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Paula Jones 8th Circuit Merit Brief [4]

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No. 95-1853

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON
Petitioner,

vs.

PAULA JONES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR 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.

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BRIEF FOR 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-

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[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 and 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.

trict 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.

At the same time, the district court concluded, "[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~~ any loss of evidence ~~with~~ occurring through 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

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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*. *Id.*

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." *Id.* 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]

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 President, however, is always in session; the President never adjourns.[5] 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.

The unadorned words of the Constitution, moreover, cannot convey the 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."[6]

> 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.[7]

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5 *See* 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.").

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

7 Harold J. Laski, The American Presidency, an Interpretation, p. 26 (Harper & Bros. 1940)(quoted in Cannon, *supra* n. __, at 147).

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. *Fitzgerald*, 457 U.S. at 749-50. A President is absolutely immune from personal liability for any action taken in connection with his official duties. *Id.* at ___. 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 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). And the Department of Justice, speaking through then-Solicitor General Robert H. Bork, has taken the position -- based on explicit language in The Federalist Papers -- 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.[10] All of these protections are "functionally mandated

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10 *See* The Federalist No. 69, at 446 (Alexander Hamilton) (Modern Library ed., 1937); id. No. 77, at 502 (Alexander Hamilton); *id.* No. 65, at 426 (Alexander Hamilton); 2 Max Farrand, The Records of the Federal Convention of 1787, at 500 (rev. ed. 1937) (noting the comment of Gouvenour Morris); *id.* at 626 (continued...)

incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.[11]

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:

> [T]here 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

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[10](...continued)
(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 17-18, *In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972*, No. 73-965 (D. Md. filed Oct. 5, 1973) (C.A. App. 92).

[11] 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.

> 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).

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 any Authority over him and Stop the Whole Machine of Government."[12] 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?[13]

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." *Fitzgerald*, 457 U.S. at 751 n.31.[14]

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[12] 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).

[13] 10 The Works of Thomas Jefferson 404 n. (Paul L. Ford ed., 1905).

[14] While there are some statements by contemporaries of the Framers that question the notion of presidential immunity in civil suits, the majority in Fitzgerald expressly declined to credit these statements, which for the most part consist of comments made by opponents to the Constitution at state

(continued...)

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 gave 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 n.37), the Court 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.[17]

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[17] Similarly, in the few cases where plaintiffs have sought to compel or restrain official action by a President, courts consistently resort to procedural or jurisdictional devices to dismiss the claims or to avoid issuing relief directed at the President personally. *See Livingston v. Jefferson*, 15 F. Cas. 660, 665 (C.C.D. Va. 1811)(No. 8,411)(dismissed for want of venue, even though this resulted in "the inconvenience of a clear right without a remedy."); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866)(discretionary presidential decision making held unreviewable); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990)(dismissed on grounds of _____); *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972), *aff'd sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973)(dismissed on grounds of _____). *See also Franklin*, 505 U.S. at ___ (plurality opinion of O'Conner, J.) (relief may be directed to defendants other than President); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (same). More recently, it has been suggested that even declaratory relief is inappropriate against the President in official capacity cases. *See Franklin*, 505 U.S. at 802-03 (Scalia, J., concurring); *Swan v. Clinton* 1996 W.L. 365410 * (D.D.C. 1996).

discovery . . . including evidence that can lead to admissible evidence." C.A. App. 122-23 (Tr. of *Nightline* (Dec. 28, 1994). 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 approach 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 almost entirely 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

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21 *See* 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).

Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents against lawsuits filed for purposes of harassment, publicity or partisanship. See Pet. App. 15; Resp. C.A. Br. xx. But those devices are, of course, far from foolproof, and 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, or will not risk sanctions under Fed. R. Civ. P. 11 if the suit is found to be frivolous. But financial restraints are insufficient to deter such claims 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 in a complaint filed in court, and when 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 for extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And an individual whose objective is to divert the President's energy and resources, or to uncover information through the discovery process, or to embarrass the President by

al duty of the Judicial Branch to do justice in criminal prosecutions." 418 U.S. at 707.[25] The Court expressly declined to extend its holding to civil proceedings. *See id.* at 709-10, 711-12 and 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." 418 U.S. at 708 and 715 (quoting *Burr*, 25 F. Cas. 187, 192 (1807)(No. 14,694).

