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[Clinton v. Jones Petition for a Writ of Certiorari] [Bound Samples] [1]

No. _____

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

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

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition for rehearing was filed on January 23, 1996, and denied on March 28, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

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U.S. CONST. amend. XXV

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STATEMENT OF THE CASE

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

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office, asserting that such a course was required by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed trial until the President's service in office expired, but held that discovery

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

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

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could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil litigation challenging his official acts as President. While the holding of *Fitzgerald* did not apply to this case because President Clinton was sued primarily for actions taken before he became President, the court stated that "[t]he language of the majority opinion" in *Fitzgerald*

> is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office.

Pet. App. 68-69. The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge stayed the trial "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.[2]

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

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

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

Judge Bowman found the reasoning in *Fitzgerald* "inapposite where only personal, private conduct by a President is at issue," (Pet. App. 11), and determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. He also wrote that

> [t]he Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered.

Pet. App. 9.

Judge Bowman further concluded that it would be an abuse of discretion to stay all proceedings against an incumbent President, asserting that the President "is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion." Pet. App. 16. Ruling that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the stay of trial issued by the district court, (Pet. App. 5 n.4) (citing *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995), *cert. denied*, 1996 WL 26287 (Apr. 29, 1996)), Judge Bowman accordingly reversed that stay as an abuse of discretion. Pet. App. 13 n.9.

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[3] Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 (1994) and the collateral order doctrine, as articulated in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) and *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones' cross-appeal. *See infra* pp. 16-19. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

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

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

Judge Ross dissented, stating that the "language, logic and intent" of *Fitzgerald*

> directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term.

Pet. App. 25. Judge Ross observed that "[n]o other branch of government is entrusted to a single person," and determined that

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> [t]he burdens and demands of civil litigation can be expected . . . to divert [the President's] energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result . . . would impair the integrity of the role assigned to the President by Article II of the Constitution.

Pet. App. 26.

Judge Ross also stated that private civil suits against sitting Presidents

> create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes.

Pet. App. 28. At the same time, he reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

The court of appeals denied the President's request for a rehearing en banc, with three judges not participating and Judge McMillian dissenting. Judge McMillian said the majority's holding had "demean[ed] the Office of the President of the United States." Pet. App. 32. He wrote that the panel majority "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed filing for at least *three* years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

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REASONS FOR GRANTING THE PETITION

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

The decision of the court below is erroneous in several respects. It is inconsistent with the reasoning of *Nixon v. Fitzgerald* and with established separation of powers principles. The panel majority's suggested cure for the separation of powers problems -- "judicial case management sensitive to . . . the demands of the President's schedule" (Pet. App. 13) -- is worse than the disease: it gives a trial court a general power to set priorities for the President's time and energies. The panel majority also grossly overstated the supposedly extraordinary character of the relief that the President seeks. The deferral of litigation for a specified, limited period is far from unknown in our judicial system, and it is routinely afforded in order to protect interests that are not comparable in importance to the interests the President advances here.

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

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

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

Accordingly, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. 753. Indeed, "[t]his tradition can be traced far back into our constitutional history." *Id.* at 753 n.34. The form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit against him until he leaves office -- is modest. It is far more limited, for example, than the absolute immunity that *Fitzgerald* accorded all Presidents for actions taken within the scope of their presidential duties.

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

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The panel majority ignored this second basis for the holding of *Fitzgerald.* The first basis of *Fitzgerald* -- that the threat of liability might chill official Presidential decision making -- is, of course, largely not present here, and accordingly, the President does not seek immunity from liability.[4] But the second danger to the Presidency emphasized by *Fitzgerald* -- the burdens inevitably attendant upon being a defendant in a lawsuit -- clearly exists here. The court of appeals simply disregarded this "unique risk[] to the effective functioning of government."

2. As the *Fitzgerald* Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. *See* 457 U.S. at 751 n.31. Justice Story stated that

> [t]he president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability.*

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added), *quoted in Fitzgerald,* 457 U.S. at 749. Senator Oliver Ellsworth and then-Vice President John Adams, both delegates to the Constitutional Convention, also agreed that

> the President, personally, was not . . . subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.

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

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

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The panel majority ignored this second basis for the holding of *Fitzgerald*. The first basis of *Fitzgerald* -- that the threat of liability might chill official Presidential decision making -- is, of course, largely not present here, and accordingly, the President does not seek immunity from liability.[4] But the second danger to the Presidency emphasized by *Fitzgerald* -- the burdens inevitably attendant upon being a defendant in a lawsuit -- clearly exists here. The court of appeals simply disregarded this "unique risk[] to the effective functioning of government."

2. As the *Fitzgerald* Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. *See* 457 U.S. at 751 n.31. Justice Story stated that

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President Jefferson was even more emphatic:

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

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

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

The panel majority envisioned that, throughout the course of litigation against him, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. If the President disagreed with a decision of the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16. In other words, under the panel's approach, a trial court could insist, before con-

sidering a request by the President for adjustment in the litigation schedule, that the President provide a "specific, particularized" explanation of why he believed his official duties prevented him from devoting his attention to the litigation at that time. The court would then be in the position of repeatedly evaluating the President's official priorities -- precisely what Jefferson so feared.

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

4. The panel majority similarly attempted to downplay the demands that defending private civil litigation would impose on the President's time and energies. Pet. App. 13-15. The concurring opinion in particular likened the defense of a personal damages suit to the few instances when Presidents have testified as witnesses in judicial or legislative proceedings. Pet. App. 22-23. This notion is implausible on its face; there is no comparison between being a defendant in a civil damages action and merely being a witness. Even so, Presidents have been called as witnesses only in cases of exigent need, and only under carefully controlled circumstances designed to minimize intrusions on the President's ability to carry out his duties.

A sitting President has never been compelled to testify in civil proceedings. Presidents occasionally have been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (*Fitzgerald*, 457 U.S. at 754) and the defendant's Constitutional right to

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compulsory process (U.S. CONST. amend. VI; *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)) -- factors that are, of course, not present here. But even in those compelling cases, as Chief Justice Marshall recognized, courts are not "required to proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). Instead, courts have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that limits the disruption of his official functions, such as by videotaped deposition.[5]

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

[5] *See, e.g.*, *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House); *United States v. Poindexter*, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (videotaped deposition); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena because defendant failed to show that President's testimony would support his defense), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

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

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

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

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

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

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

[8] Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988).

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

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

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

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

[10] *See, e.g.*, *Koester v. American Republic Invs.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976).

not provide the relief they seek. This process too can take several years. *See, e.g.*, *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-07 (1973). And public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals can routinely delay litigation for a substantial period.

We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself "above the law," or that holding this litigation in abeyance would impermissibly violate a plaintiff's entitlement to access to the courts. More specifically, these examples demonstrate that what the President is seeking -- the temporary deferral of litigation -- is relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

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

1. Respondent cross-appealed to challenge the district court's order to stay trial. Ordinarily, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. *See* 28 U.S.C. § 651 (1994).[11] In asserting that jurisdic-

[11] Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." *See, e.g.*, *Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993);

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tion existed for her cross-appeal, the respondent did not seek such a writ or contend that the stay was appealable under 28 U.S.C. § 1291 (1994) as a final order, or as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, respondent asserted, and the panel majority found, that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. 5 n.4.

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

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

Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, it is not applicable here, where the district court's order clearly contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

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

> This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident . . . and desperately needs to recover . . . damages . . . . It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.
>
> The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court . . . . Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

Review of the district court's discretionary decision to postpone the trial -- unlike review of its decision to reject the President's position that the entire case should be deferred as a matter of law -- must address these particular facts of this case. Thus the respondent's cross-appeal raised issues that, far from being "inextricably intertwined" with the President's submission, can be resolved separately from it. The panel

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majority's expansion of the court of appeals' jurisdiction over this interlocutory appeal was in error.

2. The decision to reverse the district court also was incorrect on the merits. As Justice Cardozo explained for this Court in *Landis v. North Am. Co.*, 299 U.S. 248 (1936), a trial judge's decision to stay proceedings should not be lightly overturned:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Id. at 254-55. Indeed, the Court in *Landis* specifically stated that

> [e]specially in cases of extraordinary public moment, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.

Id. at 256.

The panel majority justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. It is unclear what the panel meant by labeling the district court's order the "functional equivalent" of "temporary immunity", inasmuch as the district court held that the litigation could go forward through all steps short of trial. But it is entirely clear that the panel majority, in its sweeping and conclusory ruling, did not begin to conduct the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion.

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

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

Now, a court for the first time in history has held that a sitting President is required to defend a private civil damages action. This holding breaches historical understandings that are as appropriate today as ever before.[12] The court in *Fitzgerald* specifically anticipated the threat posed by suits of this kind. Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion). In these circumstances, the fact that there is "no historical record of numerous

[12] Heretofore, there have been no private civil damages suits initiated or actively litigated while the defendant was serving as President. While there are recorded private civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all were underway before the defendant assumed office. The first two were dismissed by the time the defendant became President; after each took office, the dismissal was confirmed on appeal. *See New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). The Kennedy case was filed while he was a candidate, and was settled after President Kennedy's inauguration, without any discovery against the Chief Executive. *See*, *Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960).

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suits against the President" -- as there was no comparable record before *Fitzgerald* (*id.* at 753 n.33) -- provides no reassurance at all that this case will be an isolated one.

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

CONCLUSION

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

Respectfully submitted,

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May 15, 1996

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42 U.S.C. § 1983 (1994).....App. 82

42 U.S.C. § 1985 (1994).....App. 82

50 U.S.C. app. § 510 (1988).....App. 84

50 U.S.C. app. § 521 (1988).....App. 84

50 U.S.C. app. § 525 (Supp. V 1993).....App. 85

FED. R. CIV. P. 40.....App. 85

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee - Cross-Appellant,

v.

William Jefferson Clinton,

Appellant - Cross-Appellee.

Danny Ferguson, Defendant.

United States of America; Akhil Reed Amar, Southmayd Professor of Law Yale Law School; Susan Low Bloch, Professor of Law, Georgetown Law School; Harold H. Bruff, Donald Phillip Rothschild Research Professor, George Washington University National Law Center; Susan Estrich, Robert Kingsley Professor of Law and Political Science, University of Southern California Law Center; Richard H. Fallon, Jr., Professor of Law, Harvard Law School; Daniel A. Farber, Henry J. Fletcher Professor & Associate Dean, University of Minnesota Law School; Philip P. Frickey, Faegre & Benson Professor, University of Minnesota Law School; Paul D. Gewirtz, Potter Steward Professor of Constitutional Law, Yale Law School; Gerald Gunther, William Nelson Cromwell Professor, Stanford Law School; John C. Jeffries, Jr., Emerson G. Spies Professor and Horace W. Goldsmith Research Professor and Academic Associate Dean, University of Virginia School of Law; Sanford Levinson, W. St. John Garwood & W. St. John Garwood Jr. Regents Chair in Law, University of Texas School of Law;

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Burke Marshall, Nicholas deB. Katzenbach Professor Emeritus, Yale Law School; Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center; Suzanna Sherry, Earl R. Larson Professor, University of Minnesota Law School; Steven H. Shiffrin, Professor of Law, Cornell Law School; Kathleen M. Sullivan, Professor of Law, Stanford Law School; Laurence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School; The American Civil Liberties Union Foundation; Stephen B. Burbank, Robert G. Fuller, Jr. Professor of Law, University of Pennsylvania Law School; William Cohen, C. Wendell and Edith M. Carlsmith Professor of Law, Stanford University Law School; Larry Kramer, Professor of Law, New York University Law School; Deborah J. Merritt, Professor of Law and Women's Studies, University of Illinois College of Law; Geoffrey P. Miller, Kirkland & Ellis Professor of Law, The University of Chicago Law School; Robert F. Nagel, Ira Rothgerber Professor of Constitutional Law, University of Colorado Law School; Richard Parker, Professor of Law, Harvard Law School; L.A. Scot Powe, Jr., Anne Green Regent Professor of Law, University of Texas Law School; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law; William Van Alstyne, William R. and Thomas C. Perkins Professor of Law, Duke University School of Law,

Amicus Curiae.

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Ira Rothgerber Professor
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Amicus Curiae.

Decided and Filed January 9, 1996

Appeals from the United States District Court
for the Eastern District of Arkansas

Before BOWMAN, ROSS, and BEAM, Circuit Judges.

BOWMAN, Circuit Judge.

We have before us in this appeal the novel question whether the person currently serving as President of the United States is entitled to immunity from civil liability for his unofficial acts, *i.e.*, for acts committed by him in his personal capacity rather than in his capacity as President. William Jefferson Clinton, who here is sued personally, and not as President, appeals from the District Court's decision staying trial proceedings, for the duration of his presidency, on claims brought against him by Paula Corbin Jones. He argues that the court instead should have dismissed Mrs. Jones's suit without prejudice to the refiling of her suit when he no longer is President. Mr. Clinton also challenges the District Court's decision to allow discovery to proceed in the case during the stay of the trial. Mrs. Jones cross-appeals, seeking to have the stays entered by the District Court lifted, so that she might proceed to trial on her claims.[1] We affirm in part and reverse in part, and remand to the District Court.[2]

[1] In addition to staying the trial on Mrs. Jones's claims against Mr. Clinton, the District Court also stayed trial against Mr. Clinton's co-defendant in the suit, Arkansas State Trooper Danny Ferguson.

[2] In addition to the briefs of the parties, amicus briefs have been filed in support of Mr. Clinton by the United States and by a group of law professors including Professors Amar, Bloch, Bruff, Estrich, Fallon, Jr., Farber, Frickey, Gewirtz, Gunther, Jeffries, Jr., Levinson, Marshall, Resnik, Sherry, Shiffrin, Sullivan, and Tribe; and in support of Mrs. Jones by The American Civil Liberties Union Foundation and by a group of law profes-

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On May 6, 1994, Mrs. Jones filed suit in the District Court against Mr. Clinton and Danny Ferguson, an Arkansas State Trooper who was assigned to Mr. Clinton's security detail during his tenure as governor of Arkansas, for actions alleged to have occurred beginning with an incident in a Little Rock, Arkansas, hotel suite on May 8, 1991, when Mr. Clinton was governor and Mrs. Jones was a state employee. Pursuant to 42 U.S.C. § 1983 (1988), Mrs. Jones alleges that Mr. Clinton, under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her. She further alleges that Mr. Clinton and Trooper Ferguson conspired to violate those rights, a claim she brings under 42 U.S.C. § 1985 (1988). Her complaint also includes two supplemental state law claims, one against Mr. Clinton for intentional infliction of emotional distress and the other against both Mr. Clinton and Trooper Ferguson for defamation.

Mr. Clinton, asserting a claim of immunity from civil suit, filed a motion to dismiss the complaint without prejudice to its refiling when he is no longer President or, in the alternative, for a stay of the proceedings for so long as he is President. On December 28, 1994, the District Court, rejecting the application of absolute immunity, denied Mr. Clinton's motion to dismiss the complaint. The court did find, however, that for separation of powers reasons Mr. Clinton was entitled to a "temporary or limited immunity from trial," [3] and thus granted his request to stay the trial for the duration of Mr. Clinton's service as President. *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994). Concluding that the claims

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sors including Professors Burbank, Cohen, Kramer, Merritt, Miller, Nagel, Parker, Powe, Jr., Presser, Rotunda, and Van Alstyne.

[3] The District Court also justified the stay on the basis of its authority under Rule 40 of the Federal Rules of Civil Procedure and "the equity powers of the Court." *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994).

