briefs

THE CAMPAIGNS FOR GOVERNOR AND CONGRESS

West Virginia

Strong Woman Clears a Hurdle

Charlotte Pritt, a former legislator and educator, and proud daughter of a coal mining family, captured the Democratic nomination for governor in West Virginia on Tuesday. Being a woman, she says, was not much of a factor.

"We have a history here of strong women, like Mother Jones," Ms. Pritt said in an interview yesterday. "Mountain women are strong women. They worked alongside the men, and they're very strong people in the home."

Ms. Pritt grew up on Buzzard Rock Mountain, not far from Charleston, and her father was a mechanic in the mines. She ran with strong support from the United Mine Workers and other labor organizations in the state; her main opponent in the Democratic primary, State Senator Joe Manchin, had heavy backing from business.

Ms. Pritt, who is 47 years old, said her victory would have special meaning for mining families. "It means that one of their own is going to be governor," she said. "For a long time they'd felt that the people who were making decisions for them might have been well intentioned but really didn't understand the reality, the day-to-day living — whether the mine would play out, whether they'd be able to get health care."

West Virginia is a heavily Democratic state, but Ms. Pritt must still overcome a Republican opponent: former Gov. Cecil Underwood, who was last elected to the office in 1956. The current Governor, Gaston Caperton, a Democrat, is barred by state law from seeking a third term.

Nebraska

Split Republicans Try to Unite

Democrats are chortling at the blood and the money spent in Nebraska's Republican primary for the Senate. Chuck Hagel, an Omaha investment banker, soundly defeated State Attorney General Don Stenberg on Tuesday, but the primary campaign was in fact a rough one. And now Mr. Hagel faces a formidable Democrat unscathed by a primary, Gov. Ben Nelson.

"Hagel may have won the primary, but once again the Nebraska G.O.P. is so internally divided he will never get a large segment of the Stenberg backers to support him," asserted Steve Jarding, communications director for the Democratic Senatorial Campaign Committee.

Mr. Hagel countered in an interview yesterday by saying Nebraska Republicans were rallying this time, mindful that their past divisions had cost them elections they should have won. "This morning in Lincoln we had a unity meeting," the new nominee said. "That's the first time this has ever been done."

While Democrats have proved to be relatively hardy in this strongly Republican state, Mr. Hagel said he saw this election as a clear-cut choice — and an auspicious one for him. "Like all general elections, it will come down to a very clear choice between a conservative Republican and a Democrat," he said. "I'll continue to talk about the things that I think are important to our nation and

our country, like cutting the size and scope of our Government, how we do that, and welfare reform."

He acknowledged, though, "I cannot beat Ben Nelson unless the Republican Party is unified."

Arizona

Full-Time Foe For a Freshman

Republican freshmen in the House are by and large a vocal lot, but even there Representative J. D. Hayworth, a 37-year-old former sportscaster who is often compared to Rush Limbaugh, stands out. Now the combative, ideologically fired Mr. Hayworth has a Democratic challenger to occupy his time.

Steve Owens, a Phoenix lawyer and former Democratic state chairman, has suspended his law practice to campaign full time against Mr. Hayworth in Arizona's Sixth Congressional District, a mostly rural district with a large Mormon population. Mr. Owens, 40, calls Mr. Hayworth "a disaster" who has "voted to give the rich tax breaks and then pay for them by slicing and dicing average families, seniors and young people." Mr. Hayworth calls Mr. Owens "that liberal lawyer."

Both had about a quarter of a million dollars in cash on hand in reports filed at the end of March. Both are attracting high-profile national support: Vice President Al Gore has visited Phoenix to help raise money for the party and Mr. Owens; Speaker Newt Gingrich and Representative John R. Kasich of Ohio, chairman of the House Budget Committee, have gone in to lend Mr. Hayworth a hand.

ROBIN TONER

Panel Urging Reform in Selection of Federal Judges

By NEIL A. LEWIS

WASHINGTON, May 15 — A bipartisan commission of leading lawyers and scholars warned today that the process of nominating and confirming Federal judges has become far too cumbersome and must be changed or it could eventually erode the quality of justice in the nation.

Lloyd N. Cutler, a member of the commission, which today issued a study on the process, said at a news conference that despite the best efforts of recent Presidents and the Senate to name judges, vacancies would continue to be filled far too slowly unless new procedures were put into place.

"Largely because of the expanding jurisdiction of the courts, judges may soon find themselves unable to deal with the flood of cases, and we must expedite the process by which we fill vacant seats," said Mr. Cutler, who was the White House counsel for President Jimmy Carter and President Clinton.