Consistent with *Nixon*, lower courts have required a strong showing of need for the President's testimony,[26] and even then, allowed it to be obtained only in a manner that limits the disruption of his official functions, such as by videotaped

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[25] The same need to ensure constitutionally-compelled fairness in criminal proceedings prompted Chief Justice Marshall's celebrated decision in *Burr* that a subpoena duces tecum could issue to the President on behalf of a criminal defendant. 25 F. Cas. at 33.

[26] *See United States v. 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. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quoting 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); quoting *Burr*, 25 F. Cas. at 192); *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990) (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") (footnote omitted).

grand jury must approve the charge, if it is serious. Civil litigation, by contrast, can be filed by any individual out of any motive. It would be highly incongruous to conclude that a sitting President can be subjected to the vastly greater burdens of being a defendant in a personal damages action, solely on the basis of a civil complaint filed against him by a private party, when the alternative -- deferral -- avoids these problems entirely 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. Instead of mitigating the separation of powers problems created by suits against the President, it exacerbates them. "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 trial judge would have to review the President's explanation to decide if it was adequate. If the trial court decided that the President should devote more time to the private litigation than official duties, the question would arise whether it could enforce that decision by threatening the President with contempt of court or sanctions. *See* Fed. R. Civ. P. 16(f). 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.

This state of affairs is an extraordinary affront to the separation of powers. A trial judge -- state or federal -- would be examining the official priorities of the individual in whom the whole of "the executive Power" is vested. And the judge would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them.

The nature of the President's responsibilities makes it especially inappropriate to allow an entity outside the Executive to insist on an answer to the kinds of questions that the trial judge inevitably would have to ask under this regime. The most obvious examples would be if the President sought a change in the litigation schedule to attend to a national security matter, a

sensitive diplomatic issue, or a matter on which he had received information from confidential intelligence or law enforcement sources. The trial court would immediately be enmeshed in the intractable problem of how to proceed when the basis for the President's request cannot be disclosed to anyone, perhaps even to the court.

Moreover, even seemingly minor changes in the President's schedule are imbued with significant portent by observers -- foreign and domestic -- such as when the President hastily schedules an unexpected meeting with his national security adviser, or with an ambassador, or even when the President must cancel a few hours' worth of appointments for unexplained reasons. Indeed, it is not uncommon for a President to seek to maintain a pretense of "business as usual" to mask an impending crisis. In such circumstances, simply having to ask a court for a change in the litigation schedule obviously would be highly damaging.[29]

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[29] Presidents Carter and Reagan provide dramatic examples: during the 1980 mission to rescue the hostages in Iran, President Carter "wanted to spend every moment monitoring the progress of the rescue mission, but had to stick to [his] regular schedule and act as if nothing of the kind was going on." Carter, *supra* n.__, at 514. Similarly, when the invasion of Grenada was being planned, President Reagan was week-ending at a Georgia golf club. He wanted to hurry back to Washington, but his advisors told him "that a change in [his] schedule might draw attention to the possibility of U.S. intervention." He decided therefore to remain in Georgia, but participated in meetings by way of telephone. Cannon, *supra*, n. __ at 441-42. If either President had been in a position where he was required to ask a Court to change his schedule -- even if no explanation whatsoever were required -- it could have posed a threat to the military operations.