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against Trooper Ferguson are factually and legally intertwined with the claims against Mr. Clinton, the court also stayed the trial against Trooper Ferguson for as long as Mr. Clinton is President, but permitted discovery on Mrs. Jones's claims against both Mr. Clinton and Trooper Ferguson to go forward. On appeal, Mr. Clinton seeks reversal of the District Court's rejection of his motion to dismiss the complaint on the ground of presidential immunity and asks us to order that court to dismiss Mrs. Jones's action in its entirety, without prejudice. In the alternative, he asks this Court to reverse the decision denying his motion to stay discovery. Mrs. Jones cross-appeals the District Court's decision to stay the trial of her claims against both Mr. Clinton and Trooper Ferguson.[4]

Mr. Clinton argues that this suit should be dismissed solely because of his status as President. The immunity he seeks would protect him for as long as he is President, but would expire when his presidency has been completed. The question before us, then, is whether the President is entitled to

[4] Mr. Clinton argues that we do not have jurisdiction to hear Mrs. Jones's cross-appeal from the orders staying the trial, as they are non-final, interlocutory orders. We conclude, however, that Mrs. Jones's cross-appeal is "inextricably intertwined" with Mr. Clinton's appeal, which is before us under the immunity exception to the general rule that only final judgments are appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Thus the orders staying trial are presently appealable under our "pendent appellate jurisdiction." *See Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995) (analyzing *Swint v. Chambers County Commission*, 115 S. Ct. 1203 (1995), and concluding that pendent appellate jurisdiction remains a viable concept in the Eighth Circuit). All issues raised in the appeal and the cross-appeal (with the exception of those portions of the orders concerning the defamation claim against Mr. Clinton, *see infra* note 7) -- the challenges to the non-dismissal of the suit, to the stays of trial, and to the allowance of discovery -- are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency, from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" than these, where answering one question of law resolves them all.

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immunity, for as long as he is President, from civil suits alleging actionable behavior by him in his private capacity rather than in his official capacity as President. We hold that he is not.

We start with the truism that Article II of the Constitution, which vests the executive power of the federal government in the President, did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society. As the Supreme Court has observed, "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . . ." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Nevertheless, mindful that for the sake of the nation's general good the Constitution empowers officials to act within the scope of their official responsibilities, the Supreme Court has recognized "that there are some officials whose special functions require a full exemption from liability" for their performance of official acts. *Id.* at 508. The list of those entitled to absolute immunity from civil liability includes the President of the United States for his official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); members of Congress for their legislative acts, regardless of motive, under the Speech and Debate Clause, U.S. Const. art. I, § 6, *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (per curiam); *Tenney v. Brandhove*, 341 U.S. 367, 372, 377 (1951); judges in courts of general jurisdiction for judicial acts, *Stump v. Sparkman*, 435 U.S. 349, 359-60 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); prosecutors for prosecutorial functions, *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); and certain executive officials performing certain judicial and prosecutorial functions in their official capacities, *Butz*, 438 U.S. at 514-15. In addition, witnesses are entitled to absolute immunity from civil suit for testimony given in judicial proceedings, *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983), and even

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government officials whose special functions do not require a full exemption from liability may have a more limited qualified immunity for their official acts, *e.g.*, *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (school officials); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (officers of the Executive Branch); *Pierson*, 386 U.S. at 557 (police officers making an arrest). We are unaware, however, of any case in which any public official ever has been granted any immunity from suit for his unofficial acts, and neither the Supreme Court nor any other court, the District Court excepted, appears to have addressed the precise issue before us today: whether the President is entitled to immunity for the duration of his presidency when sued for his unofficial actions.

The immunity that has been found for official acts is not the product of a prudential doctrine created by the courts and is not to be granted as a matter of judicial largesse. *Cf. Imbler*, 424 U.S. at 421 ("[O]ur earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983."). Rather, the question whether to grant immunity to a government official is "guided by the Constitution, federal statutes, and history" and is informed by public policy. *Fitzgerald*, 457 U.S. at 747. "In the case of the President the inquiries into history and policy . . . tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure." *Id.* at 748. Thus the historical "inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers." *Id.*

There is no suggestion in this case that federal legislation is the source of either the immunity Mr. Clinton seeks or an abrogation of a previously declared presidential immunity.

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Cf. id. at 748 n.27 (noting that the causes of action in the case were "implied" in the Constitution and federal law, and therefore declining to "address directly the immunity question as it would arise if Congress expressly had created a damages action against the President" for his official acts). Nor is presidential immunity of any kind explicit in the text of the Constitution. Instead, whatever immunity the President enjoys flows by implication from the separation of powers doctrine, which itself is not mentioned in the Constitution, but is reflected in the division of powers among the three branches. *See* U.S. Const. arts. I, II, III. The Supreme Court in *Fitzgerald*, after an exhaustive examination of the history and the constitutional significance of the presidency, held that absolute immunity from civil liability for official acts is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of separation of powers and supported by our history." 457 U.S. at 749. There is a "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743.

The parties agree, and so do we, that the fundamental authority on the subject of presidential immunity is the plurality opinion in *Fitzgerald.* As noted above, the issue before the Court in that case was whether the President is entitled to absolute immunity (rather than qualified immunity or no immunity at all) from personal civil liability for his official acts. By only a five-to-four majority, the Court held that, "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. By definition, unofficial acts are not within the perimeter of the President's official responsibility at all, even the outer pe-

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rimeter.[5] The Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion, here advanced by Mr. Clinton, that beyond this outer perimeter there is still more immunity waiting to be discovered. We thus are unable to read *Fitzgerald* as support for the proposition that the separation of powers doctrine provides immunity for the individual who serves as President from lawsuits seeking to hold him accountable for his unofficial actions. *See id.* at 759 (Burger, C.J., concurring) ("a President, like Members of Congress, judges, prosecutors, or congressional aides--all having absolute immunity--[is] not immune for acts outside official duties").[6] Moreover, having considered the arguments put forward in the present case, we cannot discern any reason grounded in the Constitution for extending presidential immunity beyond the outer perimeter delineated in *Fitzgerald.* Accordingly, we hold that a sitting President is not immune from suit for his unofficial acts. In this case it is undisputed that most of the acts alleged by Mrs. Jones clearly fall outside the zone of official presidential responsibility, given that they occurred while Mr. Clinton was still governor of Arkansas.[7]

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[5] We note that the dissenting opinion in the present case does not mention *Fitzgerald's* "outer perimeter," much less explain how unofficial acts could come within the protected zone.

[6] The dissenting opinion, while liberally citing and quoting Chief Justice Burger's concurrence, *post* at 27-28, 31 [App. 26-27, 30], does not mention that the Chief Justice expressly stated that the President is "not immune for acts outside official duties."

[7] Mrs. Jones's state law defamation claim concerns actions alleged to have been taken by Mr. Clinton's presidential press secretary while Mr. Clinton was President. The question whether these actions fall inside the "'outer perimeter' of [the President's] official responsibility," *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982), so as to come within the scope of the President's absolute immunity for official acts, is not free from doubt. This particular issue has not been addressed by the District Court, and the record as to the circumstances of the press secretary's statements is not

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Stressing that the immunity claimed here is only temporary (until the end of Mr. Clinton's presidency), Mr. Clinton and his amici would have us consider the nature of Mrs. Jones's complaint, as well as the timing of the filing of her suit (apparently just within the statute of limitations), and conclude that her suit is neither important nor urgent, and certainly not consequential enough to trump Mr. Clinton's claim to temporal immunity from suit. But that is not the test. Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws. " 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). Mrs. Jones retains that right in her suit against Mr. Clinton, regardless of what her claims may be or when her suit was filed (if otherwise timely filed), provided that she is not challenging actions that fall within the ambit of official presidential responsibility. We further reject the suggestion that Mrs. Jones's motives in filing suit, alleged to be political, should be examined, and that her suit should be dismissed if we are persuaded that her objective in bringing the suit is less than pure. Such an approach would convert a presidential immunity analysis into the taking and weighing of accusations and recriminations, an exercise unnecessary and inappropriate to the proper determination of a claim of immunity based on the Constitution.

Mr. Clinton argues that, if he is presently amenable to suit for his private acts, the proceedings against him inevitably will intrude upon the office of President, in contravention of *Fitzgerald*'s teachings, noting the Court's concern that the "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. Thus, Mr. Clinton

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fully developed. We therefore leave this issue for initial resolution by the District Court after remand and upon a more complete record.

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would have us ignore the line that *Fitzgerald* draws between official and unofficial acts and instead "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch," the analysis undertaken by the Court in reaching its decision on the question of presidential immunity for official acts. *Id.* at 754. But the Court in *Fitzgerald* was troubled by the potential impact of private civil suits arising out of the President's performance of his official duties on the future performance of those duties, not by whether the President *qua* individual citizen would have the time to be a defendant in a lawsuit. As the Court explained, "[A] President must concern himself with matters likely to 'arouse the most intense feelings,' " and "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (citations to quoted cases omitted). It is clear from a careful reading of *Fitzgerald* that the justification for the absolute immunity conferred in that case was concern that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process. The rationale of the *Fitzgerald* majority is that, without protection from civil liability for his official acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability. This rationale is inapposite where only personal, private conduct by a President is at issue.

Mrs. Jones's claims, except for her defamation claim,[8] concern actions by Mr. Clinton that, beyond cavil, are unrelated to his duties as President. This lawsuit thus does not implicate presidential decision-making. If this suit goes forward, the President still will be able to carry out his duties

[8] *See supra* note 7.

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without any concern that he might be sued for damages by a constituent aggrieved by some official presidential act. Though amenable to suit for his private acts, the President retains the absolute immunity found in *Fitzgerald* for official acts, and presidential decision-making will not be impaired. "In defining the scope of an official's absolute privilege, . . . the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.* at 755. We see no connection, much less a close one, between the unofficial actions Mr. Clinton wishes to shield from judicial process and the justifying purposes of presidential immunity as set forth by the Court in *Fitzgerald.*

Mr. Clinton argues that denying his claim to immunity will give the judiciary *carte blanche* to intrude unconstitutionally upon the Executive Branch and in fact will disrupt the performance of his presidential duties and responsibilities. As the argument goes, because a federal court will control the litigation, the Third Branch necessarily will interfere with the Executive Branch through the court's scheduling orders and its powers to issue contempt citations and sanctions. But Mr. Clinton's sweeping claim that this suit will allow the judiciary to interfere with the constitutionally assigned duties of the Executive Branch, and thus will violate the constitutional separation of powers doctrine if immunity is not granted, without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit (and, unlike the dissent, *post* at 30-31, 32 [App. 29-30, 31], we think it is Mr. Clinton's burden to do so), is insufficient ground for granting presidential immunity, even temporarily. *See Butz*, 438 U.S. at 506 ("[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); *cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding no presidential privilege attaches to presidential communications subpoenaed in criminal case when asserted privilege "is based only on the

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generalized interest in confidentiality"). We reject Mr. Clinton's argument, and instead focus our attention on the true separation of powers issues, which we already have discussed, upon which the question of presidential immunity hinges.

"[T]he Constitution by no means contemplates total separation of each of [the] three essential branches of Government." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam). Under the checks and balances provided for in the Constitution, all branches have the capacity to intrude in some way upon the province of the other branches. But under the Constitution, and because of those same checks and balances, no one branch may intrude upon another to such an extent that the threatened branch is rendered incapable of performing its constitutionally assigned duties. *See id.* at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."). What is needed, we believe, to avoid a separation of powers problem is not immunity from suit for unofficial actions, an immunity that would accord the President a degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens), but judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule. The trial court has broad discretion to control the scheduling of events in matters on its docket.[9] We have every confidence that the District Court will exercise its discretion in such a way that this lawsuit may move forward with the

[9] Notwithstanding the District Court's broad discretion in matters concerning its own docket, the alternative rationale for the stays the court granted--its power under Federal Rule of Civil Procedure 40 and "the equity powers of the Court," *Jones v. Clinton*, 869 F. Supp. at 699--attempts to justify orders that we consider an abuse of discretion. 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.

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reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties.

The unfettered filing of numerous vexatious or frivolous civil lawsuits against sitting Presidents for their unofficial acts that Mr. Clinton and the dissenting opinion in this case envision if Mr. Clinton is not granted temporal immunity from Mrs. Jones's lawsuit is not only speculative, but historically unsupported. To date no court ever has held that an incumbent President has any immunity from suit for his unofficial actions. Although our Presidents never have been recognized as having any immunity from lawsuits seeking remedies for civil liabilities allegedly incurred by them in their personal dealings, it would appear that few such lawsuits have been filed.[10]

While the President himself and his official conduct inevitably have the high visibility that concerned the Court in *Fitzgerald*, 457 U.S. at 753 (noting "the visibility of [the President's] office and the effect of his actions on countless people" as setting him up as "an easily identifiable target for

[10] The parties have identified only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties. *See also Jones v. Clinton*, 869 F. Supp. at 697. Those suits were against Theodore Roosevelt, Harry S Truman, and John F. Kennedy. In each case, the action was filed before the defendant began serving as President, and the suits against Presidents Roosevelt and Truman were already on appeal before those men assumed the office of President. *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904) (per curiam mem.); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). It does not appear that either Mr. Roosevelt or Mr. Truman claimed any immunity from suit. In the action against Mr. Kennedy, he asserted, post-election, that he was temporarily protected from suit under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-93 (1988 & Supp. V 1993), given his status as Commander-in-Chief. The court denied Mr. Kennedy's motion for a stay, apparently without a written opinion, and the case eventually settled. *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962); *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. 1962).

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suits for civil damages"), his unofficial, private conduct is on a different footing. Although such conduct may attract widespread attention when someone elects to make it public, the unofficial acts of the person who serves as President, unlike the President's official acts, are not likely to affect "countless people." Rather, unofficial conduct will affect only those who traffic with the President in his personal capacity. Thus the universe of potential plaintiffs who might seek to hold the President accountable for his alleged private wrongs via a civil lawsuit is considerably smaller than the universe of potential plaintiffs who might seek to hold the President accountable for his official conduct; in the latter case, the plaintiff could be virtually anyone who feels aggrieved by presidential action. If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Finally, we reject the notion that presidential immunity in civil cases seeking a remedy for unofficial acts can be conferred on an *ad hoc* basis. There is no constitutional basis for the proposition that a court, in its discretion, could refuse to grant immunity to a President in, for example, suits for arrearages in child support or the case of the "more urgent need" of a plaintiff seeking injunctive relief, Appellant's Reply Brief at 21 n. 14, or of a plaintiff who shows exigent circumstances, while granting immunity from suits for declaratory relief or money damages where the plaintiff demonstrates no exigency. A sitting President is either entitled to immunity from suit for his unofficial acts, or he is not. As we have noted, presidential immunity is not a prudential doctrine fashioned by the

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courts. Mr. Clinton is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion. The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances. Again, we have every confidence that the District Court will discharge its responsibility to protect the President's role as our government's chief executive officer, without impeding Mrs. Jones's right to have her claims heard without undue delay. If either party believes the court is failing to discharge that responsibility, the proper course is to petition this Court for a writ of mandamus or prohibition.

