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Paula Jones 8th Circuit Merit Brief [3]

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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

No. 95-1853

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

WILLIAM JEFFERSON CLINTON,
 Petitioner,

vs.

PAULA CORBIN JONES,
 Respondent.

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

BRIEF FOR THE PETITIONER

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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.

LIST OF PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
LEGAL PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT	2
SUMMARY OF ARGUMENT	8
ARGUMENT	13
I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.	13
A. A Personal Damages Action Against An Incumbent President Would Interfere With The Discharge Of A President's Article II Responsibilities And Jeop- ardize The Separation Of Powers	13
1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.	13
2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With Historic Understanding.	16
3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To Fulfill His Constitu- tional Functions.	22
4. Criminal Cases Where A President Has Been A Third-Party Witness Provide No Precedent For Requiring A Sitting President To Participate As A Defendant In Civil Damages Litigation.	30
B. "Case Management" By The Trial Court Does Not Mitigate, But Instead Exacerbates, The Separation Of Power Problems Created By Suits Against An Incumbent President.	34
1. "Case Management" By Federal District Courts Entangles The Branches Of Government, Rather Than Separating Them	34

PAGE

- 2. "Case Management" By State Trial Courts Is Inconsistent With Principles Of Federalism Inherent In The Constitutional Scheme. 38
- C. The Relief Sought Here Is Not Extraordinary, And Would Not Place the President "Above The Law." . . . 40
 - 1. Deferring Litigation Is Not Extraordinary . . . 40
 - 2. Presidents Remain Accountable For Private Misconduct. 43
- II. THE LITIGATION OF THIS PARTICULAR PRIVATE DAMAGES SUIT AGAINST THE PRESIDENT SHOULD, IN ANY EVENT, BE DEFERRED. 46
 - A. Several Factors Weigh Heavily In Favor Of Deferring This Litigation In Its Entirety. 46
 - B. At A Minimum, The District Court's Decision To Stay Trial Should Have Been Sustained. 50
 - 1. The Court Of Appeals Lacked Jurisdiction To Review The Respondent's Request To Overturn The District Court's Decision To Stay Trial. . . 50
 - 2. The Court Of Appeals Erred In Reversing The District Court's Decision To Stay Trial In This Case. 53
- CONCLUSION 55

PAGE

TABLE OF AUTHORITIES

[To Be Added]

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On Writ Of Certiorari To The
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BRIEF FOR THE PETITIONER

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. A petition for certiorari was filed on May 15, 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)

FED. R. CIV. P. 40

These and other provisions are set forth at Pet. App. 79-85.

STATEMENT

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 based principally on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under federal civil rights statutes and two arising under state tort 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. He asserted 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 the trial until the President left office, but held that discovery could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil liability for his official acts as President. The dis-

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 the President's 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 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.

district court noted that the holding of *Fitzgerald* did not directly apply to this case because President Clinton was sued primarily for actions taken before he became President, but concluded that a significant part of the rationale in *Fitzgerald* did apply here:

[T]he majority opinion by Justice Powell [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 stated that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." Pet. App. 69. In this connection, the district court stated that "this [is not] a case that would likely be tried with few demands on Presidential time." Pet. App. 70.

The district court concluded that "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Noting that respondent "filed this action two days before the three-year statute of limitations expired" and that she "[o]bviously . . . was in no rush to get her case to court," the district court found that "a delay in trial . . . will not harm [respondent's] right to recover or cause her undue inconvenience." *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 ruled, however, that there was "no reason why the discovery and deposition process could not proceed," and said that this would avoid the possible loss of evidence with the passage of time. Pet. App. 71.

The President and respondent both appealed.³ A divided panel of the court of appeals reversed the district court's order staying trial, and affirmed its decision allowing discovery to proceed. The majority opinion, by Judge Bowman, began by characterizing the question as whether the President "is entitled to immunity from civil liability for his unofficial acts." Pet. App. 3. Judge Bowman acknowledged that "the fundamental authority" on the question before the Court was *Nixon v. Fitzgerald*, but stated that the reasoning of *Fitzgerald* is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 8, 11. After asserting 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

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

³ The court of appeal's jurisdiction over the President's appeal was based on 28 U.S.C. § 1291 (1994). See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones's cross-appeal. See *infra* pp. xx-xx.

n.4), Judge Bowman overturned even that limited stay as an abuse of discretion. Pet. App. 13 n.9.