Even in areas not involving national security, a trial court would, under the panel's "case management" approach, be in the position of second-guessing judgements that are properly made only by the Executive branch or the President himself. A myriad of important Presidential activities might warrant a change in a litigation schedule: foreign or domestic travel; contacting members of Congress to persuade them to vote for legislation; meetings with groups of citizens to call public attention to an issue; intensive briefings from advisers on complex subjects. If the President sought an adjustment in the litigation schedule for one of these reasons, the trial judge would have to decide whether the litigation took priority over these other activities. Inevitably the judge would be in the position of setting priorities not just for the litigation, but for the business of the Executive branch.[30]

The panel majority seemed to believe that untoward consequences can be averted so long as "case management" is "sensitive" enough to the demands of the President's office. Pet. App. X, X. But this misunderstands both the nature of the problem and

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30 President Carter, for example, reports in his memoirs that he cut short a vacation to return to Washington to fight for natural gas legislation that he deemed crucial to his national energy policy. Carter, *supra* n. __, at 322. If the President had been involved in some aspect of litigation rather than on vacation, under the panel majority's scenario, he would have had to ask a court -- perhaps even a state court -- for permission to change his plans. The court then would be deciding if the President's interest in passage of the natural gas legislation was sufficiently important to warrant an interruption in judicial proceedings.

and his "official" activities on the other. Political activity, of course, is one of the responsibilities of a democratically-elected official, and as has often been recognized, these kinds of distinctions are inappropriate for judges to make.[32] These problems can, and should, be avoided altogether by holding the litigation in abeyance until the defendant is no longer President.

2. "Case Management" By State Trial Courts Is Inconsistent With The Constitutional Structure.

Perhaps the clearest evidence of the superiority of deferral to "case management," given the postulates of our constitutional system, emerges when one considers that if private civil actions can be brought against a sitting President, they are likely to be brought in state courts. Two of the claims in this case are state tort claims, and one would expect that civil suits in damages against a President for matters unrelated to his official duties would often involve causes of action under state law.[33] If a suit is brought in state court, the decisions we have de-

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[32] *See United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 13__ (D.C. Cir. 1981)(courts lack "manageable standards" by which to distinguish between political and official functions); *Winpisinger v. Watson*, 628 F.2d 133, 136 (D.C. Cir. 1980) (claim deemed not justiciable because it required judicial determination of whether executive actions were motivated by genuine concern for public interest or by "political expediency").

[33] In the absence of diversity jurisdiction, suits based on a President's personal conduct ordinarily would not be removable. *See* 28 U.S.C. 1441(b), 1442(a); *Mesa v. California*, 489 U.S. 121 (1989) (prosecution based on state law against Postal Service employees held not removable in absence of colorable defense or immunity claim based on federal law).

scribed -- decisions, in effect, about the activities and priorities of the Executive branch of the federal government -- will be made in the first instance by state trial court judges, including those chosen by partisan election. There would, moreover, probably be no immediate avenue to obtain review of these decisions in a federal forum. The President's ability to obtain interlocutory appellate review of any adverse state court "case management" decision would be dependent on the procedural devices available in that state's judicial system. The only federal forum available to the President likely would be this Court -- and only after traversing multiple levels of a state's appellate system.

The vast majority of state judges would, of course, be highly conscientious in carrying out their responsibilities in such a situation, but just the possibility that an incumbent President could be subject to the jurisdiction of a state court further demonstrates that suits against a sitting President are inconsistent with our constitutional scheme. The Framers were well aware that state governments might come into conflict with the federal government, and particularly with the Executive branch. It would take little ingenuity for an individual to contrive a personal damages action against a President based on a state law claim unrelated to the conduct of his office. In an atmosphere of local partisan hostility to the President, the ability to bring such a suit in state court would be a powerful weapon in the hands of state interests -- one that the Framers

could not possibly have intended to permit. This is further evidence that the approach most faithful to our constitutional scheme is not "case management," but the simple deferral of litigation until after the President leaves office, at which time any risk of disruption of the orderly functioning of the executive is eliminated.

Finally, as we have discussed, should the Court allow personal damages litigation against incumbent Presidents to proceed, it would be a mistake to assume that such lawsuits would be few in number, or that they would be pursued in a non-abusive way. To whatever extent these effects occur, they will immediately multiply the separation of powers and federalism problems we have identified. If a President must face several aggressive lawsuits, his Administration could be not just disrupted, but disabled.