To sum up, we hold that the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts. Accordingly, we affirm the District Court's decision denying Mr. Clinton's motion to dismiss Mrs. Jones's suit and the decision to allow discovery in this case to proceed. For the same reason, we reverse the District Court's order granting Mr. Clinton's motion to stay the trial of this matter for the duration of his presidency. Mrs. Jones's appeal of the District Court's post-judgment order staying discovery during the pendency of this appeal is dismissed as moot, as is Mr. Clinton's challenge to our jurisdiction to hear that appeal. The case is remanded to the District Court, with instructions to lift the stays that the court has entered and to allow Mrs. Jones's suit against Mr. Clinton and Trooper Ferguson to proceed in a manner consistent with this opinion and the Federal Rules of Civil Procedure.

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BEAM, Circuit Judge, concurring specially.

I concur in the conclusions reached by Judge Bowman. I write separately to express my views on three matters which are, in my mind, insufficiently discussed by either the opinion of the court or the dissent.

I.

Mr. Clinton and his amicus vigorously present their position on the potential impact of this civil litigation on the office and the duties of the presidency. And, without question, they raise matters of substantial concern given the constitutional obligations of the office. What is missing from their arguments is a coordinate and balanced analysis of the impact a stay of the litigation, including an embargo on all discovery, will have on Ms. Jones and her claims. This should also be of substantial concern because it involves fundamental constitutional rights governing access to and use of the judicial process under the First and Fourteenth Amendments and the right to a timely jury trial under the Seventh Amendment, to identify only a few specific omissions.

It is incorrect, in my view, for Mr. Clinton and his amicus to assert that the delay is of no consequence to Ms. Jones. Aside from the adage that justice delayed is justice denied, Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time. To argue that this problem may be dealt with by episodic exceptions when the risk of loss is apparent is to miss the point. Only rarely does life proceed in such a foreseeable fashion.

The dissent states, "[w]here there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office." *Infra* at 30 [App. 29]. The dissent urges total abeyance of both discovery and trial. I perceive this, perhaps incorrectly, to be an implicit finding that there is, indeed, no real urgency to Ms. Jones's suit for civil damages and, thus, the

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constitutionally based separation of powers doctrine *demands* that this litigation, in all of its manifestations, be abated until Mr. Clinton leaves office -- this to protect the constitutional grant of executive authority given to a sitting President. In my view, this greatly oversimplifies the issues in this appeal and overstates the danger to the presidency. The potential for prejudice to Ms. Jones, as earlier noted, reaches, or at least approaches, constitutional magnitude. If a blanket stay is granted and discovery is precluded as suggested by Mr. Clinton and his amicus, Ms. Jones will have no way that I know of (and none has been advanced by those counseling this course of action),[1] to perpetuate the testimony of any party or witness should they die or become incompetent during the period the matter is held in abeyance. Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal.

It is true that some of Ms. Jones's claims would survive to her guardian, heirs or assigns in the event of her incompetence or death, assuming a way is found to preserve crucial evidence. Her claim of defamation is in a different class. It almost certainly would be totally extinguished should either party die. This would also include her defamation claims asserted against Trooper Ferguson.

From the pleadings, the forum law applicable to her defamation claims is not easily discernible and I have not canvassed the law in every conceivable jurisdiction. It seems appropriate to note, however, that under Arkansas law, for example, the defamation claims would expire on the death of either party. *See* Ark. Code Ann. § 16-62-101(b) (Michie 1987 & Supp. 1993); *Parkerson v. Carrouth*, 782 F.2d 1449,

[1] Only the amicus brief filed by the Solicitor General fleetingly mentions this problem, but it offers no solutions.

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1451-53 (8th Cir. 1986). I think Arkansas expresses the rule of most jurisdictions. Accordingly, one can readily see the irreparable harm that a stay of this claim (assuming its viability as we must at this point) will bring to Ms. Jones. Thus, the total stay requested by Mr. Clinton and his amicus, and embraced by the dissent, will immediately produce a threat of irreparable injury.

Even though a sitting President is not immune from liability for his nonofficial conduct, it is fair to note that some of Ms. Jones's defamation claims, as presently alleged, may well fit within the "outer perimeter" of official responsibility as discussed in *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). Thus, at the very least, absolute immunity defenses to these claims should be immediately taken up and decided by the district court.

The dissent appears to recognize the potential for irreparable harm to Ms. Jones and proposes that her interests -- as balanced against the interests of Mr. Clinton -- be analyzed and weighed by shifting the burden of establishing "irreparable injury" to Ms. Jones, *along with* the additional burden on Ms. Jones of showing "that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office." *Infra* at 30-31 [App. 29-30]. The dissent cites no established authority or case precedent for this burden-shifting strategy, even by analogy to some reasonably comparable situation. I have discovered none. In this regard, there is no way, in my view, that a litigant could ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited. To determine, as a precondition to "immediate adjudication," that at some future time the lawsuit will not significantly impair the duties of the President would be an impossible task. Thus, the dissent's proposed safety valve is valueless, except in its recognition of the potential for irreparable harm to Ms. Jones caused by the total stay.

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Notwithstanding the separation of powers concerns outlined by the dissent, the burden, in my view, should be shouldered, as in any other civil litigation, by the party seeking to delay the usual course of discovery and trial. Otherwise, we will have established requirements of insurmountable proportions for any litigant who may have a viable and urgent civil claim against a sitting President or perhaps, against other important governmental figures with constitutionally established duties.

This approach to staying litigation is a well-established legal concept. Traditionally, an applicant for a stay has the burden of showing specific hardship or inequity if he or she is required to go forward. *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). This may be a *sub silentio* recognition of the terms of the Seventh Amendment. However, great public interest may authorize a stay which is not immoderate or oppressive in its consequences. *Id.* at 256. Thus, while there is a balancing to be done, the presumption is on Ms. Jones's, not Mr. Clinton's, side. When stays are granted, after the petitioner for the stay meets his "heav[]y" burden of showing "the justice and wisdom of a departure from the beaten track," they must be narrowly tailored or they will amount to an abuse of discretion. *Id.* Of course, the justice and wisdom of such a departure will take into account, in this case, that one of the parties is the sitting President of the United States. *See generally United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990). Nonetheless, I agree with Judge Bowman that Mr. Clinton should carry this initial burden, not Ms. Jones.

In determining whether to stay the litigation, Ms. Jones must be given the benefit of the concept that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, *whenever* [s]he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161 (1803) (emphasis added). More recently, and explicitly, access to the courts has been held to be a

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"fundamental constitutional right" founded in the Due Process and Equal Protection clauses. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977). This right is pivotal to our system of governance in that "civil rights actions [such as the 42 U.S.C. § 1983 action at issue here] are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Id.* at 827 (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969)).

Surely, if civil rights actions are of such importance that they may not be impeded or delayed by a person's incarceration, there must be at least an equal public interest in an ordinary citizen's timely vindication of his or her most fundamental right against alleged abuse of power by governmental officials. As noted, Ms. Jones has, in part, brought a 42 U.S.C. § 1983 action, not a mere run-of-the-mill tort claim. The violation of civil rights through the abuse of state government positions of power has been of such great public concern that Congress felt it necessary to enact section 1983 to protect the citizenry and to hold persons with positions of power accountable for its abuse. Thus, this is not a minor civil dispute to which one can assign *no* public interest beside that on the side of the presidency. The balance to be considered, therefore, is not completely one sided. There is a public interest, as well as an individual interest, on Ms. Jones's side of the scale. These interests are of such weight that, at least provisionally, Ms. Jones is entitled to proceed.

II.

I now turn to the potential impact upon the duties of the presidency. The dissent eloquently and properly raises several unanswered questions, *infra* at 29-30 [App. 28-29], concerning judicial branch interference with the functioning of the presidency should this suit be allowed to go forward. Again, I readily admit that these are matters of major concern. In my view, however, these concerns for interbranch interference are greatly overstated by Mr. Clinton and his amicus.

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Indeed, they are not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government. Judge Bowman notes at least three earlier instances in which sitting Presidents have been involved in civil litigation outside of official presidential duties. *Supra* at 14 & n.10 [App. 14 & n.10]. Also in the past, under appropriate circumstances "several American Presidents and former Presidents have given testimony under oath in judicial or quasi-judicial settings." 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 7.1 at 572 (2d ed. 1992). Former and sitting Presidents have previously submitted, either voluntarily or involuntarily, to questions under oath. *Id.* By doing so, they implicitly submitted to the common law rule, expressed by Lord Hardwicke, "that the public has a right to every man's evidence" 8 John H. Wigmore, *Evidence* § 2192, at 71 (John McNaughton ed. rev. 1961) (quoting 12 Cobbett's Parliamentary History 675, 693 (1942)).

> Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of *chief executive* of a state?
>
> There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice.

Id. at § 2370(c) (emphasis in original).

As a sitting President, Richard Nixon was a defendant in at least two civil actions. In one, Mr. Nixon was ordered by the Supreme Court to produce tapes subpoenaed by a special prosecutor. *United States v. Nixon*, 418 U.S. 683, 713 (1974). In the other, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) the court held that a President is amenable to legal process, even in his official capacity, if

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absolutely necessary. Mr. Nixon did not appeal that determination.

Also, as noted by Rotunda and Nowak, President Jimmy Carter gave videotaped testimony during his presidency that was presented at the criminal conspiracy trial of two Georgia state officials. *See* 1 Rotunda & Nowak § 7.1 at 575. Later, then-sitting President Carter provided videotaped testimony for a grand jury investigating charges that Robert Vesco had enlisted White House aid to quash extradition proceedings against him. *Id.* Finally, still-sitting President Carter was interviewed under oath by Justice Department investigators probing "for criminal, civil, and administrative purposes" any offenses resulting from Billy Carter's relations with the Libyan Government. *Id.* Further, President Gerald Ford was *compelled* to testify by videotape deposition in the criminal trial of Lynette (Squeaky) Fromme, who was charged with attempting to assassinate the President. *Id.* at 581. There are numerous other instances in which a *sitting* President has both voluntarily or involuntarily appeared at judicial proceedings and before committees of Congress. Such instances have involved, at least, Presidents Thomas Jefferson, James Monroe, Abraham Lincoln and Ulysses S. Grant. *See id.* § 7.1.

I concede that most of these situations have arisen within the framework of governmental operations. I further concede that there is not a perfect fit between the interests at play in the cited interbranch proceedings and the civil litigation at issue here. My point is that each named President has obviously scheduled these encounters without creating a cataclysmic episode in which the constitutional duties of the office have been compromised.

Ms. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President

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and Ms. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of the litigation with maximum consideration of the President's constitutional duties.

III.

My final concern involves Trooper Danny Ferguson. Even assuming, for sake of argument, the validity of every constitutional claim or defense advanced by Mr. Clinton, I can find no basis for staying discovery or trial of the claims against Trooper Ferguson. Whether private citizen or President, it is unlikely that Mr. Clinton would choose to be present at the deposition of Trooper Ferguson or any sundry witness; certainly he would not be required to attend and no prejudice is likely to result from his absence. Neither would he need to be directly concerned with other discovery directed to Trooper Ferguson although it might, admittedly, affect his interests. Even so, I find no separation of powers or other constitutional basis for a stay for this portion of the litigation, especially the discovery process.[2]

IV.

I in no way seek to downplay the concerns outlined by the dissent. At the same time, I feel that Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the

[2] Any problems that arise from attempts by Trooper Ferguson to depose or otherwise conduct discovery from Mr. Clinton, if resisted, are, in my view, separate from the issues raised in this appeal.

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rights of any party. As I have attempted to stress, nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled. With this understanding, I concur.

ROSS, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion. Instead, I would affirm the judgment of the district court concluding that the civil action should not be dismissed, but stayed during the President's term in office. Further, I would reverse the district court's conclusion allowing discovery to proceed.

In my opinion, the language, logic and intent of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), although set in the context of official acts, applies with equal force to the present factual scenario and directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term.

The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts. The *Fitzgerald* Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages. The Court stated, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751.

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This "diversion of energies" argument refers not only to the concern with whether the President will execute his official duties in a fearless and impartial manner, but also recognizes that the "President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." *Id.* at 749, 750. Article II, § 1 of the Constitution uniquely vests the entire executive power in the President. No other branch of government is entrusted to a single person. It is this singularity of the President's constitutional position that calls for protection from civil litigation.

The unofficial nature of the alleged events would not make defending a private suit for civil damages any less of a burden on the President's time and attention and therefore on his constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. When the President is called upon to defend himself during his term of office, even in actions wholly unrelated to his official responsibilities, the dangers of intrusion on the authority and functions of the Executive Branch are both real and obvious. 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.

Further, the *Fitzgerald* majority was concerned with the possibility that the "sheer prominence of the President's office" makes a President "an easily identifiable target for suits for civil damages." *Id.* at 752-53. In his concurrence, Chief Justice Burger noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763 (Burger, C.J. concurring). While stated in the context of official acts, Chie

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Justice Burger's concurrence applies with equal force to the present case:

> The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. . . . When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.

Id. at 763 (Burger, C.J., concurring).

The same concerns are implicated in the present action as well, where such suits could be pursued merely for the purpose of gaining partisan political disruption, public notoriety, unwarranted financial gain, or potential extortion. Indeed, any number of potential private claims could be contrived to entangle a sitting President in embarrassing or protracted litigation, alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of a pretrial motion.

The *Fitzgerald* Court also recognized that presidential immunity is "rooted in the separation of powers under the Constitution." *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)). The Court noted that the Framers of the Constitution assumed that "the President personally, was not the subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Id.* at 751 n.31 (quoting Journal of William Maclay 167 (E. Maclay ed. 1890) (alteration in original). Quoting Thomas Jefferson, the Supreme Court further underscored its concern that exercising jurisdiction over a President would

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create the opportunity for unconstitutional judicial intrusion upon Executive authority:

> [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?

Id. (quoting 10 The Works of Thomas Jefferson 404 (P. Ford ed. 1905)).

In my view, the separation of powers doctrine requires that private civil actions against a sitting President for unofficial acts must be stayed during the President's term in office. Civil lawsuits against a President create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes. It cannot be denied that the potential for such conflicts is inherent in subjecting any President personally to a court's jurisdiction.

The majority concludes the remedy for interference with the performance of the President's official duties by the demands of discovery and trial preparations and proceedings is the filing of motions with the court for rescheduling, additional time or continuances. *Ante* at 16 [App. 16]. If this route proves to be unsuccessful, the majority suggests the President should be required to petition this Court for a writ of mandamus or prohibition, *id.*, and arguably then to appeal any adverse decision to the Supreme Court. This suggestion, however, clearly epitomizes the separation of powers conflict inherent in a system that subjects a sitting President personally to the court's jurisdiction for the purpose of private civil litigation.

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The majority's decision leaves as many questions unanswered as it answers: Must a President seek judicial approval each time a scheduled deposition or trial date interferes with the performance of his constitutional duties? Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? Finally, can a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict? While the majority would encourage other courts to exercise "judicial case management sensitive to the burdens of the presidency," *ante* at 13 [App. 13], only a stay of civil litigation during a President's term in office will ensure the performance of Executive duties unencumbered by the judiciary and thereby avoid separation of powers conflicts.

While noting that the separation of powers doctrine "does not bar every exercise of jurisdiction over the President of the United States," *Fitzgerald*, 457 U.S. at 753-54, in view of the significant encroachment upon presidential duties and independence that would necessarily accompany litigation, the *Fitzgerald* Court admonished that, before asserting such jurisdiction, a court "*must* balance the constitutional weight of the interest to be served [by the litigation] against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754 (emphasis added) (citing *Nixon v. GSA*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. at 703-13)).