The commission, sponsored by the University of Virginia, included several prominent former Federal judges. It recommended that shortened and mandatory timetables be established for senators to recommend and Presidents to nominate candidates. And, most striking, it recommended that if the Senate took too long to act on a Presidential nominee, the President should use his constitutional power to fill the seat during a recess without Senate approval.

Such appointments are temporary and rarely used. But Nicholas Katzenbach, a former Attorney General and co-chairman of the commission, said that more use of such appointments would create an incentive for the Senate to act more quickly.

The commission based its recommendations on the fact that Congress had vastly increased the kinds of cases, particularly those involving narcotics, that Federal courts are obliged to deal with, creating an increasingly unmanageable caseload. But the recommendations seemed to conflict with the ideas of at least one prominent Senator, Charles E. Grassley, an Iowa Republican.

Mr. Grassley, a member of the Senate Judiciary Committee, which plays a major role in staffing the courts, has irritated some Federal judges with his public suggestions that they may be spending too much money on annual conferences and too much time on outside activities. This year Mr. Grassley conducted his own survey of Federal judges and in a report issued

today, concluded that some vacancies should not be filled because there may be a need for fewer, not more, judges.

Mr. Grassley began his survey in January when he sent questionnaires to the more than 800 Federal appeals court judges, the level just below the Supreme Court, and district court judges, those who conduct Federal trials.

Of a total of 249 appeals court judges, 170 responded to the survey, Mr. Grassley said. His survey showed that of those 170, half said that the current allotment of judges was sufficient and that there was no need to increase the size of the Federal bench. Only 2 percent thought that the courts could function with fewer judges, while 30 percent thought that more judges should be named. Mr. Grassley has not yet released the responses of the district court judges.

At the same time, the survey showed that many judges were concerned that increasing workloads obliged them to rely more on staff lawyers, who are employed by the courts, and clerks.

Lovida H. Coleman, a Washington lawyer on the bipartisan commission, said the heightened workload of judges meant that the quality of the work could be diluted as they are forced to turn to their staffs.

Yet despite all the study of the Federal courts, the state court systems are far more vast and typically is where the average citizen makes contact with the justice system.

THE NEW YORK TIMES

THURSDAY, MAY 16, 1996

Supreme Court of the State of Virginia

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON

Petitioner,

—v.—

PAULA CORBIN JONES

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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May 17, 1996

QUESTIONS PRESENTED

This case involves an uncomplicated civil action for damages against petitioner, who is currently serving as President of the United States, for acts committed by him before he became President and therefore bearing no possible relation to his official responsibilities. Petitioner sought to have the action dismissed or stayed for the duration of his service in office, but made no showing in the District Court that the lawsuit — or any particular aspect of it — would in any way impair the functioning of the presidency. The following questions are presented:

1. Whether the Court of Appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his service in office, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond “the outer perimeter of [the President’s] official responsibility,” the limit for presidential immunity set forth in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and when there was no showing of any threat to the functioning of the Executive Branch.

2. Whether the Court of Appeals erred in reversing an order granting petitioner what the District Court termed a “limited or temporary immunity from trial,” Pet. App. 68, for acts beyond the outer perimeter of petitioner’s official responsibilities as President, when there was no showing of any threat to the functioning of the Executive Branch.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853



WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

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



BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a \$6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Ms. Jones (Ms. Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Ms. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite number written on it. When Ms. Jones wondered what the Governor

wanted. Trooper Ferguson responded, "It's okay, we do this all the time for the Governor." Trooper Ferguson then escorted Ms. Jones to the Governor's floor. Complaint ¶¶ 6-13.

Ms. Jones, who had never met the Governor before, entered his suite at his invitation. Small talk followed. Mr. Clinton asked Ms. Jones about her job. The Governor noted that David Harrington, an appointee of Mr. Clinton's who served as the director of Ms. Jones's agency and her superior there, was the Governor's "good friend." The Governor then made a series of verbal and physical sexual advances toward Ms. Jones, and undressed himself from the waist down. Horrified, Ms. Jones moved away from Mr. Clinton and said, "Look, I've got to go." Pulling up his pants, Mr. Clinton said, "If you get in trouble for leaving work, have Dave. [Harrington] call me immediately and I'll take care of it." As Ms. Jones left, the Governor looked at her sternly and said: "You are smart. Let's keep this between ourselves." Visibly shaken and upset, Ms. Jones resumed her post downstairs. In the following hours and days, she told her coworker, friends and relatives about what had happened. Other than that, however, fearing for her job and for her relationship with her fiancé, she remained silent. She remained at her agency for the next twenty-one months, where she worked in constant fear of retaliation. She experienced what she perceived to be job retaliation for her refusal to submit to Mr. Clinton's advances. In 1993, Ms. Jones moved to California, and Mr. Clinton became President of the United States. Complaint ¶¶ 14-40, 48.