Judge Bowman also 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. Pet. App. 12-14. 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 acknowledged that the issues in this case "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. *Id.* He also recognized 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 asserted, 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 not attending his own trial and not participating in discovery, and by limiting the number of pretrial encounters between the President and respondent's counsel. Pet. App. 23-24.

Judge Ross dissented. Pet. App. 25-31. Noting that "[n]o other branch of government is entrusted to a single person," he stated: "It is this singularity of the President's constitution-

al position that calls for protection from civil litigation."

Pet. App. 26.

The burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result would disserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution.

Id. Judge Ross concluded 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. He stated that this conclusion was compelled by the "language, logic and intent" of *Fitzgerald*. Pet. App. 25.

Judge Ross further explained that a lawsuit against a sitting President would "create opportunities for the judiciary to intrude upon the Executive[]" and "set the stage for potential constitutional confrontations between courts and a President." Pet. App. 28. In addition, he noted, such litigation "permit[s] the civil justice system to be used for partisan political purposes." Pet. App. 28. At the same time, he stated, 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 rehearing *en banc*. Three judges did not participate, and Judge McMillian dissented. Judge McMillian stated that the panel majority's holding "demean[ed] the Office of the President." Pet. App. 32. He further stated that the holding "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.

SUMMARY OF ARGUMENT

I.A. The President, unlike any other federal official, has the sole responsibility for an entire branch of the federal government. For that reason, litigation against the individual who is serving as President unavoidably impinges on the constitutional responsibilities of the Executive Branch. The Framers explicitly recognized this point, as has this Court, on several occasions.

A personal damages action is a burdensome and disruptive form of litigation. As a practical matter, no President can be disengaged from a lawsuit that seeks to impugn his reputation and threatens him with enormous financial liability. Even if a President ultimately prevails, protracted personal damages litigation can make it impossible for him to devote his undivided

In concrete terms, trial court "case management" means that whenever a President believes that his responsibilities require a change in the schedule of litigation against him, he will have to seek the approval of the trial judge, state or federal. That judge will be authorized to insist on an explanation of the President's reasons for seeking a schedule change, a problematic state of affairs in itself. The trial judge will then review the President's explanation and decide whether to accept it, or whether the President should instead rearrange his official priorities to devote more time and attention to the litigation.

The President's priorities, however, are inseparable from the priorities of the Executive Branch of the federal government. Judges should not be in the position of reviewing those priorities. If they are, the effect will be to enmesh the President and the judiciary, to the great detriment of both branches, in a series of controversies over highly sensitive and, in an important sense, deeply political issues about the President's official priorities.

Moreover, state courts are likely to become the natural venue for private civil damages actions against an incumbent President, because such suits often will not involve federal claims. The Framers were well aware of the potential for conflict between the states and the federal government, particularly the Executive Branch of the federal government. They could not possibly have contemplated that state trial judges would have the power to control a President that is inherent in "case manage-

ment" -- much less that they would have the power to compel an incumbent President to stand trial in a state court. This further demonstrates that deferral, not "case management," is more consistent with our constitutional scheme.

C. The temporary deferral that the President seeks here is not, contrary to the court of appeals, an extraordinary remedy, and it does not place the President "above the law." In a variety of circumstances -- ranging from the automatic stay in bankruptcy to the doctrine of primary jurisdiction to the suspension of civil actions while criminal proceedings are pending -- litigation is delayed in our system in order to protect significant public or institutional interests. The interest in protecting the Presidency from disruption is at least as strong as, if not stronger than, the interests underlying these well-established doctrines.

Deferral also does not place unreasonable burdens on respondent. In many cases -- for example, where absolute, qualified, or diplomatic immunities apply -- settled doctrines deny recovery outright to innocent individuals who may have been grievously injured. Deferral of this litigation, by contrast, will not preclude respondent from ultimately seeking a remedy and, if warranted, recovering damages.

Nor does deferral mean that the President is unaccountable for wrongdoing or is "above the law." Deferral leaves him no less accountable, not only in court but in other important

forums, such as public opinion. Only the timing of the litigation is affected.

II.A. Respondent's suit, in particular, should be deferred under separation of powers principles. The suit is based on conduct that occurred before the President took office, and therefore presents no risk of abuse of Presidential power. Respondent seeks only damages, and can be made whole even if the proceedings are delayed. The suit involves the President personally and directly, not peripherally, so it is especially likely to impinge on his ability to perform his official duties. And respondent could have sought relief long before the President assumed office, or sought other avenues of relief, but chose not to do so.