Where there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office. The cause of action should be stayed unless the plaintiff can show that he or she

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will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office.

It is important to keep in mind that the issue here is not *whether* the President may be required to answer claims based on unofficial conduct, but *when*. This conclusion merely delays, rather than defeats, the vindication of the plaintiff's private legal interests, and thus is far less burdensome for a plaintiff than the absolute immunity recognized in *Fitzgerald*. A stay for the duration of the President's service in office would not prevent Jones from ultimately obtaining an adjudication of her claims. Rather, staying the litigation will protect the important public and constitutional interests in the President's unimpaired performance of his duties, while preserving a plaintiff's ability to obtain resolution of his or her claims on the merits. Postponing adjudication of private damage actions will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief. "[W]e do well to bear in mind that the focus must not be simply on the matter of judging individual conduct in a fact-bound setting; rather, in those familiar terms of John Marshall, it is a *Constitution* we are expounding. Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages." *Id.* at 758-59 (Burger, C.J., concurring).

The well-known travail of litigation and its effect on the ability of the President to perform his duties, as well as the subjection of the President to the ongoing jurisdiction of the courts and the attendant impact on the separation of powers, dictate the postponement of non-exigent, private civil damages litigation until the President leaves office.

In my opinion, the stay should include pretrial discovery, as well as the trial proceedings, because discovery is likely to pose even more intrusive and burdensome demands on the

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President's time and attention than the eventual trial itself. Similarly, I would grant a stay of proceedings against a co-defendant of a sitting President where, given all the circumstances, the claims against the co-defendant cannot proceed without materially diminishing the effectiveness of a stay of proceedings against the President. I agree with the district court's conclusion here that a stay of the claims against Trooper Ferguson is essential if the President is to be fully protected.

Out of respect for the separation of powers and the unique constitutional position of the President, I conclude the President ordinarily should not be required to defend himself against civil actions until after the completion of his service in office. Therefore I would hold that to rebut the presumption that private suits against a sitting President should not go forward during the President's service in office, the plaintiff should have to demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Absent such a showing, the litigation should be deferred.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Plaintiff - Appellee,

v.

William Jefferson Clinton,

Defendant - Appellant,

Danny Ferguson,

Defendant,

United States of America, et al.,

Amicus Curiae.

Decided and Filed March 28, 1996

Appeal from the United States District Court
for the Eastern District of Arkansas

The suggestion for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Murphy took no part in the consideration or decision of this case.

McMILLIAN, Circuit Judge, dissenting from the denial of the suggestion for rehearing en banc.

The majority opinion not only has put short pants on President William Jefferson Clinton, but also has succeeded in demeaning the Office of the President of the United States,

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recognized throughout the world as the most powerful office in the world, an office which, at this time, is grappling with world problems in Bosnia, Iran, China, Taiwan, Cuba, Russia, and most third-world nations, not to mention the myriad of domestic problems here at home. Never has there been a question of whether President Clinton is above the law and immune from suit, the question is only "when?" My colleagues, to my dismay, would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the appellant delayed filing for at least *three* years.

The panel opinion is this case unfortunately misinterprets the principles enunciated in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (*Fitzgerald*). The panel opinion will allow judicial interference with, and control of, the President's time, at least in part. The ruling thus violates the separation of powers doctrine and should be reviewed by this court en banc. I dissent from the court's refusal to do so.

My reading of *Fitzgerald* discloses two separate rationales for the immunity granted to former President Richard Nixon. The first rationale focuses on the "public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). This rationale reflects the concern that the threat of a lawsuit could interfere with the President's ability to carry out his or her official duties. *Id.* "Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32. This is the official action rationale which confers immunity to a president from lawsuits even after completion of his or her term of office.

The second rationale applies to lawsuits, such as the present one, filed during the President's term but arising from conduct or events which are unrelated to the President's offi-

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cial duties. This rationale is not based upon the need for fearless and impartial decision making by the President but rather is based upon the need to allow the President to carry out his or her official duties free from unnecessary interference and distraction. As the Court stated in *Fitzgerald*, "[i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id.* at 753. The historical discussion of presidential immunity in note 31 of the *Fitzgerald* opinion emphasizes that such immunity rests in large measure on avoiding distractions from the official duties of the President. In part that note provides:

> Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits. 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-419 (1st ed. 1833) (quoted *supra*, at 2701-2702). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States v. Burr*, 25 F.Cas. 30 (No. 14,692d) (CC Va. 1807), that a subpoena *duces tecum* can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President: "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each

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> branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404 n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original).

Id. at 750 n.31.

Judge Beam's concurring opinion in the present case illuminates the problem of judicial interference with the President's official duties. The consequence of the panel's decision is that now there will be a trial judge exercising some control over the President's schedule. As Judge Beam concludes:

> I in no way seek to downplay the concerns outlined by the dissent. At the same time, I feel that Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the rights of any party. As I have attempted to stress, *nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled. With this understanding, I concur.*

Slip op. at 25 (emphasis added). Conversely, however, nothing prohibits the trial judge from ordering the President to appear, testify, provide discovery, answer numerous interrogatories and requests for admissions at the trial judge's almost unrestricted discretion. Indeed, figuratively, the courts may "bandy him from pillar to post." If that does not violate the separation of powers between the President and the judiciary, what does?

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The Constitution of the United States provides in Article II, Section 1, "The executive power shall be vested in the President of the United States of America." Even assuming a trial judge of reasonably good judgment, judicial control over the sitting President of the United States as a defendant in an ongoing civil lawsuit must constitute a far greater affront to our separation of powers principles than that which was at stake in the *Fitzgerald* case, where the defendant was not a sitting president.

In my opinion, Judge Ross got it exactly right when he wrote in his dissent:

> The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts.

Slip op. at 26.

Finally, the impact of the limited presidential immunity sought here by President Clinton is far less drastic than the immunity granted to former President Nixon in *Fitzgerald.* Although President Nixon was no longer in office at the time of that lawsuit, his immunity was absolute. It left the plaintiff without any remedy. That is not the case here. The appellant in the present action can pursue her claims after President Clinton leaves office. While delay may be unfortunate for the appellant, it is not necessarily prejudicial. She still retains her right to sue.[1] What must be of greatest concern in this contro-

[1] Clearly, if the President were granted limited immunity from suit for the duration of his presidency, the applicable statute of limitations would be tolled for the same time period.

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versy is the welfare of this nation -- and indeed of the entire world -- over which the President of the United States exerts such strong influence as "the officeholder [who] make[s] the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Fitzgerald*, 457 U.S. at 752.

Although this court has refused to consider this important case en banc, I have every confidence that the issues of national concern in this case relating to the judiciary's relationship to the presidency will command the attention of the United States Supreme Court.

March 28, 1996

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellant/cross-appellee's motion to stay the mandate of this court is granted pursuant to Federal Rule of Appellate Procedure 41(b).

The issuance of the mandate in this case shall be stayed to and including May 16, 1996. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

April 16, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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UNITED STATES COURT OF APPEALS
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No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

President Clinton's motion to extend the stay of mandate has been considered by the Court and is denied. Judge Ross voted to grant the motion.

May 8, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed July 21, 1994

MEMORANDUM AND ORDER

Plaintiff Paula Corbin Jones seeks civil damages from the President of the United States for actions that, with one exception, are alleged to have occurred prior to his assuming office. The matter is before the Court on motion of the President for permission to file a motion to dismiss on grounds of Presidential immunity and to defer the filing of any other motions or pleadings until such time as the issue of immunity is resolved. The plaintiff has responded in opposition to the motion.[1] For the reasons that follow, the Court finds that the President's motion should be and hereby is granted.

I.

This complaint, which was filed on May 6, 1994, arises out of an alleged incident that is said to have occurred on May

[1] During a telephone conference held on June 16, 1994, separate defendant Danny Ferguson stated that he had no position with respect to the matter now before the Court.

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DISTRICT COURT
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J JONES,

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8, 1991, when President Clinton was Governor of the State of Arkansas. The plaintiff was a state employee at the time, and she claims that the President sexually harassed and assaulted her during a conference being held at a hotel in Little Rock, Arkansas.

The plaintiff asserts four claims in her complaint against the President. In Counts I and II, she alleges that President Clinton conspired to and did deprive her of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution. She contends that the President discriminated against her because of her gender by sexually harassing and assaulting her, by imposing a hostile work environment on her, and by causing her to fear that she would lose her job. She further claims that she was subjected arbitrarily to the fear of losing her job or experiencing other adverse actions in relation to her job and work environment. In Count III, plaintiff asserts a claim of intentional infliction of emotional distress or outrage, and claims in Count IV that the President, through his press aides and attorney, defamed her by denying the allegations that underlie this lawsuit.[2]

The President informs the Court that he will file a motion to dismiss the complaint without prejudice to its reinstatement after he leaves office, on grounds that sitting Presidents are constitutionally immune from having to litigate private suits for civil damages. He states that the immunity motion will raise serious issues which go to the constitutionality of compelling a sitting President to litigate private civil damages claims, as well as to this Court's authority to proceed in this case in the first instance. The President argues the Court should allow him initially to assert the immunity issue alone, thereby permitting that question to be resolved prior to filing any other pleadings in the case.

[2] Plaintiff also asserts conspiracy and defamation claims against separate defendant Ferguson.

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II.

The President states that his immunity motion will be based substantially on the Supreme Court's decision in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), a case decided on a narrow 5-4 margin. The plaintiff in that case, a former employee of the Department of the Air Force, had alleged that then-President Nixon abolished his position in retaliation for his testimony before a Congressional Committee. The District Court rejected President Nixon's claim of immunity, and the Court of Appeals dismissed his collateral appeal. The Supreme Court granted certiorari to decide the "important issue" of Presidential immunity. 457 U.S. 731, 741. Referring to the plaintiff's claim as "this merely private suit for damages," *id.* at 754, the Court held that "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. In so holding, the Court identified immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

Fitzgerald involved official actions by a sitting President while the allegations here relate to conduct that purportedly occurred prior to President Clinton's assumption of office. The President acknowledges this distinction and states that his motion will not assert absolute immunity such as was afforded in *Fitzgerald,* but will recognize the plaintiff's right to reinstate the lawsuit after he leaves office. In asserting such a claim of immunity, the President will seek entitlement to a fundamental protection from suit previously unrecognized in any court. This claim may or may not succeed. Nevertheless, because of the "singular importance of the President's duties," *Fitzgerald,* 457 U.S. at 751, and because suits for civil damages "frequently could distract a President from his public duties, to the detriment of not only the President and his office

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but also the Nation that the Presidency was designed to serve," *id.* at 753, the Court concludes that the issue of Presidential immunity deserves threshold consideration, prior to the filing of any other motions or pleadings.

In allowing the President to first assert the issue of immunity, the Court is permitting a procedure that is entirely consistent with the principles underlying absolute immunity. The "essence of absolute immunity is its possessor's entitlement not to have to answer for his [alleged] conduct in a civil damages action." *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985) (citing *Fitzgerald*, 457 U.S. 731). "The entitlement is an *immunity from suit* rather than a mere defense to liability," and "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (Emphasis in original.) *See also Siegert v. Gilley,* 500 U.S. 226, 232 (1991) (noting that one of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending an extended lawsuit); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687 (1993) (same). Because the entitlement is an immunity from suit, the Supreme Court has stressed that immunity questions should be resolved at the earliest possible stage in litigation. *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991).

Moreover, the immunity that will be asserted in this case is of a unique character and does not require an analysis of the allegations of the complaint. The Court thus has no need for dispositive motions at this time. Were the President asserting a defense of qualified immunity, the Court might well agree with the plaintiff that the substantive allegations of her complaint must be addressed. In such cases, courts are required to determine whether the alleged actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To decide whether an official is protected by qualified immunity, a court must determine whether the

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official's action was objectively legally reasonable in the light of the legal rules that were clearly established at the time the action occurred. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). This inquiry involves a two-step process. First, the court must determine as a threshold matter whether the plaintiff has alleged a violation of a constitutional right. *Munz v. Michael*, No. 93-1865, 1994 WL 288376, at *4 (8th Cir. July 1, 1994) (citing *Beck v. Schwartz*, 992 F.2d 870, 871 (8th Cir. 1993) (per curiam)). *See also Siegert*, 500 U.S. at 232. Second, the court must determine whether that constitutional right was clearly established at the time that the officials acted. *Munz*, 1994 WL 288376, at *4 (citing *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993)).

The immunity that will be asserted by the President, however, is premised on his status as President and does not require the Court to review the legal sufficiency of the complaint. Indeed, the allegations of the complaint are irrelevant. This Court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law." *Forsyth*, 472 U.S. at 528.[3]

Nevertheless, plaintiff argues that the Federal Rules of Civil Procedure require every defendant, including the President of the United States, to either answer a complaint or file a single dispositive motion raising all available grounds for dismissal, including absolute immunity. Certainly, that is one way to handle a case, but it is not the only way it can be done.

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[3] It is true that for some officials, the question of absolute immunity will depend upon the particular function the official is performing. Such an inquiry involves application of a "'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993) (citations omitted). In such cases, it may be necessary to examine the substantive allegations of the complaint. In the case at bar, however, the immunity that will be asserted by the President is premised on his status as President and does not require application of the "functional approach."

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Plaintiff asserts, however, that the briefing schedule sought by the President is "nothing less than a categorical suspension of the Federal Rules of Civil Procedure." To the contrary, Rule 12 specifically allows for successive motions to dismiss for failure to state a claim. *Sharma v. Skaarup Ship Management Corp.,* 699 F.Supp. 440, 444 (S.D.N.Y. 1988), *aff'd,* 916 F.2d 820 (2nd Cir. 1990), *cert. denied,* 499 U.S. 907 (1991). "Although defenses of lack of jurisdiction over the person, improper venue and insufficiency of process are waived if not raised in a party's first responsive pleading, 'A defense of failure to state a claim upon which relief can be granted ... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.' " *Id.* (citing Fed.R.Civ.P. 12(h)). *See also* 2A Moore's Federal Practice ¶ 12.07[3] at 12-102 (2d ed. 1994) (affirmative defenses not enumerated in Rule 12(b) may be made by motion under Rule 12(b)(6)); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 at 447-48 (1990) (Rule 12(b)(6) motions are exempted by Rule 12(g) from the consolidation requirement). The briefing schedule sought by the President is in conformity with the Federal Rules of Civil Procedure and does not afford him privileges unavailable to other defendants.[4]

To be sure, the plaintiff's interest in seeking prompt relief for the alleged violation of her rights is certainly legitimate and not to be minimized. The Court, however, finds that plaintiff's concern that the briefing schedule proposed by the President will entail undue delay is unfounded. Should the

[4] Plaintiff also argues that the cases cited by the President require that every defendant either answer a complaint or file a single dispositive motion raising all available grounds for dismissal. However, the courts in those cases did not specifically require the concurrent filing of all motions but simply addressed the particular procedure in which the litigants before them happened to proceed. Those cases do not stand for the proposition that the briefing schedule proposed by the President is inappropriate or otherwise precluded.

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Court deny the President's claim of immunity, such order would be immediately appealable. *Forsyth,* 472 U.S. at 525; *Puerto Rico Aqueduct & Sewer Authority,* 113 S.Ct. at 687. This would be so regardless of the Court's ruling on any other Rule 12(b) motions.