In January 1994, a widely publicized magazine article reported that, while Governor of Arkansas, Mr. Clinton regularly used members of his security detail to solicit women for sex with him. The article, which was apparently based upon the accounts of various Arkansas state troopers, reported that an unidentified trooper (clearly Mr. Ferguson) had told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and had escorted her to Mr. Clinton's room at the Excelsior Hotel. The article

reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Ms. Jones had had a sexual relationship with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Ms. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances. She also asked Mr. Clinton to acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Ms. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, Ms. Jones commenced an action against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

Mr. Ferguson answered the complaint on June 10, 1994. He admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer ¶ 11. He disclaimed having "personal knowledge of what took place in the hotel room." *Id.* ¶ 14.

For his part, Mr. Clinton did not answer the complaint, but instead requested and obtained an order allowing him to defer a response pending a motion to dismiss on grounds of "presidential immunity." Pet App. 40. On August 10, 1994, Mr. Clinton filed what was styled a "Motion to Dismiss on Grounds of Presidential Immunity." See Pet. App. ii. As the

District Court noted, Mr. Clinton asserted "a claim of absolute immunity": "that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office." Pet. App. 55. He principally argued that complaint should be dismissed without prejudice to being refiled after he leaves the White House; in the alternative, he argued that the District Court should stay the case until he leaves office. Pet. App. 55. Mr. Clinton's motion was predicated simply upon the fact of his occupancy of the Office of President of the United States. He made no factual showing that any aspect of the pre-trial or trial proceedings would in any way hinder him from carrying out the duties of that Office.

The District Court denied the substance of Mr. Clinton's motion on December 28, 1994. Pet. App. 54. Rejecting Mr. Clinton's claim of absolute immunity, the court denied the motion to dismiss. The court observed that "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support . . . be found" for Mr. Clinton's claim that he has "immunity from civil causes of action arising prior to [his] assuming the office" of the presidency. Pet. App. 68. The court found Mr. Clinton's contention to be "contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." Pet. App. 68. Nevertheless, in a self-contradictory holding premised upon isolated language in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the District Court granted Mr. Clinton what it called a "limited or temporary immunity from trial." Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton and Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be in 1997 or 2001. Pet. App. 68-71. The

court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Ms. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the District Court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74.

On January 9, 1996, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never* been "any case in which any public official . . . has been granted any immunity from suit for his *unofficial* acts." Pet App. 7 (emphasis added). The Court of Appeals noted that, to the contrary, this Court's decision in *Nixon v. Fitzgerald* had recognized a presidential immunity that extended only to " 'acts within the 'outer perimeter' of [the President's] official responsibility,' " and that "unofficial acts" are "[b]y definition . . . not within the perimeter of the President's official responsibility at all, even the outer perimeter." Pet. App. 8-9 (quoting *Fitzgerald*, 457 U.S. at 756). The court concluded that *Fitzgerald's* rationale — "that, without protection from civil liability for his *official* acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability" — is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 11 (emphasis added). The District Court's denial of Mr. Clinton's motion to dismiss was accordingly affirmed.

The Court of Appeals reversed the District Court's grant of a "limited or temporary immunity from trial" for the same reasons. While recognizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on

its docket," Pet. App. 13 (footnote omitted), the Court of Appeals held that, to the extent the District Court's grant of such an immunity could be characterized as an exercise of that discretion, the District Court's postponement of trial was an "abuse of discretion" because it was "the functional equivalent of a grant of temporary immunity to which . . . Mr. Clinton is not constitutionally entitled," *id.* at 13 n.9. The Court of Appeals stressed that the District Court had considerable power to ensure that the litigation would not interfere with Mr. Clinton's official duties, and it directed the District Court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," Pet. App. 13:

We have every confidence that the District Court will exercise its [scheduling] discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .

If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .

The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his

official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

In a concurring opinion, Judge Beam emphasized that Mr. Clinton had failed to point out any "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case was "not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government." Pet. App. 22. He concluded:

Ms. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President and Ms. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of

the litigation with maximum consideration of the President's constitutional duties. . . .

As I have attempted to stress, nothing (in our decision) prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired.

Pet. App. 23-25 (emphasis added).

REASONS FOR DENYING THE WRIT

This one-of-a-kind case is singularly inappropriate for exercise of this Court's certiorari jurisdiction. There is no conflict among the Courts of Appeals, and so the question becomes whether Mr. Clinton has raised an important question of law that requires this Court's attention. SUP. CT. R. 10. He has not.