For these and all the reasons set forth more fully below, the decision of the court of appeals should be reversed, and this litigation should be deferred in its entirety until the President leaves office.

ARGUMENT**I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.****A. A Personal Damages Action Against An Incumbent President Would Interfere With The Discharge Of A President's Article II Responsibilities And Jeopardize The Separation Of Powers.****1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.**

Under our system of government, the Executive Branch is the sole responsibility of the individual who has been elected President. Anything that significantly affects that individual will affect the functioning of the Executive Branch as well. For this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

That the President "occupies a unique position in the constitutional scheme" (*Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power. The President alone is director of all the executive departments and Commander-In-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed and to conduct foreign policy. U.S. CONST.

art. II, §§ 2-3. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. See THE FEDERALIST Nos. 70-77 (Alexander Hamilton).⁵

The extraordinary character of the Presidency in this respect is woven into the very fabric of the Constitution. The Constitution envisions that Congress will be in session for a period of time and then adjourn. U.S. CONST., art. I, §§ 4, 5, 7. The Presidency, however, is always "in session;" the Presidency never adjourns.⁶ The Constitution further provides specific steps to replace the President in the event of his disability. U.S. CONST. amend. XXV, §§ 3-4. These provisions, made for no other federal officer, further confirm that the Presidency is inseparable from the individual who is President.

⁵ See PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 135 (1978): "The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government."

⁶ Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon And Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) ("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.").

The Constitution thus imposes momentous and unrelenting burdens of the Presidency. "[T]he President, for all practical purposes . . . affords the only means through which we can act as a nation" ⁷

The range of the President's functions is enormous. He is ceremonial head of the state. He is a vital source of legislative suggestion. He is the final source of all executive decision. He is the authoritative exponent of the nation's foreign policy. ⁸

Although he has many advisers, the President cannot delegate ultimate decision making authority and accountability for matters of war and peace, international relations, domestic terrorism, the economy, and other profoundly important questions of national policy, which affect millions of people in this country and around the world. The President's obligations to the office never cease; serious crises can and often do erupt unexpectedly, commanding the President's immediate attention. ⁹

⁷ George E. Reedy, *Discovering the Presidency*, N.Y. TIMES, Jan. 20, 1985, at G1, quoted in LOU CANNON, *PRESIDENT REAGAN -- THE ROLE OF A LIFETIME* 147 (1991).

⁸ HAROLD J. LASKI, *THE AMERICAN PRESIDENCY, AN INTERPRETATION* 26 (1940), quoted in CANNON, *supra* note __, at 147.

⁹ This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of a KAL Flight 007 while on vacation. CANNON, *supra* note __, at 191, 399, 420. President Carter spent one vacation reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. JIMMY CARTER, *KEEPING FAITH -- MEMOIRS OF A PRESIDENT* 57 (1982). President Clinton was notified of the terrorist (continued...)

To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the energies of a single man unsurpassed by the exigencies of any other political office in the world.¹⁰

2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With Historic Understanding.

The nation's courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753 & n.34. Accordingly, courts historically have refrained from exercising jurisdiction over the President personally, except in cases of imperative need, and only to the most limited extent possible. *See id.* at 753-54.

This Court repeatedly has recognized that the President's unique status and range of responsibilities under the Constitution distinguish him from all other federal officers. *Id.* at 749-50. A President is absolutely immune from personal liability for any action taken in connection with his official duties. *Id.* at 749. A President's communications are presumptively privileged, and that privilege can be overridden only in cases of exceptionally strong public need. *United States v. Nixon*, 418

⁹(...continued)

bombing of U.S. military personnel on the eve of the G-7 economic summit, causing him both to change his priorities for the summit and to return to the U.S. before it was over to attend memorial services. Associated Press, *Clinton Calls For Unity Against Terrorism*, CHI. TRIB., June 27, 1996, at A1.

¹⁰ LASKI, *supra* note __, p. 26.