Furthermore, it must be recognized that the relief plaintiff seeks is of a purely personal nature, the delay of which will affect but a single individual who waited two days short of three years in which to file her lawsuit. The President's claim to immunity from suits for civil damages, on the other hand, is equally legitimate and may affect "not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald,* 457 U.S. at 753.[5] Indeed, the amenability of a sitting President to suits for civil damages raises significant and important constitutional issues, the resolution of which will directly impact the institution of the Presidency. That being so, and because the President's constitutional responsibilities and status require this Court to exercise judicial deference and restraint, *Fitzgerald,* 457 U.S. at 753, the Court finds that the President should be allowed to defer the filing of any other motions or pleadings until such time as the issue of immunity has been resolved by this Court.

III.

For the foregoing reasons, the Court will allow the President to file a motion to dismiss on the grounds of presidential immunity on or before August 10, 1994, and to defer and preserve the filing of any other motions or pleadings that may or must be filed under the Federal Rules of Civil Procedure until

[5] As was previously noted, the Supreme Court has expressed concern that suits for civil damages could distract a President from his public duties. *Fitzgerald,* 457 U.S. at 753. In this regard, the Court noted that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. *Id.* at 754 n.37.

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such time as the issue of presidential immunity has been resolved by this Court.[6]

IT IS SO ORDERED this 21st day of July 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[6] Nothing in this Order should be construed as indicating how the Court will rule on the President's soon-to-be-filed immunity motion. This Order only addresses the procedural issue, not the substantive questions relating to immunity.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

The Court is in receipt of amicus briefs which have been submitted for filing in this case. Because the Court has been well briefed by the President, Plaintiff Paula Corbin Jones, and the United States Department of Justice[1] on the issue of presidential immunity, it does not now intend to accept any amicus briefs for filing. Any amicus briefs that are submitted to the Court will be made a part of the correspondence file in the case.

DATED this 27th day of October 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[1] Pursuant to 28 U.S.C. § 517, the United States filed, on August 19, 1994, a Statement of Interest in this case. Section 517 provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

Separate defendant President Clinton seeks leave to file a reply brief on the issue of presidential immunity. Neither the co-defendant nor the plaintiff objects.

The Federal Rules of Civil Procedure do not provide for the filing of a reply to a response to a motion to dismiss, and district courts are not obligated to consider a reply in such circumstances. The Local Rules do not permit or prohibit filing of replies to responses. Since the Court has not requested a reply brief in this case, the motion is denied.

IT IS SO ORDERED this 27th day of October 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed November 23, 1994

ORDER

On November 1, 1994, separate defendant William Jefferson Clinton filed herein a motion requesting oral argument [Doc. # 28] on the issue of presidential immunity, which is the only issue now before the Court. For the reasons that follow, the motion is denied. Also denied is plaintiff Paula Corbin Jones' motion to file an affidavit under seal [Doc. # 29].

This Court seeks to follow some semblance of order in its conduct of cases. In this case in particular, the Court believes it must keep a tight rein on the proceedings to ensure the case progresses in a timely manner with a minimum of distractions and fanfare. A brief review of recent developments in this case will illustrate the Court's concerns.

The defendant's request for oral argument and the plaintiff's request to file an affidavit under seal are the latest motions that seek actions by the Court which are not part of this Court's usual conduct of cases. It is not the regular practice of this Court to hear oral argument on motions to dismiss.

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The Federal Rules of Civil Procedure do not mandate oral arguments on motions at the district court level.[1]

The plaintiff, meanwhile, seeks to file an affidavit under seal, the contents of which may not be disclosed, even to the Court, without the prior approval of the plaintiff. This is an extremely unusual request, and the plaintiff has presented no persuasive argument why it should be granted. Rule 26 of the Federal Rules of Civil Procedure provides for the filing of documents under seal in certain circumstances, but under that rule the court, not the parties, directs when the sealed documents will be opened. There is no provision in the Federal Rules of Civil Procedure for such a filing as the plaintiff requests.

The previous motion for leave to file a reply brief and the submission of amicus briefs were also outside the usual progression of a case in this Court. Neither the federal rules nor local rules of this Court provide for amicus briefs at the district court level or for a reply to a response.[2]

To revisit the facts with regard to the amicus briefs and reply briefs, the last pleading due in this case was a response and brief filed on October 21, 1994, by the plaintiff. On the same date, a motion and amicus brief were submitted by the American Civil Liberties Union, and after the due date of plaintiff's response, another amicus brief was submitted by a group of prominent professors of constitutional law from

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[1] As the Court and parties are aware, the Federal Rules of Appellate Procedure do set forth circumstances in which oral argument will be permitted. *See* Fed. R. App. P. 34.

[2] As the Court and parties are aware, there are provisions in the Federal Rules of Appellate Procedure concerning filing amicus briefs in cases on appeal. *See* Fed. R. App. P. 29. The filing of a reply to a response is not unheard of in this Court, but because such a reply is not provided for in the Federal Rules of Civil Procedure, the Court is not obligated to consider reply briefs in making its rulings unless the Court directs the parties to file the replies.

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various American law schools. By recent Order, those two amicus briefs were refused filing with the Clerk of the Court and were placed in a correspondence file available to the Court along with other correspondence which the Court has received about this case. Documents in the correspondence file are not included as part of the official record of the case.[3]

Further, subsequent to the filing by the plaintiff of her response and brief, one of the Court's clerks was contacted by a local attorney for President Clinton, who requested to file a reply brief to the plaintiff's response and who sought a mid-December due date for the reply. Presumably, plaintiff Jones would have wished to file a response to the President's reply brief. The Court would certainly have had to permit the plaintiff to respond if a reply were accepted from the defendant. The Court, acting through the clerk, informed President Clinton's local counsel that the Federal Rules of Civil Procedure do not provide for replies to responses. Through his attorneys, the President then sought leave to file a reply brief, which the Court denied. Presumably, the parties would have wanted to respond to the amicus briefs had they been made a part of the record. It is clear to the Court that without orderly management of this case, briefing could have continued unabated for months.

After this case was filed in May 1994, the Court set up a briefing schedule agreeable to the parties. The amicus briefs were not submitted until the conclusion of that schedule, even though the schedule had been established in mid-summer and was readily available from the Court. Both the questions of

[3] Correspondence relating to cases before the Court is often placed in the official case file. However, in cases which generate correspondence not only from the parties but also from interested members of the public, a separate correspondence file is sometimes maintained. If a district court's decision is appealed, the Eighth Circuit Court of Appeals has discretion to decide whether the correspondence file is sent to the Court of Appeals along with the case file.

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reply briefs and oral argument were raised after the briefing schedule had been concluded.

The Court has been thoroughly informed about the issue pending before it as the result of well-researched, well-documented briefs filed herein by the attorneys for the parties and by the Department of Justice.[4] It has received and believes it would benefit from the scholarly amicus briefs submitted.

The Court intends to act on the issue before it in a timely manner, recognizing the extreme importance of the case as well as the intense interest in it. To prolong the decision through oral argument and further briefs would not, in the view of the Court, prove of any benefit to the Court and would only serve to needlessly delay resolution of the issue.

In sum, the defendant's motion for oral argument is denied, and the plaintiff's motion to file an affidavit under seal is denied.

IT SO ORDERED this 23rd day of November 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[4] The United States filed a Statement of Interest in this case on August 19, 1994, pursuant to 28 U.S.C. § 517.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed December 28, 1994

MEMORANDUM OPINION AND ORDER

The Plaintiff, Paula Corbin Jones, filed a damage suit against the Defendants William Jefferson Clinton and Danny Ferguson to recover for acts which were alleged to have taken place primarily while Defendant Clinton was Governor of Arkansas and Defendant Ferguson was a Trooper with the Arkansas State Police assigned to the Governor. Subsequently, in the General Election of November, 1992, Mr. Clinton was elected President of the United States and assumed that office on January 20, 1993.

The complaint was filed on May 6, 1994, and was predicated on an alleged incident which was said to have occurred on May 8, 1991. The action alleged sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, which are provisions included in civil rights legislation of the reconstruction era. It also alleged state law claims of defamation and outrage.

Defendant Ferguson responded to these allegations by, in essence, denying any which might involve questionable ac-

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tivities on his part. Defendant Clinton responded with a motion to bifurcate the briefing schedule so as to permit the question of Presidential immunity to be argued on a motion to dismiss before any other questions were presented. On July 21, 1994, the Court entered a Memorandum and Order allowing President Clinton to file a motion to dismiss on the basis of Presidential immunity and deferring and preserving the filing of any other motions or pleadings until the issue of Presidential immunity had been resolved. *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994). The Court noted that this order was purely procedural in nature and addressed only the question of whether Presidential immunity would be considered as a threshold issue. *Id.* at 907 n.6.

The basic issue, therefore, which this Memorandum Opinion and Order addresses is whether a civil action may be asserted against the President of the United States while he is in office when the fact situation alleged in the complaint arose before his election and assumption of office.

I.

Absolute Immunity of the President from Civil Suit

The President has asserted that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office. This, of course, is a claim of absolute immunity. The President would have the Court dismiss the complaint while preserving through some equitable tolling of the statute of limitations the right of Ms. Jones to sue him civilly as soon as he left office. The Justice Department in its Statement of Interest of the United States also argued for immunity, but urged the Court in the alternative simply to stay the proceedings until the President had left office. Ms. Jones argued against immunity, but also argued alternatively for dismissal with an automatic reinstatement on the Court's docket on the last day of his Presidency and against a stay. All briefs discussed at some length the intent of the framers of

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the Constitution and interpretations of various scholars and judges relating to this subject, and all were thorough and well researched.

A. The English Legacy

The Court believes that the place to begin this discussion, before coming to the vital question of constitutional interpretation, is in English law and the development of the rights and liberties of the English people. The rights and liberties of England became our inheritance. The Constitution of the United States and the constitutions of the states contain provisions that come directly from that source.

Almost all of the states adopted "reception statutes" receiving into state law the English common law and acts of Parliament as they existed as of a certain date -- which was usually 1607, 1620, or 1776 -- except to the extent that they were contrary to our federal or state constitutions or statutes or were contrary to our form of government. Arkansas adopted such a statute shortly after becoming a state. Ark. Code Ann. § 1-2-119 (Michie 1987); Ark. Stat. Ann. § 1-101 (1976 Repl.); discussed in *Moore v. Sharpe,* 121 S.W. 341 (1909). The statute adopted the English common law, subject to the stated limitations, as it existed prior to the fourth year of James I. Various English statutes or common law rules passed into Arkansas law as a result. *E.g. Biscoe v. Thweatt,* 74 Ark. 545, 86 S.W. 432 (1905) (Statute of Charitable Uses); *Horsley v. Hilburn,* 45 Ark. 458 (1884) (Rule in Shelley's Case implicitly recognized but not applied to fee tail pursuant to superseding Arkansas statute); *Moody v. Walker,* 3 Ark. 140 (1840) (Rule Against Perpetuities). Also received were those portions of the Magna Carta relating to due process of law, equal protection, trial by jury, and rights unrelated to the feudal system.

The Magna Carta was largely a restatement of feudal law pertaining to land tenures and their incidents, and thus most of it has no application here. However, in addition to enshrining

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in English law some of our basic rights and liberties, it constituted a series of limitations placed upon the King and his authority. There would follow in English history a long and bloody struggle to define the rights of the monarchy as opposed to Parliament and the citizenry and also to the common law itself.

The tension between the King and Parliament, on the one hand, and the King and the common law, on the other, reached its heights with the ascension to the throne of the Stuart monarchy in the person of King James the First (who was James the Sixth of Scotland). Friction soon arose between the King and the House of Commons. At the root of the disagreement, once again, was the Magna Carta. *See generally* William Swindler, *Magna Carta: Legend and Legacy* 169-176 (1965).

An important participant in all of this was Sir Edward Coke, whose writings had an enormous influence on English and American law, and who had served as Solicitor General and later Attorney General under Queen Elizabeth I and also as Chief Justice of the Court of Common Pleas. He subsequently would become Chief Justice of the King's Bench under King James I. *See* 3 Roscoe Pound, *Jurisprudence* 428 (1959). Under Elizabeth, as her attorney, Coke had been a staunch defender of the Crown, but as a judge, he would quote Bracton to King James: "The King ought to be under no man, but under God and the law." Swindler, *supra*, at 172. He also stated in *Dr. Bonham's Case,* 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (1610): "And it appears in our bodies, that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void" if they are "against common right and reason." William B. Lockhart et al., *The American Constitution* 251 (5th ed. 1981). That was unlikely to be a true statement of the law in the early 17th Century, but to the extent that it was precedent, it may be said to be an early expression of judicial review.

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None of this and other frictions set well with the King, and Coke was dismissed from the bench, turning his efforts to Parliament. The continuing friction between Parliament and James' successor, King Charles I, ultimately led to the adoption of the Petition of Right, which in essence ratified and extended the Magna Carta, and in effect further limited the prerogatives of the Crown. A defining moment came when the House of Commons rejected a proposal of the House of Lords that would add a clause recognizing the sovereignty of the King. Coke gave this fulmination:

> I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto -- Magna Carta is such a Fellow, he will have no Sovereign.

Swindler, *supra,* at 185.

The Petition of Right was one of the foundation stones of the English Constitution. It enlarged upon the Magna Carta as a constitutional limitation upon the power of the monarchy. It made it apparent that the King's prerogative was limited. *Sub Deo et Lege*[1] was the law of the land.

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[1] In *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64-65 (K.B. 1608), Lord Coke wrote:

> [B]ut His Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in

> safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et lege*. [That the King ought not to be under any man, but under God and the law.]

quoted in DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 203 (1963).

In Catherine Drinker Bowen's book, *The Lion and the Throne*, the situation which led to this opinion is discussed in some detail. The events of this period in English legal and political history were conclusive in determining the end of "the divine right of Kings" and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside of the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution. It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century.

Despite these statements by Lord Coke that the King was subject to the law, there existed contemporaneously in England the rule that "the King can do no wrong," a relic presumably rooted in the divine right of Kings. Blackstone expressed it this way:

> Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute *perfection*. The King can do no wrong: which ancient and fundamental maximum is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.
>
> The King, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Chitty ed. 1855) (emphasis in the original).

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B. The American Experience

In the formulation of Article II of the Constitution, there were varying viewpoints as to the office of the President.[2]

Of course, when Blackstone published his *Commentaries,* this idea was already ludicrous in the light of the history of the English monarchy. A litany of the wrongs, weaknesses and sins of English kings would establish that they were not only capable of "doing wrong" but also of "thinking wrong" and were replete with folly and weakness.

The English concept of kingship never entered into the law of the United States, although in England it apparently "exists today to give the Queen an absolute immunity from being sued for personal torts in the civil courts." R.J. Gray, *Private Wrongs of Public Servants,* 47 CAL. L. REV. 303, 307 (1959). *See also* Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique,* 72 Nw. U. L. REV. 526 (1977).

States did not adopt through the reception statutes those aspects of English law relating to the monarchy since kings and queens are contrary to our form of government. Thus what remains of our English heritage on this point are the basic documents of English liberties -- the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights.

Moreover, as Chief Justice John Marshall pointed out in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), the King is subject to being "sued" in the form of a petition "and he never fails to comply with the judgment of his court."