Mr. Clinton erroneously contends that the Court of Appeals held that "the President should receive no form of protection from . . . civil suits" for his unofficial acts. Pet. 9. The Court of Appeals stressed, however, that the district courts have ample authority — by solicitous scheduling — to ensure the unimpeded conduct of presidential business. As Judge Beam's concurrence emphasized, "nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (emphasis added).

No peril would be posed for the presidency by allowing this case to proceed. This case has nothing to do with Mr. Clinton's official duties, and, as far as federal litigation goes, it is a very simple case. Not surprisingly, Mr. Clinton made no showing that his presidential duties would be impaired by this case. He attempted no such showing because he could not make one. This case thus presents neither a legal

issue nor a factual record that would justify review by this Court.

Beyond this, Mr. Clinton's contention that, under this Court's decision in *Nixon v. Fitzgerald*, he is "entitled, as a matter of law, to defer this litigation," Pet. 17, is completely unfounded and unworthy of review. It is tantamount to the argument — for official immunity for *unofficial* acts — that was repeatedly made by Mr. Clinton and rejected below. The argument was correctly rejected: as one *amicus* explained below in refuting Mr. Clinton's immunity claim, "[u]p to this time, *no* court has *ever* held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporarily." Brief for *Amicus Curiae* American Civil Liberties Union Foundation in Support of Appellee Jones 17, *Jones v. Clinton*, Nos. 95-1050, 95-1167 (8th Cir. filed Apr. 28, 1995) (emphasis added). The farthest the Court has ever extended immunity is to "acts within the 'outer perimeter' of [the President's] official responsibility." *Nixon v. Fitzgerald*, 457 U.S. at 756. As Chief Justice Burger's concurring opinion in *Fitzgerald* explained, the President's immunity "*does not extend beyond such actions,*" and "a President [is] *not immune for acts outside official duties.*" *Id.* at 761 n.4, 759 (Burger, C.J., concurring) (emphasis added). The Court of Appeals simply applied what has long been understood to be the law. Its decision need not be reviewed by this Court.

Equally unworthy of review is Mr. Clinton's contention that the Court of Appeals erred in reversing the District Court's grant of an "immunity from trial." The Court of Appeals correctly found the trial judge's ruling to be an abuse of discretion because it was not an exercise of discretion; it was instead the "functional equivalent" — as the district judge herself made clear — "of a grant of temporary immunity to which . . . Mr. Clinton is not entitled." Pet. App. 13 n.9; *see id.* at 68. If analyzed as a discretionary stay of litigation, the District Court's holding manifestly failed to meet the

standards for such stays set forth by this Court in *Landis v. North American Co.*, 299 U.S. 248, 256 (1936): “[T]he burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily upon [the] suppliant[] for relief” — here Mr. Clinton — and a trial court’s “discretion” is “abused if [a] stay [is] not kept within the bounds of moderation.” There was no showing that a stay was justified, and the District Court’s issuance of a categorical stay of trial until perhaps the year 2001 was certainly immoderate. The Court of Appeals’ holding on this point is unassailable, and surely does not warrant review by this Court.

I. THIS CASE DOES NOT POSE ANY CONCEIVABLE THREAT TO THE FUNCTIONING OF THE EXECUTIVE BRANCH.

This case would not work any hardship upon the presidency. It is, at bottom, a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably his counsel has already spent with him the short time required to obtain his recollection of events. By its nature, the case will not require the production of many documents. Discovery and trial in this case will not be burdensome, and can be controlled by the ample powers of the District Court to prevent any interference with official duties. Mr. Clinton has thus necessarily sought to advance his argument that this litigation might “interfere with [his] constitutionally assigned duties . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit.” Pet. App. 12 (emphasis added). He asks this Court to review his claims upon a record that is barren by his own choice. His petition can and should be denied for that reason alone.

Unable to present this Court with any factual record to support his contentions, Mr. Clinton instead asserts, as he did below, that this case will not be "an isolated one," that the courts will be "confronted with more private civil damage complaints against incumbent Presidents." Pet. 8, 21. As the Court of Appeals correctly noted, however, his assertions are "not only speculative, but historically unsupported." Pet. App. 14. In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." Pet App. 14 n.10. The historical record reveals no claims of any presidential hardship in these cases, let alone any claims of presidential immunity. Although President Kennedy, invoking his status as Commander-in-Chief, did make an unsuccessful attempt to obtain a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), see Pet. App. 14 n.10, that fact, like Mr. Clinton's citation of the automatic stay provision of the Bankruptcy Code, Pet. 15,¹ only illustrates that the only proper forum for the relief Mr. Clinton seeks is Congress, not the courts.