C. The Relief Sought Here Is Not Extraordinary, And Would Not Place the President "Above The Law."

A recurrent theme of both respondent and the panel majority is that the President's claim in this case is somehow extraordinary, both in the relief that it seeks and in the burden that it would place on respondent. This is wrong. The relief that the President seeks does not provide, in the panel majority's words (Pet. App. 13), a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)"; on the contrary, the relief that the President seeks -- temporary deferral of litigation -- is far from unknown in our system, and is afforded in a variety of circumstances to

public officials and private citizens alike. At the same time, the burdens that temporary deferral of the litigation would impose on plaintiffs are limited and reasonable.

1. **Deferring Litigation Is Not Extraordinary.**

The deferral that the President seeks is properly classified with an unexceptional family of doctrines -- those that provide for litigation to be stayed in certain relatively common circumstances. 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.

- The automatic stay provision of the Bankruptcy Code provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. The stay ordinarily remains in effect until the bankruptcy proceeding is completed. 11 U.S.C. § 362 (1994). That stay affects all litigation that "was or could have been commenced" prior to the filing of the petition. *Id.* Under this provision, civil actions by numerous plaintiffs -- in some proceedings, hundreds of plaintiffs -- can be stayed for extended periods.[34] Thus, if respondent had sued a party who entered bank-

[34] A bankruptcy judge also has discretion to order a stay even of third-party litigation, to which the debtor is not a party, if that litigation conceivably could have an effect on the bankruptcy estate. *See* 11 U.S.C § 105 (1994); 2 COLLIER ON BANKRUPTCY § 105.02 (Lawrence P. King ed, 15th ed. 1994), and cases cited therein.

- Courts also may defer civil litigation until the conclusion of a related criminal prosecution against the same defendant, if doing so is in the interests of justice or the public's interest in criminal law enforcement.[36] That process may, of course, take several years. During that time, the civil plaintiff -- who may have been injured by a party who engaged in criminal conduct -- is afforded no relief.

- The doctrine of primary jurisdiction, where it applies, also compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may not provide the relief they seek. This process too can take several years. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-07 (1973). This doctrine ensures that a regulatory agency will be able to pursue its institutional agenda in an orderly fashion. **[CITE; DS to provide]** The institutional interests of the Presidency are, again, surely as strong and

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[35] (...continued)
here emanates from the nature of the President's constitutional duties and principles of separation of power.

[36] *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. 1978); *Texaco Co. v. Borda*, 383 F.2d 607 (3d Cir. 1967).

should justify imposing a comparable burden on civil plaintiffs.

- 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 routinely can delay litigation for a substantial period, even though, in the end, the official may be found not to be entitled an immunity; in fact the stay attaches only in those cases where a trial court has initially rejected the claim of immunity.

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 dispel any suggestion that the President, in asking that this litigation be deferred, is somehow seeking extraordinary relief, or that holding this or any other litigation in abeyance violates a plaintiff's right to access to the courts. More specifically, these examples demonstrate that the President is seeking a form of relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

2. Presidents Remain Accountable For Private Misconduct.

The panel majority, wielding the term "immunity," also suggested at various points that the President was seeking a rule that would bar liability for alleged wrongful conduct committed outside the scope of his official responsibilities. This, of course, is untrue. The only relief the President seeks is to defer the litigation until he leaves office. At that time, he is fully prepared to go forward with the litigation under established rules. He remains accountable for his conduct and amenable to potential liability. Accordingly, relieving a President temporarily of the requirement to defend private civil damages action does not, as the respondent suggests, place the President "above the law." C.A. Brief at ___.

Deferring damages litigation manifestly does not shield Presidents from personal accountability, or give them free license to engage in private misconduct. As this Court has observed, there are formal and informal checks quite apart from civil damages that deter unlawful, tortious or unconstitutional behavior by Presidents or those who may run for office in the future. These include the prospect of impeachment in egregious cases, as well as "constant scrutiny by the press." *Fitzgerald*, 457 U.S. at 757. Plaintiffs can take their charges to the newspapers and broadcast media, as has been done here. "Other incentives to avoid misconduct . . . include a desire to earn reelection," *id.*, or in the case of those who seek the Presidency, the desire to be elected in the first instance. Further deterrence may be found in the concern of a President "for his

historical stature." *Id.* And of course, the prospect of being held liable for damages *after* leaving office remains an effective regulator of private conduct on the part of a President or candidate for that office.