[2] Russell Kirk cites Sir Henry Maine for the proposition that "the office of the President really is the office of a King -- the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." He adds: "Maine even suggests that the framers of the Constitution may have had in mind the powers of George III, when they established the powers of the American presidency." He continues in that vein discussing how powerful an office it is. He adds, however, that the restraint exercised by the first six presidents prevented the reduction of the legislative and judicial branches "to insignificance." RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 427-428 (1974). This seems to be an exaggeration, however, since during that period of time, the opinions of Chief Justice John Marshall sufficed to prevent the Executive Branch from subverting the Judicial Branch, although the first six presidents did exercise substantial restraint, particularly Washington and Adams. It seems much more likely that in providing for

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Some, such as Roger Sherman of Connecticut, believed that the President should be "nothing more than an instrument for carrying the will of the Legislature into effect," while others, such as Gouverneur Morris of Pennsylvania, thought the President should be "the guardian of the people, even of the lower classes, against Legislative tyranny." Arthur Schleinger, Jr., *The Constitution: Article II, in An American Primer* 121-22 (Daniel J. Boorstin ed., 1968). What resulted was the compromise that we have today, amended only sightly from the original. It sets out the powers and duties of the Executive Branch (*i.e.,* the President and the administrators he appoints), but it does not address the immunity question.

A large part of the problem, aside from the silence of the Constitution, is that for all practical purposes, the Executive Branch, unlike the Congress and the Supreme Court, consists of only one person. His administrative appointees serve at his pleasure. Thus, a large part of the President's assertion may be summarized in the proposition that, without immunity, to cripple the Presidency in one way or another in civil litigation is to deliver a blow to and weaken the effectiveness of the entire Executive Branch of government which in effect is only one person, the President.

The importance of unimpeded, independent branches of government is discussed by Alexander Hamilton[3] in *The Federalist No. 51:*

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the Executive Branch, the founders did not have George III in mind at all, except in an unfavorable sense. The "George" that they likely had in mind was George Washington. The Executive Branch was probably modeled for the first man to occupy it -- which may explain why even the insertion of an impeachment provision for criminal offenses was a matter of debate.

[3] Some attribute this paper to James Madison. In I THE PEOPLE SHALL JUDGE 312 (University of Chicago Social Science Staff 1949), its author is listed "Hamilton *or* Madison."

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> Were the executive, magistrate, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal. . . [We must give] to those who administer every department the necessary constitutional means and personal motives to resist encroachments of the others. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I *The People Shall Judge* 312, 313 (University of Chicago Social Science Staff 1949). He is speaking of independence from other branches, but also of the responsibility that goes along with it.

The President and his lawyers, in arguing the immunity issue, seem to place substantial reliance on the intention of the framers of the Constitution. Much of what they argue relates to the impeachment process. For example, they seize in their brief upon this commentary by Hamilton from *The Federalist No. 69:* "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." Of course, Hamilton was talking about *impeachment* under Article II, Section 4, under which the President may be "removed from

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This is not to say, however, that the question of Presidential immunity from suit was not discussed at the Constitutional Convention or during the years immediately following. Justice Lewis Powell addresses this in speaking for the majority of the Court in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982):

> [T]here is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams -- both delegates to the Convention -- that 'the President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.' Journal of William Maclay 167 (E. Maclay ed. 1890).

457 U.S. at 751-52 n.31.

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Justice Powell also quoted from Justice Joseph Story's *Commentaries on the Constitution of the United States* to this effect:

> '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 J. Story, Commentaries on the Constitution of the United States Sec. 1563, pp. 418-419 (1st ed. 1833).

457 U.S. at 750.

But just as the English law moved from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law, the situation in American law prior to *Fitzgerald* had proceeded essentially in the same direction with regard to the office of President. For example, it has been pointed out that when Hamilton made the statement quoted previously from *The Federalist No. 69,* "he was referring to his own plan" rather than reciting faithfully what had been proposed. Raoul Berger, *Selected Writings on the Constitution* 46-47 n.94 (1987). Moreover, the discussion at the Constitutional Convention revolved around the impeachment process, the basis for which was the commission of "high crimes and misdemeanors." Although Justice Story, writing several decades later, discusses civil cases, as previously quoted, he is writing from the perspective of someone who was a boy at the time of the Convention -- although admittedly he was rather close in time to those proceedings. He was successful in that what he wrote was embodied in *Fitzgerald.* There was much opposition even to the

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impeachment provision; some thought that the Supreme Court should conduct the trial rather than the Senate. James Madison was an advocate of that view, although Gouverneur Morris thought that "no other tribunal than the Senate could be trusted" and believed that the Supreme Court "were too few in number and might be warped or corrupted." 2 *Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 535 (reported by James Madison) (Gaillard Hunt & James Brown Scott, eds., 1987).

The disagreement over Presidential immunity at the Constitutional Convention carried over into the years that followed. In *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), Chief Justice John Marshall ruled that a *subpoena duces tecum* could be issued to President Thomas Jefferson. Jefferson protested strongly, arguing that the three branches of government had to be independent of each other, including independence by the executive from the judiciary. (Discussed in *Nixon v. Fitzgerald,* 457 U.S. at 751 n.31.) In *Livingston v. Jefferson,* 15 F.Cas. 660 (C.C.D. Va. 1811) (No. 8,411), damages were sought for alleged trespass committed by a federal officer at the direction of Jefferson, but a federal court dismissed it for having been brought improperly in Virginia. The immunity issue was not reached. Of course, even before these cases, the argument of total independence of the Executive Branch from judicial action had been settled in large part by *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). This case is remembered for the recognition and use of judicial review by the Supreme Court of an Act of Congress, but it also directed by mandamus that Secretary of State James Madison deliver Marbury's justice of the peace commission to him contrary to the desires of President Jefferson. While not bearing upon the immunity question directly, it was apparent that the Executive Branch was not immune from action by the Judicial Branch in enforcing mandates of the Constitution. In fact, Chief Justice Marshall said of Marbury's rights and remedies: "The very essence of civil liberty cer-

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tainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163.

However, in *Mississippi v. Johnson,* 71 U.S. 475 (1867), the Supreme Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Chief Justice Salmon P. Chase, writing for a unanimous Court, declined to enjoin enforcement of the legislation even though it was allegedly unconstitutional. He distinguished *Marbury* by stating that it only related to *ministerial duties* involving no discretion while these Acts related to "executive and political" duties involving broad discretion. To enjoin the President would be to restrain him from carrying out his constitutional responsibility to execute the laws. Enjoining him would threaten the separation of powers between the branches and the independence of the President. *See similarly, Kendall v. United States,* 37 U.S. 524, 610 (1838), and *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 608-612 (D.C. Cir. 1974).

Of course, the complaint of Paula Corbin Jones in this civil case relates neither to the ministerial nor the executive duties of the President. The allegations relate to alleged conduct of the President while he was Governor of Arkansas. (The allegations, it might be noted, also do not relate to any ministerial or executive duty of the Office of Governor.) The Justice Department, in its brief, stated that it knew of only three private suits based on pre-presidential conduct which had been adjudicated during the President's term in office. These three were (1) an action against Theodore Roosevelt and the Board of Police in New York City, which was resolved in the Board's favor in 1904, *People ex rel. Hurley v. Roosevelt,* 179 N.Y. 544 (1904); (2) A damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, *Devault v. Truman,* 194 S.W.2d 29 (Mo. 1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim

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from an automobile accident occurring during the 1960 campaign, which was ultimately settled, *Bailey v. Kennedy,* No. 757,200 (Cal. Super. Ct. 1962).

However, the case most applicable to this one is *Nixon v. Fitzgerald,* cited previously. In a 5-4 decision, the Supreme Court decided that President Nixon had absolute immunity from a suit brought by A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, whom the President ordered fired because he had given congressional testimony on cost overruns which embarrassed his superiors in the Department of Defense (and presumably embarrassed the President also). Fitzgerald sued for damages. The district court rejected President Nixon's assertion of Presidential immunity. The court of appeals affirmed, but the Supreme Court reversed, holding that the President had absolute immunity from a civil suit for damages resulting from official actions taken by the President while in office. The majority opinion of Justice Lewis Powell was hotly disputed in a dissent by Justice Byron White, in which Justices Blackmun, Brennan and Marshall joined. The majority opinion was in accord with the view of the scholar, Edward S. Corwin, in discussing the President's immunity from judicial process. Edward S. Corwin, *The President: Office and Powers* 138 (3d ed. 1948).

But the facts of *Fitzgerald,* as stated previously, are not the same as those in this case. Mr. Nixon was President when he fired Mr. Fitzgerald and was acting in his capacity as the head of the Executive Branch. Mr. Clinton was not President and was not even the President-elect when the alleged cause of action arose in this case.

The Constitution, of course, is silent on all of this. The framers debated even the subject of whether the President should be subject to impeachment for criminal acts and, if so, who should conduct the trial. There is nothing in the document relating to civil actions. Justice Story, *supra*, was of the

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mind that the President possessed immunity from civil suit, and the Supreme Court in *Fitzgerald* agreed in a severely divided opinion that the President was civilly immune from suits brought for official actions taken while in office.

Thus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judicial Branch, particularly the Supreme Court. This District Court is not activist in nature and is not inclined to "make law" where none exists. As stated by Chief Justice John Marshall in *Marbury v. Madison,* however: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

This Court recognizes the reasoning of Justice Powell and his thin majority in *Nixon v. Fitzgerald* that the President has absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Therefore, the President's Motion to Dismiss on Grounds of Presidential Immunity is denied.

II.

Limited or Temporary Immunity from Trial

The question does not end here, however, because the intent of the Supreme Court in *Nixon v. Fitzgerald* would seem to carry this case beyond the question of absolute immunity from civil suit. The language of the majority opinion by Justice Powell is sweeping and quite firm in the view that to disturb the President with defending civil litigation that

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Justice Powell states unequivocally the following: "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. He adds:

> In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance 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.

457 U.S. at 754.

Chief Justice Burger expressed the same theme in his concurring opinion: "Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment." 457 U.S. at 762.

Of course, in the preceding part of this opinion, this Court has pointed out that President Clinton's alleged acts took place before he was President and that he was not acting in the scope of Executive authority. Nonetheless, the concerns expressed by a majority of the Supreme Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same -- the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situa-

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tion, as stated by Justice Powell in one of the preceding quotations from *Nixon v. Fitzgerald,* could have harmful effects in connection not only with the President but also with the nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

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

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. Her complaint, in ¶¶ 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in *The American Spectator,* in which the author purportedly obtained his information from state troopers, including Defendant Ferguson. 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. For want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require

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due to the fact that the primary defendant is the President. The Court believes that such ruling is also permitted under Rule 40 of the Federal Rules of Civil Procedure allowing district courts to place matters upon the trial calendar "as the courts deem expedient." Further, such limited immunity from trial would seem to be justified under the equity powers of the Court.

By putting the case on hold, as far as trial is concerned, the Court avoids any tolling of the statute of limitations problems which might otherwise be presented if the case were dismissed without prejudice. Despite the fact that the President considers himself estopped to object to a refiling, the Court believes that a delay of the trial is the better way to proceed.

This does not mean, however, that the case is put on the shelf for all purposes. There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself. This approach eliminates the problem that witnesses may die, disappear, become incapacitated, or become forgetful due to the passage of time.

Because there is too much interdependency of events and testimony to proceed piecemeal, the allegations against the trooper will be tried at the same time as those against the President. His case is integrally related to the allegations against the President; both cases arose out of the same alleged incident; and while the suit against the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident, it would not be possible to try the Trooper adequately without testimony from the President.

III.

Conclusion

The Court has attempted to follow its understanding of *Nixon v. Fitzgerald* and other cases as well as to adhere to the

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historical framework involved. Most importantly, the Court has sought to give effect to the full meaning of the separation of powers doctrine originally enunciated by Montesquieu and implicit in the founding fathers' structure of the Constitution. Essential Presidential prerogatives are "rooted in the separation of powers under the Constitution." *United States v. Nixon,* 418 U.S. 683, 708 (1974).

On the other hand, in situations in which the President was not the holder of his office when the action allegedly arose, there would seem to be no immunity against civil litigation. The rights of Plaintiff Jones as an American citizen must be protected. *Sub Deo et lege* is our law as well as the law of Great Britain. No one, be he King or President, is above the law.

To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office. President Clinton's term in office, if he is re-elected in 1996, would end no later than January 20, 2001. An earlier termination might come on January 20, 1997, which is only slightly over two years away. By permitting discovery as to all including the President, the Court is laying the groundwork for a trial shortly after the President leaves office.

In granting limited or temporary immunity from immediate trial to President Clinton, the Court wishes to emphasize that it holds no brief for alleged sexual harassment, a matter of important concern to many people. The importance of such issue is another reason why there should be no absolute immunity in this case, but only a temporary Presidential immunity from trial.

Finally, the Court must express its awareness that this case is one in which new law is being made. All of the references to historical events and to other cases do not change that

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fact. In making such a ruling, the Court is also not unmindful of the fact that to this extent the separation of powers has been breached. But it has happened before in many cases including *United States v. Nixon, supra,* and many of the landmark decisions of Chief Justice John Marshall. In the end, the decision must be made by the courts when there is doubt and only limited precedent.

As previously noted, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury,* 5 U.S. (1 Cranch) at 177. *United States v. Nixon* reaffirmed that statement: "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." 418 U.S. at 707. That is what this Court has tried to do, keeping in mind the words of Chief Justice John Marshall that "we must never forget that it is *a constitution* we are expounding." *McCulloch v. Maryland,* 17 U.S. (4 Wheaton) 316, 407 (1819),[4] and that it is intended to endure for generations and to be applied to the various crises of human affairs.

The President's motion seeking immunity from suit is denied. The court will issue a scheduling order in due course.

IT IS SO ORDERED this 28th day of December 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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[4] As explained by Judge Robert H. Bork, Chief Justice Marshall was pointing out that "there are differences in the way we deal with different legal materials. . . . By this [Chief Justice Marshall] meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, 'partake of the prolixity of a legal code.'" ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990).

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed February 24, 1995

ORDER

On December 28, 1994, this Court entered a Memorandum Opinion and Order denying the motion of Defendant William Jefferson Clinton to dismiss on the grounds of presidential immunity. The Court found, however, that trial of the entire matter should be delayed until after President Clinton leaves office. In spite of ordering a delay in setting the case for trial, the Court found that discovery could proceed as to all persons, including the President.

Both sides have appealed the Court's Order, and President Clinton has filed a Motion for Stay Pending Appeal. Plaintiff has responded in opposition to the motion, and the President has filed a reply to Plaintiff's response. For the reasons stated below, the Court grants the motion for stay.

I.

The denial of the President's motion to dismiss on the grounds of presidential immunity constitutes a "final" order that is immediately appealable under 28 U.S.C. § 1291. An

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appeal from a denial of official immunity requires a stay of all proceedings pending resolution of the appeal. As stated in *Johnson v. Hay,* 931 F.2d 456, 459 n.2 (8th Cir. 1991), upon the filing of a notice of appeal in an immunity case, "[j]urisdiction has been vested in the court of appeals and the district court should not act further." Thus, this Court no longer has jurisdiction over those aspects of the case involved in the President's appeal to the Eighth Circuit.[1]

The parties agree and there is no question that the Court is required to stay discovery against the President pending appeal. There is, however, a separate defendant in this case, Arkansas State Trooper Danny Ferguson, who has filed an answer to the complaint and has nothing to appeal. The President moves the Court to stay all proceedings against Ferguson as well, arguing that the issue of whether the case should go forward against Ferguson is one of the "'aspects of the case involved in the appeal.'" *Johnson v. Hay, supra.*

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[1] The issues on appeal, as stated in the President's Certificate Regarding Transcript and Notice of Issues on Appeal, are as follows:

1. Whether the Constitution and principles of separation of powers require the dismissal without prejudice of this civil damages suit against an incumbent President and his co-defendant, and the tolling of any statutes of limitation applicable to the claims asserted therein, until such time as the President is no longer in office;

2. Whether the District Court's Order of December 28, 1994, erred in holding that the Supreme Court's decision in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), requires that sitting Presidents be immune only from trial, and not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the office of the President; and

3. Whether the District Court's Order of December 28, 1994, erred in refusing to stay the proceedings in their entirety until such time as the President leaves office.