U.S. 683, 705 (1974). Similarly, there is an "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular executive acts. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring); see *id.*, at 802-03 (plurality opinion). And the Department of Justice, speaking through then-Solicitor General Robert H. Bork, has taken the position -- based on explicit language in *The Federalist* -- that while an incumbent Vice-President is subject to a criminal prosecution, the President must be impeached and removed from office before he can be prosecuted.¹¹ All of these protections are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation

¹¹ See THE FEDERALIST No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 77, at 464 (Alexander Hamilton); *id.* No. 65, at 398-99 (Alexander Hamilton); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1966) (noting the comment of Gouvenour Morris); *id.* at 626 (comment of James Wilson). Solicitor General Bork explained that the unique burdens of the President's duties distinguished him in this regard from all other federal officers:

[The Framers] assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 17, *In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972*, (No. 73-965) (D. Md. filed Oct. 5, 1973) (C.A. App. 92).

of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.¹²

This tradition of judicial deference and restraint toward the Presidency -- a tradition that "can be traced far back into our constitutional history" (*Fitzgerald*, 457 U.S. at 753 n.34) -- bars personal damages litigation against an incumbent President. Over 150 years ago, Justice Story explained why such litigation cannot go forward while the President is in office:

There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them The president cannot, therefore, 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), quoted in *Fitzgerald*, 457 U.S. at 749.

The second and third Presidents of the United States held the same view. John Adams explained that the President personally is not subject to any process whatever, for to permit otherwise would "put it in the power of a common Justice to exercise

¹² This Court repeatedly has stated that a specific textual basis is not necessary to support such incidents of the President's office. *Fitzgerald*, 457 U.S. at 750 n.31; *Nixon*, 418 U.S. at 705 n.16.

any Authority over him and Stop the Whole Machine of Government."¹³ President Jefferson was even more emphatic:

[W]ould 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?¹⁴

As this court stated 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. at 751 n.31.¹⁵

The traditional practice has been fully consistent with this historical doctrine. While "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President," *Fitzgerald* at 753-54, it "has been taken for granted for nearly two centuries," *id.* at 758 (Burger, C.J., concurring) that one could not hale an incumbent President

¹³ THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (recording a discussion between then-Vice President Adams and Senator Oliver Ellsworth during the first Congress) (Kenneth R. Bowling and Helen E. Veit eds., 1988).

¹⁴ 10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905) (emphasis in original), quoted in *Fitzgerald*, 457 U.S. at 751 n.31.

¹⁵ While there are some statements by contemporaries of the Framers that questioned the notion of presidential immunity to civil suit, the majority in *Fitzgerald* observed in response that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

into court and seek damages from him personally. So far as can be determined, no President has ever been required to give evidence in a civil proceeding, let alone appear as a defendant. No President has ever been compelled to appear personally to testify at trial in any case, civil or criminal. President Jefferson was sued for official actions he took while he was President, but notably, not until after he left office.¹⁶ Three other Presidents had civil damages litigation pending against them during their tenure in office, but in each case, suit was filed before they took office; two were effectively disposed of before the President was sworn in; and none was actively litigated while the defendant served as President.¹⁷

¹⁶ *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411) (suit for trespass, based on federal seizure of land, dismissed for want of venue).

¹⁷ In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, (*id.* at 544), nine months before he assumed the Presidency. The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. *Id.* at 544.

In *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944 (*id.* at 31), and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. *Id.* at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable
(continued...)

In *Fitzgerald*, the Court explained that historically, the President has been subjected to a court's jurisdiction only when necessary to serve a compelling, broad-based constitutional or public interest, and only when the exercise of jurisdiction would not unduly intrude on the functions of the office. 457 U.S. at 753-54. The Court has given two examples of such exceptional cases: those seeking to curb abuses of Presidential authority and maintain separation of powers, *id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); and those seeking to vindicate the public interest in criminal prosecutions. *Id.* (citing *United States v. Nixon*, 418 U.S. at 703-13). Noting that there is a lesser public interest in actions for civil damages than in criminal proceedings, *id.* at 754 n.37, the Court in *Fitzgerald* concluded that a "merely private suit for damages based on a President's official acts" does not warrant the exercise of jurisdiction over a President. *Id.* at 754.¹⁸

¹⁷(...continued)

for injuries incurred while riding in a car leased to his campaign. Complaint, *Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960 and subsequently consolidated) (C.A. App. 128, 135) (hereinafter "*Bailey*"). The court did not permit the plaintiffs to take the President's deposition, permitting the President to respond by way of written interrogatories. *Bailey*, Order Denying Motion for Deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. See *infra* note ____.