Like other protections available to public officials, holding private damages litigation against a President in abeyance seeks to "advance compelling public ends." *Fitzgerald*, 457 U.S. at 758. Indeed, the law recognizes far more invasive protection -- absolute or qualified immunity from damages -- for tens of thousands of public employees.[37] These immunity doctrines can leave innocent victims wholly without remedy, even in cases where an official's conduct amounts to gross abuse of individual rights. The law protects public employees, from an officer of the law to the governor of a state, because of the public's interest in the unfettered performance of their official duties. And diplomats, members of their families and foreign heads of

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[37] *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985)(Attorney General enjoyed qualified immunity for authorizing warrantless wiretaps, notwithstanding that such wiretaps were subsequently held to be a violation of constitutional rights); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge held absolutely immune from damages notwithstanding that he ordered a mildly retarded teenager sterilized in an ex parte proceeding, without a hearing, without notice to the young woman, and without appointment of a guardian *ad litem*); *Imbler v Pachtman*, 424 U.S. 409 (1976) (prosecutor held absolutely immune from damages notwithstanding that plaintiff had successfully established in a federal habeas corpus petition that the prosecutor knowingly used false testimony at trial which led to plaintiff's murder conviction and death sentence); *Scheuer v Rhodes*, 416 U.S. 232 (1974) (qualified immunity for Governor alleged to have "intentionally, recklessly and wantonly" ordered National Guard troops to college campus, with orders that resulted in students' deaths).

state are wholly immune from liability in this country, even for personal misconduct and criminal acts.[38] Due to similarly potent public interests, the far more modest accommodation of temporarily excusing the President from the burdens of private civil litigation simply regulates the process by which damage claims are pursued, in a manner consistent with the President's official responsibilities.[39]

In sum, the President asserts a limited form of protection that is reasonably calibrated to accommodate a plaintiff's right

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38 *See, e.g., LaFontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994)(head-of-state immunity rendered President of Haiti absolutely immune from civil rights claim alleging that he ordered the murder of plaintiff's husband); *Skeen v. Brazil*, 566 F. Supp. 1414 (D.D.C. 1983)(government of Brazil, ambassador and grandson of ambassador immune from civil damages suit alleging that grandson shot plaintiff outside nightclub); *In the Matter of Terrence K.*, 138 Misc. 2d 611 (N.Y. Fam. Ct. 1988)(family court lacked jurisdiction over child protective proceeding against United Nations diplomat accused of beating his children). Head-of-state immunity, founded on long-standing principles of international common law, permits heads of state, including our own, "to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." *LaFontant*, 844 F. Supp. at 132 (citations omitted). Diplomatic immunity, founded on the Vienna Convention, is a reciprocal immunity that exists "[t]o protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates." *Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D. Va. 1995); *aff'd*, 73 F.3d 535 (4th Cir. 1996).

39 Indeed, while we seek here only to defer the plaintiff's opportunity to pursue redress, we note that courts have, with few qualms, denied damages remedies altogether in other cases. "It never has been denied that . . . immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Fitzgerald*, 457 U.S. at 754 n.37.

to seek redress in the courts and the public's right to have the person they elected President available to perform the unique and demanding responsibilities of that office. Because the plaintiff's right ultimately to seek redress is preserved, it also is in accordance with Chief Justice Marshall's declaration that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Temporarily deferring civil litigation until the defendant leaves the Oval Office therefore does not place the President "above the law."

