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Paula Jones Reply Brief [1]

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

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

MOTION OF THE UNITED STATES AS AMICUS CURIAE
FOR DIVIDED ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting petitioner. We further request that the United States be allowed 15 minutes of argument time. Petitioner wishes to cede 15 minutes of argument time to the United States and therefore joins in this motion. Granting this motion accordingly would not require the Court to enlarge the overall time for argument.

This is a private civil action for damages against the President of the United States based on conduct that is alleged to have occurred before the President took office. A divided panel of the Eighth Circuit rejected the contention, advanced by the President and by the United States as amicus curiae, that private civil actions for damages against a sitting President should be deferred until the conclusion of the President's service in office.

The court of appeals held that both discovery and trial could proceed during the President's term.

In the view of the United States, to require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties. A sitting President cannot defend himself against private litigation seeking to impose personal financial liability, and bear the substantial burdens that such an undertaking entails, without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to do so would place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions, and would therefore violate the separation of powers under the Constitution. The United States has accordingly filed a brief amicus curiae arguing that this litigation should be stayed during the pendency of the President's service in office.

The United States has a substantial institutional interest in protecting the office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be compelled to take part in judicial proceedings in state or federal court. As we note in our brief in this case (see U.S. Br. 2 n.1), the United States has participated in several other cases that have presented

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related issues of Presidential participation in judicial proceedings. We therefore believe that oral presentation of the views of the United States would be of material assistance to the Court.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996

Ad hoc case management also cannot protect a President who is faced with an ever increasing number of civil damages actions. In today's "no holds barred" political arena, allowing a single action to proceed may well encourage the filing of still more suits for purposes of publicity or partisan gain. At that point, it will be impossible for individual judges issuing piecemeal rulings in individual cases to [manage the threat to] [protect] the President -- no matter how well-intentioned those judges might be. They will simply be unable to provide a coordinated and effective response to the burgeoning obligations such litigation would impose on the President.

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No. 95-1853

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

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Respondent.

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

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For The Eighth Circuit**

REPLY BRIEF FOR THE PETITIONER

The active litigation of a personal damages action against an incumbent President is unknown in our constitutional tradition. Such litigation would divert a President's energy and attention from his official duties, and would spawn a series of constitutional confrontations between the courts and the President. The litigation of such actions should therefore be deferred, in all but the most exceptional cases, until the President leaves office.

Respondent and her amici offer a number of unfounded arguments in opposition to deferral. They assert that litigation of this kind should not be viewed as an extraordinary event, even though history clearly shows that it is. They insist, in the face of overwhelming evidence to the contrary, that the burdens of the Presidency are not so great that such litigation would impede a President's ability to discharge his responsibilities. And they contend that deferral of such actions would

place a President "above the law" -- even though the President would remain amenable to liability when he leaves office.

Ultimately, however, respondent and her amici concede that such litigation would jeopardize a President's ability to discharge his constitutional responsibilities, and that some means must be found to protect the proper functioning of government. The question is how this is to be done. Respondent's proposed solution -- ad hoc "case management" by state and federal trial judges -- is no solution at all. It would multiply the litigation burdens on the Presidency and invite the use of civil litigation as a political weapon. Most troubling, it would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President should attend to private litigation at the expense of his official duties -- rulings that inevitably would enmesh the trial court in Executive Branch management.

Deferral, by contrast, eliminates these problems. This limited form of protection accommodates both a plaintiff's right to seek legal redress, and the public interest in having a President available to perform the unique and demanding duties of his office. Deferral also preserves the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or The Separation Of Powers.

Perhaps the most striking feature of the briefs of respondent and her amici is the contrast between their abstract complaint that deferral would place the President "above the law,"¹ and their energetic assertions that trial courts should

¹ Brief for Respondent ("Resp. Br.") 16. See also Brief of *Amicus Curiae* of Law Professors in Support of Respondent ("Resp. Prof. Br.") 3; Brief for *Amicus Curiae* Coalition of American Veterans ("CAV Br.") 10-11.

conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts “owe great deference to the presidency in overseeing litigation” (Resp. Br. 34) and that the President is owed “greater solicitude than . . . other defendants.” *Id.* at 36. Respondent endorses what she calls “[t]he scheme of deference established by the court of appeals” (*id.* at 38), and confidently insists that this “scheme” should prevent “even the slightest impairment of presidential business.” *Id.* at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should “ ‘halt[] or delay[] or reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled.’ ” *Id.* at 35, 36 (quoting Pet. App. 25 (Beam, J., concurring)) (emphases added by respondent).