¹⁸ In the few cases where plaintiffs have sought to compel or restrain official action by a President, courts consistently have resorted to procedural or jurisdictional devices to dismiss the claims or to avoid issuing relief directed at the President personally. See, e.g., *Mississippi v. Johnson*, 71 U.S. (4 Wall.) (continued...)

Until the unprecedented decision by the court of appeals in this case, private civil damages litigation has not been thought to warrant an exception to the teaching of the Framers. To the contrary, such litigation does not serve the broad-based, compelling public or constitutional interests enumerated in *Fitzgerald*. To allow it to proceed would be an abrupt break with well-established principles of American jurisprudence.

3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To Fulfill His Constitutional Functions.

In *Nixon v. Fitzgerald*, this Court held that the President enjoys absolute immunity from damages liability for acts within the "outer perimeter" of his official duties. 457 U.S. at 756. The logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here -- the temporary deferral of private civil litigation.

Fitzgerald relied upon three significant grounds. First, the Court was concerned that to subject a President to liability for official conduct would inhibit him in carrying out his duties fearlessly and impartially, and would inject courts improperly into Presidential decision-making. *Id.* at 752 & n.32. Second, the Court stated, "[b]ecause of the singular importance of the

¹⁸(...continued)

475, 500-01 (1866) (discretionary presidential decision making held unreviewable); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissed for lack of ripeness). See also *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion of O'Connor, J.) (relief may be directed to defendants other than President); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (same).

President's duties," the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. And third, the Court was concerned that the "sheer prominence of the President's office" would make him "an easily identifiable target for suits for civil damages." *Id.* at 752-53.

This case is different from *Fitzgerald*, of course, in that it largely does not touch upon official actions. Accordingly, it does not warrant, and the President does not seek, any immunity from liability. But because this case involves a sitting President, it directly implicates the two other critical concerns that prompted the decision in *Fitzgerald*: the President's vulnerability to civil damages actions, and the diversion of the President's time and attention to attend to such litigation. These concerns are present equally whether the lawsuit is based on private conduct or official conduct. Defending such a suit is not any less of an imposition on the President's ability to attend to his constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. Protection for the Presidency therefore is still required, albeit the much more limited protection of holding litigation in abeyance until the President leaves office.

A protracted lawsuit "ties up the defendant's time and prolongs the uncertainty and anxiety that are often the principal costs of being sued." *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993). The discovery phase alone of civil damages

litigation would be an enormous imposition on a President's time and attention. "No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage to survive that ordeal, once again at trial."¹⁹ Discovery, "used as a weapon to burden, discourage or exhaust the opponent," makes even a relatively minor case a costly and lengthy ordeal.²⁰ As this Court has recognized, "pre-trial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted).

The instant case clearly illustrates these points. Respondent's counsel have revealed their intention to pursue discovery aggressively, stating that, "all is on the table in . . . discovery . . . including evidence that can lead to admissible evidence." They announced that they will "fully pursue, and exhaustively pursue" matters that go far beyond the limited contacts between the President and the respondent alleged in the complaint, including the President's alleged "relationships with other women" and alleged use of state troopers to ap-

¹⁹ Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 GA. L. REV. 1, 11 (1992).

²⁰ Hon. William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 179 (1991).

proach women -- a line of inquiry they assert is germane to establish an alleged "pattern of conduct" of sex discrimination and misuse of government resources. They also may ask the trial court to compel an unprecedented physical examination of the President.²¹

Clearly, a President could not ignore, or leave to others to handle, a lawsuit such as this, which focuses on his personal conduct, aims to impugn his integrity, and seeks to impose hundreds of thousands of dollars in damages on him personally. Defending against such allegations would require the extensive personal involvement of the President.

Indeed, one of the most significant misconceptions in the panel majority's reasoning is the notion that the President can remain disengaged from a personal damages action brought against him. The panel majority seemed to envision that, perhaps apart from giving a deposition and consulting briefly on a few occasions with his trial counsel, the President can essentially ignore the litigation. It was even suggested that the President could forego attending his own trial. Pet. App. 23-24 (Beam, J., concurring). It should go without saying that if the President is a defendant, he will be entitled to -- and, as a practical matter, will simply have to -- devote considerable time and attention to his defense.

²¹ Transcript, *Daybreak* (CNN television broadcast, Dec. 29, 1994) at 3-4 (comments of Joseph Cammarata) (C.A. App. 117-18); Transcript, *Nightline* (ABC television broadcast, Dec. 28, 1994) at 3-4 (comments of Gilbert Davis) (C.A. App. 122-23).