II. THE LITIGATION OF THIS PARTICULAR PRIVATE DAMAGES SUIT AGAINST THE PRESIDENT SHOULD, IN ANY EVENT, BE DEFERRED.

A. Several Factors Weigh Heavily In Favor Of Deferring This Litigation In Its Entirety.

Even if it were determined that temporary insulation from private civil damages litigation is not presumptively mandated in every case involving the President, there remains the question of whether, under principles enunciated in this Court's separation of powers cases, litigation of this particular nature should go forward while the President is in office. We respectfully submit that it should not.

Even in the absence of a presumptive rule of deferral, courts should assess whether proceeding with a particular case is warranted if it threatens to intrude impermissibly on Presidential functions. In *Fitzgerald*, the Court framed the analysis that must be undertaken as follows: "a court, before exercising

actions. Irrespective of whether the doctrine of laches should formally apply, this fact, too, suggests that deferral is especially appropriate here. When the plaintiff has delayed extensively before suing, there is reason to think that further delay will not harm the plaintiff's interests. By the same token, when a plaintiff delays bringing suit based on pre-Presidential conduct, until the President is elected, the danger that the suit was prompted by illegitimate motives is obviously greater.

Finally, as the district court observed, "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Respondent seeks only damages. If she ultimately prevails, she will be made whole regardless of the delay.[40] Respondent also does not identify any special need for the damages she seeks and, in fact, has stated that she intends to donate any award to charity. (Dist. Ct. App. ___). Again, in a suit seeking only damages, where a plaintiff can be made whole by prejudgment interest and has disclaimed personal or expedient need for financial recovery, the danger that respondent will be prejudiced is diminished, and the justification for the potential interfer-

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[40] Prejudgment interest generally is available in appropriate circumstances in cases arising under 42 U.S.C. § 1983. *See Winter v. Cerro Gordo County Conservation Board*, 925 F.2d 1069, 1073 (8th Cir. 1991); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991). Prejudgment interest also is available under Arkansas law in appropriate cases. *Wooten v. McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981) (prejudgment interest available in contract and tort actions, provided that at time of injury, damages are immediately ascertainable with relative certainty).

Respondent instead asserted that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. The panel majority agreed, even though this Court recently ruled that "pendent appellate jurisdiction" should not be used "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995).

Swint exhibits strong skepticism toward the type of pendent jurisdiction exercised in this case. There, the Court explained that under 28 U.S.C § 1292(b), Congress gave a district court "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable," thus

> confer[ring] on district courts first line discretion to allow interlocutory appeals. If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.

115 S. Ct. 1210 (footnote omitted). Notwithstanding this language, and without any certification of the issue by the district court, the Eighth Circuit asserted pendent appellate jurisdiction over the respondent's interlocutory appeal of the stay of trial.[42]

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[41](...continued)
applicable here, where the district court's order contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

[42] Since *Swint*, numerous other circuit courts have eschewed asserting pendent jurisdiction in appeals such as this. *See, Woods v. Smith*, 60 F.3d 1161, 1166 & n.29 (5th Cir.
(continued...)

its exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion.[44]

The district court here, in deciding to postpone trial, explicitly invoked its discretionary powers over scheduling. Pet. App. 71 (citing Fed. R. Civ. P. 40). The district court then expressly based its decision on the particular circumstances of this case:

> This is not a case in which any necessity exists to rush to trial. . . . . 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.

As this passage makes clear, the district court's decision to stay trial rested upon the particular facts at hand, and review of that stay -- unlike review of its decision to reject the President's position that the entire case must be deferred as matter of law -- must address these particular facts. Because

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[44] *See, e.g., Moses H. Cone Memorial Hosp.*, 460 U.S. at 19 (reviewing district court's decision to stay federal arbitration pending disposition of a state action for abuse of discretion).

respondent's cross-appeal raised issues that clearly can be resolved separately from the President's appeal, the two issues were not "inextricably intertwined." Accordingly, even if the concept of "pendent appellate jurisdiction" survived *Swint*, the panel majority's exercise of such jurisdiction over this interlocutory appeal was erroneous.