See Docket Entry # 38.

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Plaintiff responds that while the effect of the President's appeal is to halt proceedings related to him, there is no reason or right to stop the case as it relates to Ferguson. Plaintiff contends that just as immune and non-immune claims arising in the same lawsuit may proceed on separate tracks, so too may immune and non-immune defendants proceed separately. Plaintiff also urges that the President has two roles in this case, one as a defendant and another as a witness. Even though all proceedings against him in his role as defendant may be stayed pending appeal, Plaintiff asserts the President may still be subject to discovery on other claims as a witness.

II.

The Court rejects the President's attempt to, in effect, claim immunity on behalf of Ferguson, who has advanced no such right. The President's argument goes beyond any authority this Court has been able to find. The Court is unwilling to extend the effects of the President's immunity to Ferguson and finds that it retains jurisdiction over the case as to the Plaintiff's claims against him.

While the Court is not convinced by the President's argument that Plaintiff's claims against Ferguson are part of the aspects of the appeal, it will, nevertheless, grant President Clinton's motion to stay all proceedings in this case pending the appeal for another reason.

The Court cannot imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys. The claims are so inextricably intertwined that in order to protect the President to the full extent that his claim of immunity would provide, the Court finds that the motion should be granted. The pragmatic fact is that if discovery were allowed to proceed against Ferguson, he could only testify to action on his part, and other deponents would have to limit their testimony to Ferguson. Trooper Ferguson's testimony is among the most important in this case, but if he could not testify as to then-Governor Clinton's

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

United States of America, et al

Amicus Curiae

Appeal from the United States District Court
for the Eastern District of Arkansas

Decided and Filed April 17, 1995

Appellants' motion to expedite the briefing schedule and place this case on the June oral argument calendar, appellee's response in opposition and appellant's reply thereto have been referred to the Court for decision. After review, the Court hereby denies appellant's motion to expedite briefing and placement on the oral argument calendar.

This case shall proceed upon the established briefing schedule absent the filing of any parties' brief before the scheduled deadline. Counsel is reminded that any early filing will automatically advance the briefing schedule. This case shall be placed on the oral argument calendar in the ordinary course.

April 17, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

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U.S. CONST. art. II, § 3

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 4

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. CONST. amend. XXV

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such

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SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

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42 U.S.C. § 1983 (1994)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 (1994)

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully,

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and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

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50 U.S.C. app. § 510 (1988)

§ 510. Purpose; suspension of enforcement of civil liabilities

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591 of this Appendix] remains in force.

50 U.S.C. app. § 521 (1988)

§ 521. Stay of proceedings where military service affects conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix] unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

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50 U.S.C. app. § 525 (Supp. V 1993)

§ 525. Statutes of limitations as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

FED. R. CIV. P. 40

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

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No. _____

IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

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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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October Term, 1995

WILLIAM JEFFERSON CLINTON,

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PAULA CORBIN JONES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition for rehearing was filed on January 23, 1996, and denied on March 28, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983 (1994)

42 U.S.C. § 1985 (1994)

50 U.S.C. app. § 510 (1988)

50 U.S.C. app. § 521 (1988)

50 U.S.C. app. § 525 (Supp. V 1993)

FED. R. CIV. P. 40

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

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STATEMENT OF THE CASE

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

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office, asserting that such a course was required by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed trial until the President's service in office expired, but held that discovery

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

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

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could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil litigation challenging his official acts as President. While the holding of *Fitzgerald* did not apply to this case because President Clinton was sued primarily for actions taken before he became President, the court stated that "[t]he language of the majority opinion" in *Fitzgerald*

> is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office.

Pet. App. 68-69. The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge stayed the trial "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.[2]

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

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

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

Judge Bowman found the reasoning in *Fitzgerald* "inapposite where only personal, private conduct by a President is at issue," (Pet. App. 11), and determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. He also wrote that

> [t]he Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered.

Pet. App. 9.

Judge Bowman further concluded that it would be an abuse of discretion to stay all proceedings against an incumbent President, asserting that the President "is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion." Pet. App. 16. Ruling that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the stay of trial issued by the district court, (Pet. App. 5 n.4) (citing *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995), *cert. denied*, 1996 WL 26287 (Apr. 29, 1996)), Judge Bowman accordingly reversed that stay as an abuse of discretion. Pet. App. 13 n.9.

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[3] Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 (1994) and the collateral order doctrine, as articulated in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) and *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones' cross-appeal. *See infra* pp. 16-19. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

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

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

Judge Ross dissented, stating that the "language, logic and intent" of *Fitzgerald*

> directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term.

Pet. App. 25. Judge Ross observed that "[n]o other branch of government is entrusted to a single person," and determined that

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> [t]he burdens and demands of civil litigation can be expected . . . to divert [the President's] energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result . . . would impair the integrity of the role assigned to the President by Article II of the Constitution.

Pet. App. 26.

Judge Ross also stated that private civil suits against sitting Presidents

> create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes.

Pet. App. 28. At the same time, he reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

The court of appeals denied the President's request for a rehearing en banc, with three judges not participating and Judge McMillian dissenting. Judge McMillian said the majority's holding had "demean[ed] the Office of the President of the United States." Pet. App. 32. He wrote that the panel majority "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed filing for at least *three* years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

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REASONS FOR GRANTING THE PETITION

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

The decision of the court below is erroneous in several respects. It is inconsistent with the reasoning of *Nixon v. Fitzgerald* and with established separation of powers principles. The panel majority's suggested cure for the separation of powers problems -- "judicial case management sensitive to . . . the demands of the President's schedule" (Pet. App. 13) -- is worse than the disease: it gives a trial court a general power to set priorities for the President's time and energies. The panel majority also grossly overstated the supposedly extraordinary character of the relief that the President seeks. The deferral of litigation for a specified, limited period is far from unknown in our judicial system, and it is routinely afforded in order to protect interests that are not comparable in importance to the interests the President advances here.

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

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

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

Accordingly, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. 753. Indeed, "[t]his tradition can be traced far back into our constitutional history." *Id.* at 753 n.34. The form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit against him until he leaves office -- is modest. It is far more limited, for example, than the absolute immunity that *Fitzgerald* accorded all Presidents for actions taken within the scope of their presidential duties.

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

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The panel majority ignored this second basis for the holding of *Fitzgerald*. The first basis of *Fitzgerald* -- that the threat of liability might chill official Presidential decision making -- is, of course, largely not present here, and accordingly, the President does not seek immunity from liability.[4] But the second danger to the Presidency emphasized by *Fitzgerald* -- the burdens inevitably attendant upon being a defendant in a lawsuit -- clearly exists here. The court of appeals simply disregarded this "unique risk[] to the effective functioning of government."

2. As the *Fitzgerald* Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. *See* 457 U.S. at 751 n.31. Justice Story stated that

> [t]he president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability.*

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added), *quoted in Fitzgerald*, 457 U.S. at 749. Senator Oliver Ellsworth and then-Vice President John Adams, both delegates to the Constitutional Convention, also agreed that

> the President, personally, was not . . . subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.

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

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

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President Jefferson was even more emphatic:

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

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

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

The panel majority envisioned that, throughout the course of litigation against him, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. If the President disagreed with a decision of the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16. In other words, under the panel's approach, a trial court could insist, before con-

sidering a request by the President for adjustment in the litigation schedule, that the President provide a "specific, particularized" explanation of why he believed his official duties prevented him from devoting his attention to the litigation at that time. The court would then be in the position of repeatedly evaluating the President's official priorities -- precisely what Jefferson so feared.

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

4. The panel majority similarly attempted to downplay the demands that defending private civil litigation would impose on the President's time and energies. Pet. App. 13-15. The concurring opinion in particular likened the defense of a personal damages suit to the few instances when Presidents have testified as witnesses in judicial or legislative proceedings. Pet. App. 22-23. This notion is implausible on its face; there is no comparison between being a defendant in a civil damages action and merely being a witness. Even so, Presidents have been called as witnesses only in cases of exigent need, and only under carefully controlled circumstances designed to minimize intrusions on the President's ability to carry out his duties.

A sitting President has never been compelled to testify in civil proceedings. Presidents occasionally have been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (*Fitzgerald*, 457 U.S. at 754) and the defendant's Constitutional right to

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compulsory process (U.S. CONST. amend. VI; *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)) -- factors that are, of course, not present here. But even in those compelling cases, as Chief Justice Marshall recognized, courts are not "required to proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). Instead, courts have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that limits the disruption of his official functions, such as by videotaped deposition.[5]

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

[5] *See, e.g.*, *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House); *United States v. Poindexter*, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (videotaped deposition); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena because defendant failed to show that President's testimony would support his defense), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

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

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

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

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

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

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

[8] Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988).

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

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

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

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

[10] *See, e.g.*, *Koester v. American Republic Invs.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976).

not provide the relief they seek. This process too can take several years. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-07 (1973). And public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals can routinely delay litigation for a substantial period.

We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself "above the law," or that holding this litigation in abeyance would impermissibly violate a plaintiff's entitlement to access to the courts. More specifically, these examples demonstrate that what the President is seeking -- the temporary deferral of litigation -- is relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

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

1. Respondent cross-appealed to challenge the district court's order to stay trial. Ordinarily, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. *See* 28 U.S.C. § 651 (1994).[11] In asserting that jurisdic-

[11] Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." *See, e.g., Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993);

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tion existed for her cross-appeal, the respondent did not seek such a writ or contend that the stay was appealable under 28 U.S.C. § 1291 (1994) as a final order, or as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, respondent asserted, and the panel majority found, that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. 5 n.4.

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

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

Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, it is not applicable here, where the district court's order clearly contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

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

> This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident . . . and desperately needs to recover . . . damages . . . . It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.
>
> The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court . . . . Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

Review of the district court's discretionary decision to postpone the trial -- unlike review of its decision to reject the President's position that the entire case should be deferred as a matter of law -- must address these particular facts of this case. Thus the respondent's cross-appeal raised issues that, far from being "inextricably intertwined" with the President's submission, can be resolved separately from it. The panel

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majority's expansion of the court of appeals' jurisdiction over this interlocutory appeal was in error.

2. The decision to reverse the district court also was incorrect on the merits. As Justice Cardozo explained for this Court in *Landis v. North Am. Co.*, 299 U.S. 248 (1936), a trial judge's decision to stay proceedings should not be lightly overturned:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Id. at 254-55. Indeed, the Court in *Landis* specifically stated that

> [e]specially in cases of extraordinary public moment, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.

Id. at 256.

The panel majority justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. It is unclear what the panel meant by labeling the district court's order the "functional equivalent" of "temporary immunity", inasmuch as the district court held that the litigation could go forward through all steps short of trial. But it is entirely clear that the panel majority, in its sweeping and conclusory ruling, did not begin to conduct the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion.

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

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

Now, a court for the first time in history has held that a sitting President is required to defend a private civil damages action. This holding breaches historical understandings that are as appropriate today as ever before.[12] The court in *Fitzgerald* specifically anticipated the threat posed by suits of this kind. Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion). In these circumstances, the fact that there is "no historical record of numerous

[12] Heretofore, there have been no private civil damages suits initiated or actively litigated while the defendant was serving as President. While there are recorded private civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all were underway before the defendant assumed office. The first two were dismissed by the time the defendant became President; after each took office, the dismissal was confirmed on appeal. *See New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). The Kennedy case was filed while he was a candidate, and was settled after President Kennedy's inauguration, without any discovery against the Chief Executive. *See*, *Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960).

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tunity for the Court to review the adequate relief. If review is de- will proceed in the trial court, and ;eks to preserve by having the liti- 'rooted in the constitutional tradi- wers" -- will be irretrievably lost. 749. Should the President prevail ›urt will not even have the oppor- ›r future cases.

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suits against the President" -- as there was no comparable record before *Fitzgerald* (*id.* at 753 n.33) -- provides no reassurance at all that this case will be an isolated one.

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

CONCLUSION

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

Respectfully submitted,

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May 15, 1996

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee - Cross-Appellant,

v.

William Jefferson Clinton,

Appellant - Cross-Appellee.

Danny Ferguson, Defendant.

United States of America; Akhil Reed Amar, Southmayd Professor of Law Yale Law School; Susan Low Bloch, Professor of Law, Georgetown Law School; Harold H. Bruff, Donald Phillip Rothschild Research Professor, George Washington University National Law Center; Susan Estrich, Robert Kingsley Professor of Law and Political Science, University of Southern California Law Center; Richard H. Fallon, Jr., Professor of Law, Harvard Law School; Daniel A. Farber, Henry J. Fletcher Professor & Associate Dean, University of Minnesota Law School; Philip P. Frickey, Faegre & Benson Professor, University of Minnesota Law School; Paul D. Gewirtz, Potter Steward Professor of Constitutional Law, Yale Law School; Gerald Gunther, William Nelson Cromwell Professor, Stanford Law School; John C. Jeffries, Jr., Emerson G. Spies Professor and Horace W. Goldsmith Research Professor and Academic Associate Dean, University of Virginia School of Law; Sanford Levinson, W. St. John Garwood & W. St. John Garwood Jr. Regents Chair in Law, University of Texas School of Law;

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Burke Marshall, Nicholas deB. Katzenbach Professor Emeritus, Yale Law School; Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center; Suzanna Sherry, Earl R. Larson Professor, University of Minnesota Law School; Steven H. Shiffrin, Professor of Law, Cornell Law School; Kathleen M. Sullivan, Professor of Law, Stanford Law School; Laurence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School; The American Civil Liberties Union Foundation; Stephen B. Burbank, Robert G. Fuller, Jr. Professor of Law, University of Pennsylvania Law School; William Cohen, C. Wendell and Edith M. Carlsmith Professor of Law, Stanford University Law School; Larry Kramer, Professor of Law, New York University Law School; Deborah J. Merritt, Professor of Law and Women's Studies, University of Illinois College of Law; Geoffrey P. Miller, Kirkland & Ellis Professor of Law, The University of Chicago Law School; Robert F. Nagel, Ira Rothgerber Professor of Constitutional Law, University of Colorado Law School; Richard Parker, Professor of Law, Harvard Law School; L.A. Scot Powe, Jr., Anne Green Regent Professor of Law, University of Texas Law School; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Ronald D. Rotunda, Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law; William Van Alstyne, William R. and Thomas C. Perkins Professor of Law, Duke University School of Law,

Amicus Curiae.

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Suzanna Sherry, Earl R.
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Edith M. Carlsmith Profes-
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Amicus Curiae.

Decided and Filed January 9, 1996

Appeals from the United States District Court
for the Eastern District of Arkansas

Before BOWMAN, ROSS, and BEAM, Circuit Judges.

BOWMAN, Circuit Judge.