There has been no onslaught of vexatious personal litigation against the President in the two years since this case was brought, even though the case has been highly publicized. Nor is such an onslaught likely: the President's "unofficial conduct will affect only those who traffic with [him] in his personal capacity," which of course makes "the universe of potential plaintiffs . . . considerably small[]" indeed. Pet. App. 15. Mr. Clinton's purported fear that political partisans will make litigation their vehicle of choice is obviously unfounded. As the Nation's political history shows, litigation

¹ The automatic stay provision merely limits the ability of a creditor to proceed against a debtor in a forum other than the bankruptcy court. The creditor is provided an opportunity to immediately assert a claim in the bankruptcy court. Therefore, the automatic-stay analogy is inept.

is hardly necessary to accuse, attack, or embarrass a public figure. Indeed, if accusations against a public figure are unjustified or purely partisan, one would think that litigation — which gives the public figure access to discovery and to a neutral forum in which to obtain vindication — is the *least* likely mode of attack. Unlike so many others who have made charges against public officials, Ms. Jones has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a court empowered not only to dismiss her claims, but to impose sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including those against Presidents.

No credible reason exists to believe that lawsuits against Presidents for unofficial conduct generally, let alone *this* lawsuit, present any problem for the practical functioning of the presidency. The lower courts have ample power to remedy any problems that might arise. That is the essence of the decision below: in rare cases such as these, trial courts can and will “exercise [their] discretion in such a way that [the] lawsuit[s] may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President’s performance of his official duties.” Pet. App. 13-14. The trial judge remains completely free under the Court of Appeals’ decision to “halt[] or delay[] or reschedul[e]” anything in the litigation — including a trial — “at any time should she find that the duties of the presidency are even *slightly* imperiled.” Pet. App. 25 (emphasis added). In the past, moreover, presidents and former Presidents have given evidence under judicial supervision even on matters that were related to their office, without any ill effect. Pet. App. 22-23.² Indeed, Mr. Clinton himself

² See, e.g., *United States v. Fromme*, 405 F. Supp. 578, 582-83 (E.D. Cal. 1975); see also *United States v. Poindexter*, 732 F. Supp. 142, 143-146, 149-160 (D.D.C. 1990); 1 Ronald D. Rotunda & John E. Nowak, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 7.1 (2d ed. 1992); Laurence H. Tribe, *AMERICAN CONSTI-*

recently testified at length by videotape deposition in an unrelated case in the District Court, which successfully and uncontroversially balanced the President's schedule with the rights of the litigants and the evidentiary needs of the case.³ Mr. Clinton stated publicly that he saw nothing "inappropriate" in his being called to testify in that case, given that "Presidents since Thomas Jefferson from time to time have testified in court proceedings," and added that "[i]f . . . there's something that I know [that] can help the trial, I'll be happy to cooperate with the court."⁴ And Mr. Clinton apparently either will be or has been subpoenaed to testify in yet another trial now scheduled to begin in June before the same District Judge who decided the immunity question below.⁵

Finally, Mr. Clinton offers no credible reason to believe that the exercise of judicial discretion over scheduling would give the trial judge a "general power to set priorities for the President's time and energies," or would require Mr. Clinton to seek judicial "approval to carry out [his] day-to-day responsibilities." Pet. 8, 12. The decision below neither contemplates nor compels any such judicial overreaching. To the contrary, it directs *deference* to the presidency; it mandates "judicial case management *sensitive* to the burdens of the

TUTIONAL LAW 278 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

³ *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark.); *see, e.g.*, Stephen Labaton, *Clinton Denies Any Link to Whitewater Case Loan*, N.Y. Times, May 10, 1996, § A, p. 1, col. 1; Alison Mitchell, *Clinton Is Ordered To Testify in Ex-Partners' Fraud Trial*, N.Y. Times, Feb. 6, 1996, § A, p. 16, col. 5; Ronald Smothers, *Judge Rules Clinton Testimony Will Be Videotaped for Trial*, N.Y. Times, Mar. 21, 1996, § A, p. 16, col. 1; Hugh Aynesworth, *Clinton Deposition Could Take 8 Hours. Judge Tells Lawyers*, Wash. Times, Apr. 18, 1996, part A, p. 18.

⁴ Video Monitoring Services of America, Inc., Transcript of CNN Headline News Telecast, Feb. 7, 1996, 11:00-11:30 P.M. (EST).