This would be true whether the litigation involved allegations regarding personal misconduct, as here, or a disputed commercial transaction. Any case relating to events in which the President personally was involved would require the President's participation at almost every stage. In order to protect his interests adequately, the President, like any responsible litigant, would be required to review the complaint and answer; prepare and assure the veracity of discovery responses; retrieve and review documents; assist counsel to prepare for other witnesses' depositions; review those depositions and other evidence in the case; review the opposition's pleadings and motions; and consult with counsel throughout the case. He also would have the right and the obligation to review and approve all pleadings and motions filed on his behalf. Beyond that, the President would have to prepare for and participate in his own deposition, and finally, attend trial -- perhaps for weeks or months -- in a courtroom far from Washington.

The panel majority's antiseptic notion that the President can remain aloof from a personal damages action against him simply does not conform with reality. In truth, the litigation would command a significant part of the President's time, while the urgent business of the nation competed for his attention. The President would be put to an impossible choice between attending to his official duties or protecting his personal interests in the litigation -- a choice that is unfair both to the President and to the nation he serves.

Even one lawsuit would have the potential seriously to disrupt the President's conduct of his official duties, just as one lawsuit could disrupt the professional and personal life of any individual. But if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events. Presidents likely would become "easily identifiable target[s]" for private civil damages actions in the future. *Fitzgerald*, 457 U.S. at 753. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas at the expense of the public's interest in unimpeded constitutional governance.

In particular, any President is particularly vulnerable to politically motivated "strike suits" financed or stimulated by partisan opponents of whatever stripe, hoping to undermine a President's pursuit of his policy objectives or to attack his integrity, and thereby diminish his effectiveness as a leader. Partisan opponents would also be tempted to file suit in order to take advantage of modern discovery techniques, unknown throughout most of our history, to uncover personal and financial information about the President, his family and close associates.²² Use

²² The suit against John F. Kennedy, *supra* note ___, illustrates how plaintiffs can use litigation for purposes of political mischief and potential extortion. The plaintiffs believed President Kennedy's policies were inimical to their state. *Bailey, Reply to Objections to Cross-Interrogatories* at 4-5 (Sept. 28, 1962) (continued...)

of the judicial system in this manner would corrode the political process.

Even if a claimant has a legitimate grievance, litigation against an incumbent President can deflect the exercise of the popular will by appropriating the President's time and energy, which properly belongs not to the party who sued the President, but to the electorate. Therefore, "[w]e should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."²³

Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents against meritless lawsuits filed for purposes of harassment, publicity or partisanship. See Pet. App. 15; Resp. C.A. Br. 30, 32-33. But those devices are, of course, far from foolproof, and

²²(...continued)

(C.A. App. 156). They attempted to propound politically embarrassing interrogatories to Attorney General Robert F. Kennedy, who had been the President's campaign manager. They also sought to obtain information about Kennedy family finances, and used pleadings to allege that the President was using his office to harass them and their state. See *Bailey, Cross-Interrogatories to Robert F. Kennedy* (Sept. 20, 1962) (C.A. App. 162); *Bailey, Reply To Objections To Cross-Interrogatories* at 3-4 (Sept. 28, 1962) (C.A. App. 156). As fatuous as the allegations were, President Kennedy settled the suit for \$17,750, a significant sum in 1963. *Two Suits Against Kennedy Settled*, L.A. HERALD-EXAMINER, Apr. 2, 1963 (C.A. App. 181). Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency.

²³ Amar & Katyal, *supra* note ___, at 713.

for a variety of reasons are likely to be ineffective in protecting the President.

The strongest deterrent of unfounded lawsuits is typically financial: usually an individual will not incur the expense of suit if there is no prospect of prevailing, and will not risk sanctions under Rule 11 of the Federal Rules of Civil Procedure if the suit is found to be frivolous. But financial restraints are overcome by other incentives when -- as many prominent business, entertainment and public figures have learned to their dismay -- plaintiffs can attain instant celebrity status or political impact simply by including allegations against such figures in a complaint filed in court. The notoriety that accompanies such a lawsuit is lucrative in and of itself, in the form of book or movie contracts, for both client and lawyer. Likewise, a frivolous but embarrassing claim may be filed because the target is perceived, as a President surely would be, as vulnerable to quick settlement. As Chief Justice Burger observed, suits against Presidents can be "used as mechanisms of extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And a party whose objective is to divert the President's energy and resources, or to uncover information through discovery, or to embarrass the President by making sensational allegations, might willingly incur the costs of litigation even if there is no hope of success on the merits.