Respondent’s amici further advocate special procedural rules in cases where the President is a defendant, such as holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Prof. Br. 21-22; *see also* Pet. App. 23 (Beam, J., concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent’s amici eventually do, that the President “is not like any other litigant.”²

As this chorus of accommodation and deference illustrates, this case is not about whether the President is “above the law.” Rather, this case is about identifying the proper means of protecting the compelling interests that are impli-

² Brief of *Amicus Curiae* American Civil Liberties Union (“ACLU Br.”) 6.

cated when a private civil damages suit is filed against a sitting President. Respondent's "scheme of deference," however, actually endangers these interests; that is why deferral is the proper approach.

To begin with, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. But she does not repudiate the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." Pet. App. 16. The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it necessarily gives capacious discretion to trial judges.

Moreover, in the real world of litigation, it is inevitable that whenever the President seeks to postpone some scheduled aspect of the litigation, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections in all likelihood will include, as they have here, claims that the President is abusing his office to obtain some undeserved litigation advantage, or that he seeks delay for political purposes. The trial judge will then have to decide, in a highly adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this function, the trial judge will have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries -- likely to occur repeatedly throughout the litigation -- present a serious threat to separation of powers, as well as to the integrity of sensitive information about matters of national concern. See Brief for the Petitioner ("Pet. Br.") 29-34. And it should be evident that these problems are far more intractable when the President is

a defendant than when he is asked merely to give third-party testimony. *See id.* 26-29.

Ad hoc case management also cannot protect a President who is faced with an ever increasing number of civil damages actions. *See Resp. Br. 7* (quoting *Pet. App. 15*). If more and more such suits are filed for purposes of publicity or partisan gain -- and in today's "no holds barred" political arena, there is every reason to believe that they will be -- it will be impossible for individual judges issuing piecemeal rulings in individual cases to manage the threat. However well-intentioned and deferential they may be, they will simply be unable to provide a coordinated response to the burgeoning obligations such litigation would impose on the President. Only a generally applicable prophylactic will adequately prevent overburdening the Presidency.

In short, the disadvantages of respondent's scheme are great when compared to a simple rule of deferral. Respondent's scheme necessarily creates serious separation of powers problems; deferral averts those problems. Respondent's scheme augments the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, it would not justify the substantial costs that it would inflict on our system of government.

B. Respondent's Scheme Cannot Be Reconciled With *Fitzgerald* And This Court's Other Immunity Decisions.

Contrary to respondent's contention, the deferral the President seeks here is not an expansion of the absolute immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). It is a considerably narrower remedy, because it does not insulate a President from liability. Deferral is, moreover,

strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's other immunity decisions.

Respondent spends a great deal of energy arguing that *Fitzgerald* does not mean what it says. For example, respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making. Resp. Br. at 11-16. The Court, however, noted how the simple fact of on-going litigation could interfere with the performance of official duties. The Court was quite explicit in saying that "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. And the Court explained that the President's exceptional immunity is necessary because "[t]he President occupies a unique position in the constitutional scheme" (*id.* at 749) and performs "singular[ly] importan[t] . . . duties." *Id.* at 751. The Court went out of its way to note that the President is "an easily identifiable target for suits for civil damages," and found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Each of these rationales for absolute immunity in *Fitzgerald* also dictates the more modest remedy of deferral in this case.³

³ See also *id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . ."). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. Resp. Br. 11 (quoting *Fitzgerald*, 457 U.S. at 761 n.4 (Burger, C.J., concurring)). We of course, do not disagree with this statement, which addresses *absolute* immunity, in a case involving a *for-*

The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).⁴ A denial of immunity, qualified or absolute, is also immediately appealable, precisely because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870 (1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

These doctrines would make no sense if, as respondent supposes, damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction . . . from . . . dut[y]" (*Harlow*, 457 U.S. at 816), however good a public official's "lawyers and assistants" may-be. This is so even

mer President. The Chief Justice's language quoted at the beginning of this note, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation of any kind could go forward against a sitting President. In fact, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed. Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

⁴ In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

when, as is typical in immunity cases, the defendant official is represented by government lawyers. Here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal conduct by the President. The complaint unjustifiably attacks the President's integrity, alleges serious wrongdoing, and seeks to hold him personally liable for hundreds of thousands of dollars in damages. In this context, respondent's notion that a President can largely disregard the litigation -- or that he would choose to do so -- and rely instead on his lawyers, is simply implausible. *See* Pet. Br. 22-23.

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule that is a much greater imposition on potential plaintiffs than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is one of "manifest simplicity" (Resp. Br. 9), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily,⁵ and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery.⁶ Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

⁵ Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13.

⁶ Resp. Br. 27; Resp. Prof. Br. 6; ACLU Br. 4.

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