⁵ *United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.); *see, e.g.*, Glenn R. Simpson, *Whitewater Prosecutors Wrap Up Case Against Tucker and the McDougals*, Wall St. J., May 14, 1996.

presidency and the demands of the President's schedule," Pet. App. 13 (emphasis added); it orders the trial court to *refrain* from "creating scheduling conflicts" for the President, *id.* at 14. In the highly unlikely event that a district judge fails to heed these commands, the decision below contemplates "a writ of mandamus or prohibition" from the Court of Appeals. Pet. App. 16. And if somehow, someday, *both* a trial judge and a circuit court fail to respect the duties of the presidency — an even more unlikely event — the President may seek relief from this Court. If and when that day ever comes, perhaps there would be presented a record from which this Court could find that the prerogatives of the presidency were impaired. No such record exists here.

Mr. Clinton's petition, in short, fails to raise any substantial issue as to the institutional interests of the presidency. To show anything approaching a separation-of-powers violation under this Court's cases, he must, at a minimum, specifically identify "the extent to which [the challenged law or ruling] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). He has not done that here.

II. PETITIONER IS NOT "ENTITLED, AS A MATTER OF LAW, TO DEFER THIS LITIGATION" BECAUSE THE ACTS COMPLAINED OF ARE NOT WITHIN THE OUTER PERIMETER OF HIS OFFICIAL DUTIES.

In the proceedings below, Mr. Clinton consistently styled his claim as one of "immunity." He has now dropped that word, but the relief he seeks is effectively the same.⁶ For

p. A6, col. 1; Linda S. Caillouet, *President Will Receive Subpoena in Perry County Bankers' Case*, *Arkansas Democrat-Gazette*, May 10, 1996, p. 13A.

⁶ By dropping his use of the word "immunity" to describe the relief he seeks, Mr. Clinton apparently attempts to reconcile his con-

notwithstanding his advocacy of discretionary stays, he still contends that under *Nixon v. Fitzgerald* he is "entitled, as a matter of law, to defer this litigation" for the remainder of his presidency. Pet. 17. That is essentially the argument for presidential immunity that was made and rejected below, and it is not only incorrect, but unprecedented. None of the prior Presidents who were sued for nonpresidential acts (Presidents Theodore Roosevelt, Harry Truman, and John Kennedy) raised this defense. Yet another President, President Nixon, *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States v. Nixon*, 418 U.S. 683 (1974), and then later, in his briefs in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).⁷

tentions with those of the Solicitor General, who declined below to adopt Mr. Clinton's position that the immunity case law mandated the dismissal of the suit with leave to refile after Mr. Clinton leaves office. Instead, the Solicitor General argued that "the appropriate form of relief is a stay, rather than a dismissal." Brief for the United States as *Amicus Curiae* 5, *Jones v. Clinton*, Nos. 95-1050, 95-1167 (8th Cir. filed Apr. 5, 1995).

Since the views of the United States were fully expressed below, there is no need for the Court to invite the Solicitor General to file a brief on Mr. Clinton's petition. For the convenience of the Court, copies of the briefs filed by the Solicitor General in the Eighth Circuit have been lodged with the Clerk of the Court.

⁷ At oral argument in *United States v. Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?

MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument 80, *United States v. Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

(footnote continued)

The decision below merely recognized Mr. Clinton's contention for what it is: a plea for a radical, unprecedented extension of immunity to acts never before covered by immunity — acts having *nothing* to do with a public official's duties. Whether the immunity is styled "temporal" or "absolute," whether it be enforced by dismissal or by stay, there is simply no authority for the protection Mr. Clinton seeks. He remains unable to cite, and the panel members below (including the dissent) were unable to find, "any case in which any public official ever has been granted any immunity from suit for his unofficial acts." Pet. App. 7 (emphasis added). In more than a century of immunity decisions, from *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), to *Fitzgerald*, this Court has not once suggested that a public official could avoid litigation of a case involving only unofficial acts. The Court has never extended protection for public officials, including Presidents, beyond the clear boundary set in *Fitzgerald* — "the 'outer perimeter' of [the President's] *official responsibility*." 457 U.S. at 756 (emphasis added). To the contrary, as Chief Justice Burger's concurrence in *Fitzgerald* repeatedly stressed, the Court's cases have always presumed that protection of public officials from suit covers only *official* actions and "*does not extend beyond such actions*" — that "a President, like Members of Congress, judges, prosecutors, or congressional aides . . . [is] *not* immune for acts outside official duties." *Id.* at 761 n.4, 759 (Burger, C.J., concurring) (emphasis added). It was precisely *that* limitation that allowed Chief Justice Burger to declare that *Fitzgerald* did not "place [the] President 'above the law.'" *Id.* at 759 (Burger, C.J., concurring) (citation omitted).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon 8-9 n.6, *Nixon v. Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