2. The Court Of Appeals Erred In Reversing The District Court's Decision To Stay Trial In This Case.

The district court clearly had the authority to stay trial in this case. In *Landis v. North Am. Co.*, 299 U.S. 248 (1936), Justice Cardozo wrote for this Court that:

> [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 (emphasis added). Obviously, a trial here, which would require the heavy involvement of a sitting President, is a case of "extraordinary public moment".

The panel majority in this case showed none of the deference to the district court's determination required by *Landis*. Instead, it rejected the trial court's order with a single sentence: "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. This sweeping and conclusory ruling hardly represents the careful weighing of particular facts and circumstances necessary to support a conclusion that the trial court abused its discretion.

The district court, by contrast, specifically assessed the case and appropriately concluded that trial here should not proceed. For all the reasons enumerated above, the trial court found it simply would not be possible to try the case without enormous and extraordinary demands on the President's time, and that the respondent's interests would be substantially preserved notwithstanding the stay. In sum, due to these case-specific factors, the district court correctly stayed trial until the President left office. That decision was not an abuse of discretion and, if reviewed at all, should have been sustained.

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2009-1006-F
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clear to me there was

DS - draft outline
AS - revised/improved outline
Divided sections -
She did Pt I A - reworked quite a bit.
DS Pts I B, C
II A - Particular case deferred
II B - Steve Vaughn.

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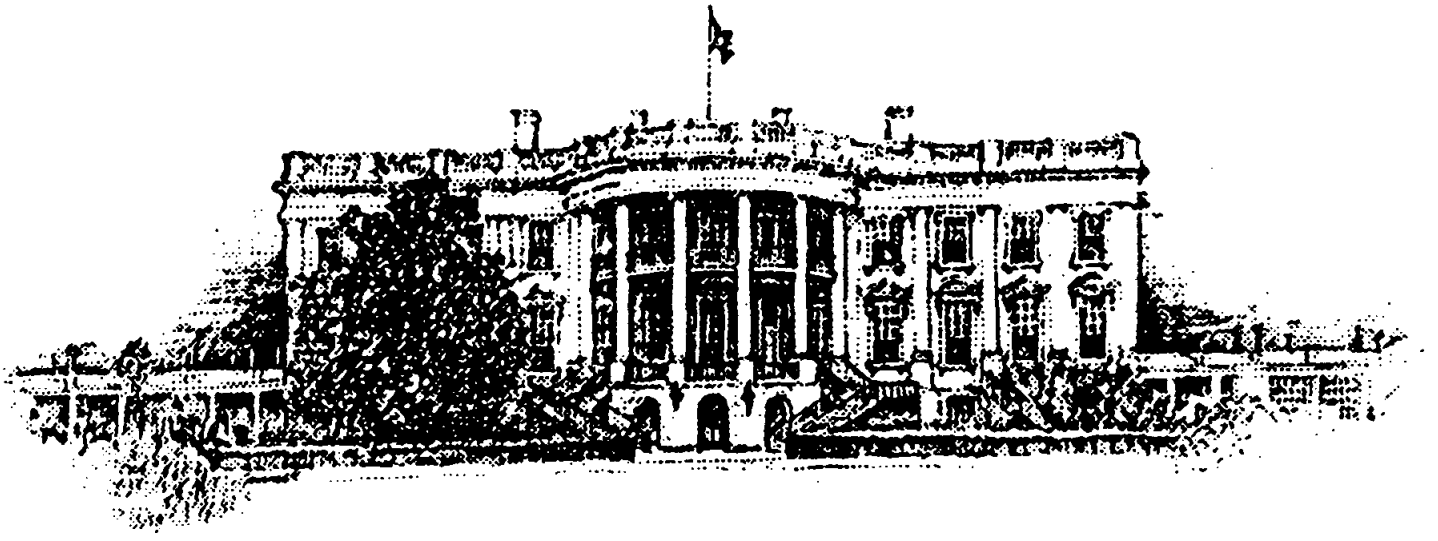

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004. draft	Clinton vs. Jones; RE: Brief for the Petitioner (25 pages)	08/04/1996	P5

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

FOLDER TITLE:
Paula Jones 8th Circuit Merit Brief [4]

2009-1006-F
db1562

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]