Nor does a motion to dismiss or for summary judgment promise swift or painless relief for the target of meritless litigation.

site of what respondent and the panel majority say: those cases show that requiring an incumbent President to submit as a defendant in a private damages action would go far beyond anything a court has done before.

As this Court has emphasized, the interests at stake in criminal cases are of an altogether different magnitude from the interests affected by private damages actions. See e.g., *Fitzgerald*, 457 U.S. at 754; *United States v. Gillock*, 445 U.S. 360, 371-72 (1970). Not only is the public interest in the accurate outcome of a criminal prosecution far greater see, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935), but the defendant has a constitutional right under the Compulsory Process Clause of the Sixth Amendment to obtain evidence in a criminal proceeding. *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d).²⁴

Only once in our history, in *United States v. Nixon*, 418 U.S. 683 (1974), has the Supreme Court required a sitting President to give evidence. That case, of course, involved physical evidence, not the President's own testimony. Even so, the Court could not have been clearer that the limitation on Presidential autonomy was warranted only because of the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court expressly declined to extend its holding to civil proceedings. See *Nixon*, 418 U.S. at 709-10,

²⁴ This right, of course, has no constitutional counterpart in civil cases.

711-12 & n.19. At the same time, the Court quoted, not once but twice, Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Id.* at 708 and 715 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694)).

Consistent with *Nixon* and *Burr*, lower courts have required a strong showing of need for the President's testimony.²⁵ Even then, courts have allowed it to be obtained only in a manner that limits the disruption of the President's official functions, such as by videotaped deposition.²⁶ Thus, even obtaining third-party evidence from a President is a complex and delicate matter, to be

²⁵ See *Nixon*, 418 U.S. at 713 (subpoena enforced against the President because there was a "demonstrated, specific need for evidence in a pending criminal trial"); see also *United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996) (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (quoting *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990)); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena to President when defendant failed to show "that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

²⁶ See *Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *Branscum*, *supra* note ___ (videotaped deposition); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parties would be shown at trial); *Poindexter*, 732 F. Supp. at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

done only in cases of great public need or where the constitutional right to compulsory process is at stake.

Neither of these factors is present, however, in ordinary civil litigation. Criminal prosecutions additionally carry certain important safeguards that are absent in civil litigation: they must be approved by a public official, premised on a finding of probable cause, and often require approval by a grand jury. Civil litigation, by contrast, can be filed by any individual out of any motive. In light of these differences, it is far from clear that a sitting President could constitutionally be compelled to testify as a third-party witness in an ordinary civil proceeding.

The issue here, moreover, is not whether the President can be compelled to testify as a mere witness. It is, rather, whether he can be sued as a defendant. Whatever difficulties may be involved in arranging for the President to testify as a third-party witness, those difficulties would be increased exponentially if the President were made a defendant in a civil action for damages, which has the potential to interfere much more severely, over a much more extended period of time, with his ability to fulfill the unique and extraordinarily demanding responsibilities of his office. It would be highly incongruous to subject the President -- and the nation -- to these burdens solely on the basis of a civil complaint filed against him by a private party, when the alternative -- deferral -- avoids these problems entire-

ly and provides reasonable protection for the interests of all parties.

B. "Case Management" By The Trial Court Does Not Mitigate, But Instead Exacerbates, The Separation Of Power Problems Created By Suits Against An Incumbent President.

1. "Case Management" By Federal District Courts Entangles The Branches Of Government, Rather Than Separating Them.

Even the panel majority did not deny that private damages actions against a sitting President threaten to interfere with the integrity of the Executive Branch and to undermine the separation of powers. Its solution to these problems, however, was "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. This supposed cure is worse than the disease. "Case management" by the judiciary of a suit against the Chief Executive entangles the two branches in an ongoing and mutually harmful relationship, instead of maintaining the separation of the branches, as the Constitution envisions.

The panel majority suggested that throughout the litigation, 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. Under this approach, the President would have to provide detailed information about the nature of pending Executive Branch matters requiring his attention, and the trial judge would have to pass judgment on the President's priorities. If the trial judge -- state or feder-

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