Fitzgerald surely does not, as Mr. Clinton asserts, suggest that "a sitting President may not be subjected to private civil lawsuits" relating to unofficial acts. Pet. 10. The controlling consideration in *Fitzgerald* — and, indeed, in all of this Court's immunity case law — is the fear that if the President and other officials could be sued for their official conduct, "executive officials would hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action." *Fitzgerald*, 457 U.S. at 745 (quoting *Spalding v. Vilas*, 161 U.S. 483, 499 (1896)). Put simply, the Court's longstanding rationale for immunity is this:

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

Id. (quoting *Spalding v. Vilas*, 161 U.S. at 498).⁸ As the Court of Appeals concluded, "[i]t is clear from a careful reading of *Fitzgerald*" that this Court was "concern[ed] that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making pro-

⁸ See also, e.g., *Mireles v. Waco*, 502 U.S. 9, 10-11 (1991) (per curiam) (judges held immune for judicial acts so that they may act in official capacity without apprehension of personal liability); *Forrester v. White*, 484 U.S. 219, 226-29 (1988) (same); *Butz v. Economou*, 438 U.S. 478, 504-17 (1978) (same for executive agency officials); *Imbler v. Pachtman*, 424 U.S. 409, 424-431 (1976) (state prosecutors); *Scheuer v. Rhodes*, 416 U.S. 232, 240-49 (1974) (state executive officials); *Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951) (state legislators); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-53 (1872) (judges).

cess," and might cause the President to "make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability." Pet. App. 11. Nothing in *Fitzgerald* places a President, when acting personally, upon a pedestal above any other citizen in this democracy. To do so would contravene the Nation's egalitarian civic creed and the Constitution's guarantee of equal protection of the laws. As the Court of Appeals said below, Article II "did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society." Pet. App. 6.

The Court of Appeals thus correctly found the rationale for official immunity to be entirely "inapposite" here, "where only personal, private conduct by a President is at issue." Pet. App. 11. Imposing liability for pre-presidential or other unofficial conduct will simply not cause Presidents to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.'" *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding v. Vilas*, 161 U.S. at 499). It will not diminish a President's "ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). It will not place the President "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages." *Id.* at 745 (quoting *Spalding*, 161 U.S. at 498). And it will not require any court "to probe into the elements of Presidential decisionmaking," or to engage in "judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information." *Id.* at 761-62 (Burger, C.J., concurring).

Nor did the Court of Appeals "ignore" this Court's concern in *Fitzgerald* about the potential for the "diversion of [the President's] energies by concern with private lawsuits," as

Mr. Clinton contends. Pet. 9-10 (quoting *Fitzgerald*, 457 U.S. at 751). The Court of Appeals simply reached the unassailable conclusion that this potential was far less substantial in a case having nothing to do with official conduct, and that it could be amply addressed through the sound scheduling discretion of the trial court. The court correctly concluded — given the historical experience, and the fact that the “universe of potential plaintiffs” was so small as to unofficial conduct — that the danger of distraction here is “on a different footing” than in cases (like *Fitzgerald*) that involve official acts. Pet. App. 15. Still, far from “disregard[ing] [any] risk[] to the effective functioning of government,” Pet. 10, the Court of Appeals made clear that the institutional interests of the presidency could and would be protected:

If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, *then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities.* Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15 (emphasis added).

Finally, Mr. Clinton's contention that “deep roots in our [Nation's] traditions” (Pet. 10) support his vision of the law, is as blind as that vision itself. He cites, for example, the views of President Jefferson and others, to the effect that “‘the President, personally, was not . . . subject to any process whatsoever.’” Pet. 10 (citation omitted). Even the District Court found this view meritless; it concluded, after analyzing the historical materials, that there was “no credible support” for it. Pet. App. 68; *see* Pet. App. 56-67. It is enough to know

that President Jefferson lost the point 189 years ago. *United States v. Burr*, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.) ("That the president of the United States may be subpoenaed, and examined as a witness, . . . cannot be controverted."). And President Nixon lost it, too — thrice. *United States v. Nixon*, 418 U.S. 683 (1974) (ordering disclosure of official presidential communications despite claim of executive privilege); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974) (holding President amenable to judicial process in a civil case); *Nixon v. Sirica*, 487 F.2d 700, 789 (D.C. Cir. 1973) (en banc) (per curiam) (ordering President to comply with grand jury subpoena). Mr. Clinton's attempt to rewrite the historical record should be rejected, and his petition should be denied.

III. THE COURT OF APPEALS, IN A PROPER EXERCISE OF JURISDICTION, CORRECTLY REVERSED THE DISTRICT COURT'S GRANT OF TEMPORARY IMMUNITY FROM, OR A STAY OF, TRIAL.

A. Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary immunity from trial." Pet. App. 68 (emphasis added); see Pet. 19. The Court of Appeals correctly found that what the District Court ordered — a postponement of the trial until perhaps the year 2001 — was "the functional equivalent of a grant of temporary immunity" that had no basis under the Constitution or laws of the United States. Pet. App. 13 n.9. As such, the District Court's decision was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays.

The controlling precedent is *Landis v. North American Co.*, 299 U.S. 248 (1936), a case Mr. Clinton misconstrues. The Court in *Landis* did indeed hold 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." *Id.* at 254. But a stay of litigation may be granted "[o]nly in rare circumstances." *Id.* at 255. In particular, the Court held that "the suppliant for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* at 255 (emphasis added). Thus, "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the . . . suppliant[] for relief, and discretion [is] abused if the stay [is] not kept within the bounds of moderation." *Id.* at 256.

In reversing the District Court's postponement of trial, the Court of Appeals was faithful to *Landis*. In granting trial "immunity" to Mr. Clinton, the District Court made no finding that Mr. Clinton had made a showing of an actual and "clear case of hardship," a showing not even attempted. As Judge Beam explained, moreover, the danger of harm to Ms. Jones was manifest: she "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." Pet. App. 17. And the passage of time contemplated by the District Court's order — possibly into the next century — was surely immoderate. Indeed, in *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year." 299 U.S. at 256. Reversal of the District Court's "stay" order, if anything, was all but *required* under *Landis*. And since the "stay," despite the District Court's citation of Fed. R. Civ. P. 40 and the court's equity powers, was dependent upon its erroneous holding that Mr. Clinton was entitled to an "immunity from trial as *Fitzgerald* seems to require," Pet. App. 70, it was properly reversed for that error as well. The Court of Appeals' conclusion was thus both uniquely circumstanced

and correct, and accordingly raises no issue warranting review by this Court.

B. Mr. Clinton makes a last-ditch effort to restore the District Court's "trial immunity" order by contending that the Court of Appeals lacked jurisdiction to review it. Pet. 16-19. But he makes no effort to show why this jurisdictional issue — which understandably is not even mentioned in his list of questions presented — is worthy of certiorari review. The Eighth Circuit simply applied longstanding principles of pendent appellate jurisdiction, a concept that, as this Court has recognized, has been "endorsed" by all the federal Courts of Appeals. *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1209 n.2 (1995) (citing cases from each Circuit).⁹ Mr. Clinton does not argue that, in any other Circuit, the jurisdictional ruling would have come out any other way.

Mr. Clinton is wrong in any event. He contends that the question whether he is entitled to a stay of the litigation generally is entirely "distinct" from whether he is entitled to a stay of just the trial. But as *he* presented them in the courts below, these questions were one and the same. In the Court of Appeals, *he* argued that he was entitled, *as a matter of law*, to an immunity or stay as to *all* proceedings, *including* the trial, for one reason, and one reason alone — the fact that he is President of the United States. Ms. Jones' cross-appeal argued an issue that indisputably was inextricably intertwined with Mr. Clinton's — namely, to borrow the District Court's words, whether he was entitled to "a temporary or limited immunity from trial [under] *Fitzgerald*." Pet. App. 70. The Court of Appeals reached the obvious conclusion that both appeals

⁹ In *Swint*, the Court observed that it "ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." 115 S. Ct. at 1211. *Swint* thus did not impugn the viability of pendent appellate jurisdiction; it held only that "there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise" in that case. *Id.* at 1212.

are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" than these, where answering one question of law resolves them all.

Pet. App. 5 n.4. On this point as well, the Court of Appeals was correct, and its holding raises no important question of general applicability for this Court to address.

* * *

The protections Mr. Clinton has sought in this case are unique and unprecedented; they contravene *Fitzgerald's* explicit language; they require, contrary to *Landis*, the imposition of an insurmountable burden upon a plaintiff to prove that a President is *not* entitled to postpone a lawsuit; and they would prevent a plaintiff such as Ms. Jones from collecting her evidence before memories fade, documents are lost, and witnesses die or become incapable of testifying. In matters having nothing to do with the presidency, Mr. Clinton has sought to make a plaintiff unequal to the President in the eyes of the law. Mr. Clinton has thus demanded an immunity from suit for unofficial acts that would place him, unlike any prior President or public official, above the law. There is no support in reason, the common law, the Constitution, or in simple justice, for his demand. The Court of Appeals correctly rejected it.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 17, 1996