We have before us in this appeal the novel question whether the person currently serving as President of the United States is entitled to immunity from civil liability for his unofficial acts, *i.e.*, for acts committed by him in his personal capacity rather than in his capacity as President. William Jefferson Clinton, who here is sued personally, and not as President, appeals from the District Court's decision staying trial proceedings, for the duration of his presidency, on claims brought against him by Paula Corbin Jones. He argues that the court instead should have dismissed Mrs. Jones's suit without prejudice to the refiling of her suit when he no longer is President. Mr. Clinton also challenges the District Court's decision to allow discovery to proceed in the case during the stay of the trial. Mrs. Jones cross-appeals, seeking to have the stays entered by the District Court lifted, so that she might proceed to trial on her claims.[1] We affirm in part and reverse in part, and remand to the District Court.[2]

[1] In addition to staying the trial on Mrs. Jones's claims against Mr. Clinton, the District Court also stayed trial against Mr. Clinton's co-defendant in the suit, Arkansas State Trooper Danny Ferguson.

[2] In addition to the briefs of the parties, amicus briefs have been filed in support of Mr. Clinton by the United States and by a group of law professors including Professors Amar, Bloch, Bruff, Estrich, Fallon, Jr., Farber, Frickey, Gewirtz, Gunther, Jeffries, Jr., Levinson, Marshall, Resnik, Sherry, Shiffrin, Sullivan, and Tribe; and in support of Mrs. Jones by The American Civil Liberties Union Foundation and by a group of law profes-

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On May 6, 1994, Mrs. Jones filed suit in the District Court against Mr. Clinton and Danny Ferguson, an Arkansas State Trooper who was assigned to Mr. Clinton's security detail during his tenure as governor of Arkansas, for actions alleged to have occurred beginning with an incident in a Little Rock, Arkansas, hotel suite on May 8, 1991, when Mr. Clinton was governor and Mrs. Jones was a state employee. Pursuant to 42 U.S.C. § 1983 (1988), Mrs. Jones alleges that Mr. Clinton, under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her. She further alleges that Mr. Clinton and Trooper Ferguson conspired to violate those rights, a claim she brings under 42 U.S.C. § 1985 (1988). Her complaint also includes two supplemental state law claims, one against Mr. Clinton for intentional infliction of emotional distress and the other against both Mr. Clinton and Trooper Ferguson for defamation.

Mr. Clinton, asserting a claim of immunity from civil suit, filed a motion to dismiss the complaint without prejudice to its refiling when he is no longer President or, in the alternative, for a stay of the proceedings for so long as he is President. On December 28, 1994, the District Court, rejecting the application of absolute immunity, denied Mr. Clinton's motion to dismiss the complaint. The court did find, however, that for separation of powers reasons Mr. Clinton was entitled to a "temporary or limited immunity from trial," [3] and thus granted his request to stay the trial for the duration of Mr. Clinton's service as President. *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994). Concluding that the claims

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sors including Professors Burbank, Cohen, Kramer, Merritt, Miller, Nagel, Parker, Powe, Jr., Presser, Rotunda, and Van Alstyne.

[3] The District Court also justified the stay on the basis of its authority under Rule 40 of the Federal Rules of Civil Procedure and "the equity powers of the Court." *Jones v. Clinton*, 869 F. Supp. 690, 699 (E.D. Ark. 1994).

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against Trooper Ferguson are factually and legally intertwined with the claims against Mr. Clinton, the court also stayed the trial against Trooper Ferguson for as long as Mr. Clinton is President, but permitted discovery on Mrs. Jones's claims against both Mr. Clinton and Trooper Ferguson to go forward. On appeal, Mr. Clinton seeks reversal of the District Court's rejection of his motion to dismiss the complaint on the ground of presidential immunity and asks us to order that court to dismiss Mrs. Jones's action in its entirety, without prejudice. In the alternative, he asks this Court to reverse the decision denying his motion to stay discovery. Mrs. Jones cross-appeals the District Court's decision to stay the trial of her claims against both Mr. Clinton and Trooper Ferguson.[4]

Mr. Clinton argues that this suit should be dismissed solely because of his status as President. The immunity he seeks would protect him for as long as he is President, but would expire when his presidency has been completed. The question before us, then, is whether the President is entitled to

[4] Mr. Clinton argues that we do not have jurisdiction to hear Mrs. Jones's cross-appeal from the orders staying the trial, as they are non-final, interlocutory orders. We conclude, however, that Mrs. Jones's cross-appeal is "inextricably intertwined" with Mr. Clinton's appeal, which is before us under the immunity exception to the general rule that only final judgments are appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Thus the orders staying trial are presently appealable under our "pendent appellate jurisdiction." *See Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995) (analyzing *Swint v. Chambers County Commission*, 115 S. Ct. 1203 (1995), and concluding that pendent appellate jurisdiction remains a viable concept in the Eighth Circuit). All issues raised in the appeal and the cross-appeal (with the exception of those portions of the orders concerning the defamation claim against Mr. Clinton, *see infra* note 7) -- the challenges to the non-dismissal of the suit, to the stays of trial, and to the allowance of discovery -- are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency, from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" than these, where answering one question of law resolves them all.

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immunity, for as long as he is President, from civil suits alleging actionable behavior by him in his private capacity rather than in his official capacity as President. We hold that he is not.

We start with the truism that Article II of the Constitution, which vests the executive power of the federal government in the President, did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society. As the Supreme Court has observed, "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . . ." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Nevertheless, mindful that for the sake of the nation's general good the Constitution empowers officials to act within the scope of their official responsibilities, the Supreme Court has recognized "that there are some officials whose special functions require a full exemption from liability" for their performance of official acts. *Id.* at 508. The list of those entitled to absolute immunity from civil liability includes the President of the United States for his official acts, *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); members of Congress for their legislative acts, regardless of motive, under the Speech and Debate Clause, U.S. Const. art. I, § 6, *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (per curiam); *Tenney v. Brandhove*, 341 U.S. 367, 372, 377 (1951); judges in courts of general jurisdiction for judicial acts, *Stump v. Sparkman*, 435 U.S. 349, 359-60 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); prosecutors for prosecutorial functions, *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); and certain executive officials performing certain judicial and prosecutorial functions in their official capacities, *Butz*, 438 U.S. at 514-15. In addition, witnesses are entitled to absolute immunity from civil suit for testimony given in judicial proceedings, *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983), and even

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government officials whose special functions do not require a full exemption from liability may have a more limited qualified immunity for their official acts, *e.g.*, *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (school officials); *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (officers of the Executive Branch); *Pierson*, 386 U.S. at 557 (police officers making an arrest). We are unaware, however, of any case in which any public official ever has been granted any immunity from suit for his unofficial acts, and neither the Supreme Court nor any other court, the District Court excepted, appears to have addressed the precise issue before us today: whether the President is entitled to immunity for the duration of his presidency when sued for his unofficial actions.

The immunity that has been found for official acts is not the product of a prudential doctrine created by the courts and is not to be granted as a matter of judicial largesse. *Cf. Imbler*, 424 U.S. at 421 ("[O]ur earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983."). Rather, the question whether to grant immunity to a government official is "guided by the Constitution, federal statutes, and history" and is informed by public policy. *Fitzgerald*, 457 U.S. at 747. "In the case of the President the inquiries into history and policy . . . tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure." *Id.* at 748. Thus the historical "inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers." *Id.*

There is no suggestion in this case that federal legislation is the source of either the immunity Mr. Clinton seeks or an abrogation of a previously declared presidential immunity.

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Cf. id. at 748 n.27 (noting that the causes of action in the case were "implied" in the Constitution and federal law, and therefore declining to "address directly the immunity question as it would arise if Congress expressly had created a damages action against the President" for his official acts). Nor is presidential immunity of any kind explicit in the text of the Constitution. Instead, whatever immunity the President enjoys flows by implication from the separation of powers doctrine, which itself is not mentioned in the Constitution, but is reflected in the division of powers among the three branches. *See* U.S. Const. arts. I, II, III. The Supreme Court in *Fitzgerald*, after an exhaustive examination of the history and the constitutional significance of the presidency, held that absolute immunity from civil liability for official acts is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of separation of powers and supported by our history." 457 U.S. at 749. There is a "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743.

The parties agree, and so do we, that the fundamental authority on the subject of presidential immunity is the plurality opinion in *Fitzgerald.* As noted above, the issue before the Court in that case was whether the President is entitled to absolute immunity (rather than qualified immunity or no immunity at all) from personal civil liability for his official acts. By only a five-to-four majority, the Court held that, "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. By definition, unofficial acts are not within the perimeter of the President's official responsibility at all, even the outer pe-

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rimeter.[5] The Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion, here advanced by Mr. Clinton, that beyond this outer perimeter there is still more immunity waiting to be discovered. We thus are unable to read *Fitzgerald* as support for the proposition that the separation of powers doctrine provides immunity for the individual who serves as President from lawsuits seeking to hold him accountable for his unofficial actions. *See id.* at 759 (Burger, C.J., concurring) ("a President, like Members of Congress, judges, prosecutors, or congressional aides--all having absolute immunity--[is] not immune for acts outside official duties").[6] Moreover, having considered the arguments put forward in the present case, we cannot discern any reason grounded in the Constitution for extending presidential immunity beyond the outer perimeter delineated in *Fitzgerald.* Accordingly, we hold that a sitting President is not immune from suit for his unofficial acts. In this case it is undisputed that most of the acts alleged by Mrs. Jones clearly fall outside the zone of official presidential responsibility, given that they occurred while Mr. Clinton was still governor of Arkansas.[7]

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[5] We note that the dissenting opinion in the present case does not mention *Fitzgerald's* "outer perimeter," much less explain how unofficial acts could come within the protected zone.

[6] The dissenting opinion, while liberally citing and quoting Chief Justice Burger's concurrence, *post* at 27-28, 31 [App. 26-27, 30], does not mention that the Chief Justice expressly stated that the President is "not immune for acts outside official duties."

[7] Mrs. Jones's state law defamation claim concerns actions alleged to have been taken by Mr. Clinton's presidential press secretary while Mr. Clinton was President. The question whether these actions fall inside the "'outer perimeter' of [the President's] official responsibility," *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982), so as to come within the scope of the President's absolute immunity for official acts, is not free from doubt. This particular issue has not been addressed by the District Court, and the record as to the circumstances of the press secretary's statements is not

Stressing that the immunity claimed here is only temporary (until the end of Mr. Clinton's presidency), Mr. Clinton and his amici would have us consider the nature of Mrs. Jones's complaint, as well as the timing of the filing of her suit (apparently just within the statute of limitations), and conclude that her suit is neither important nor urgent, and certainly not consequential enough to trump Mr. Clinton's claim to temporal immunity from suit. But that is not the test. Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws. " 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). Mrs. Jones retains that right in her suit against Mr. Clinton, regardless of what her claims may be or when her suit was filed (if otherwise timely filed), provided that she is not challenging actions that fall within the ambit of official presidential responsibility. We further reject the suggestion that Mrs. Jones's motives in filing suit, alleged to be political, should be examined, and that her suit should be dismissed if we are persuaded that her objective in bringing the suit is less than pure. Such an approach would convert a presidential immunity analysis into the taking and weighing of accusations and recriminations, an exercise unnecessary and inappropriate to the proper determination of a claim of immunity based on the Constitution.

Mr. Clinton argues that, if he is presently amenable to suit for his private acts, the proceedings against him inevitably will intrude upon the office of President, in contravention of *Fitzgerald*'s teachings, noting the Court's concern that the "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. Thus, Mr. Clinton

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fully developed. We therefore leave this issue for initial resolution by the District Court after remand and upon a more complete record.

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would have us ignore the line that *Fitzgerald* draws between official and unofficial acts and instead "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch," the analysis undertaken by the Court in reaching its decision on the question of presidential immunity for official acts. *Id.* at 754. But the Court in *Fitzgerald* was troubled by the potential impact of private civil suits arising out of the President's performance of his official duties on the future performance of those duties, not by whether the President *qua* individual citizen would have the time to be a defendant in a lawsuit. As the Court explained, "[A] President must concern himself with matters likely to 'arouse the most intense feelings,' " and "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (citations to quoted cases omitted). It is clear from a careful reading of *Fitzgerald* that the justification for the absolute immunity conferred in that case was concern that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process. The rationale of the *Fitzgerald* majority is that, without protection from civil liability for his official acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability. This rationale is inapposite where only personal, private conduct by a President is at issue.

Mrs. Jones's claims, except for her defamation claim,[8] concern actions by Mr. Clinton that, beyond cavil, are unrelated to his duties as President. This lawsuit thus does not implicate presidential decision-making. If this suit goes forward, the President still will be able to carry out his duties

[8] *See supra* note 7.

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without any concern that he might be sued for damages by a constituent aggrieved by some official presidential act. Though amenable to suit for his private acts, the President retains the absolute immunity found in *Fitzgerald* for official acts, and presidential decision-making will not be impaired. "In defining the scope of an official's absolute privilege, . . . the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.* at 755. We see no connection, much less a close one, between the unofficial actions Mr. Clinton wishes to shield from judicial process and the justifying purposes of presidential immunity as set forth by the Court in *Fitzgerald.*

Mr. Clinton argues that denying his claim to immunity will give the judiciary *carte blanche* to intrude unconstitutionally upon the Executive Branch and in fact will disrupt the performance of his presidential duties and responsibilities. As the argument goes, because a federal court will control the litigation, the Third Branch necessarily will interfere with the Executive Branch through the court's scheduling orders and its powers to issue contempt citations and sanctions. But Mr. Clinton's sweeping claim that this suit will allow the judiciary to interfere with the constitutionally assigned duties of the Executive Branch, and thus will violate the constitutional separation of powers doctrine if immunity is not granted, without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit (and, unlike the dissent, *post* at 30-31, 32 [App. 29-30, 31], we think it is Mr. Clinton's burden to do so), is insufficient ground for granting presidential immunity, even temporarily. *See Butz*, 438 U.S. at 506 ("[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); *cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding no presidential privilege attaches to presidential communications subpoenaed in criminal case when asserted privilege "is based only on the

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generalized interest in confidentiality"). We reject Mr. Clinton's argument, and instead focus our attention on the true separation of powers issues, which we already have discussed, upon which the question of presidential immunity hinges.

"[T]he Constitution by no means contemplates total separation of each of [the] three essential branches of Government." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam). Under the checks and balances provided for in the Constitution, all branches have the capacity to intrude in some way upon the province of the other branches. But under the Constitution, and because of those same checks and balances, no one branch may intrude upon another to such an extent that the threatened branch is rendered incapable of performing its constitutionally assigned duties. *See id.* at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."). What is needed, we believe, to avoid a separation of powers problem is not immunity from suit for unofficial actions, an immunity that would accord the President a degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens), but judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule. The trial court has broad discretion to control the scheduling of events in matters on its docket.[9] We have every confidence that the District Court will exercise its discretion in such a way that this lawsuit may move forward with the

[9] Notwithstanding the District Court's broad discretion in matters concerning its own docket, the alternative rationale for the stays the court granted--its power under Federal Rule of Civil Procedure 40 and "the equity powers of the Court," *Jones v. Clinton*, 869 F. Supp. at 699--attempts to justify orders that we consider an abuse of discretion. 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.

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reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties.

The unfettered filing of numerous vexatious or frivolous civil lawsuits against sitting Presidents for their unofficial acts that Mr. Clinton and the dissenting opinion in this case envision if Mr. Clinton is not granted temporal immunity from Mrs. Jones's lawsuit is not only speculative, but historically unsupported. To date no court ever has held that an incumbent President has any immunity from suit for his unofficial actions. Although our Presidents never have been recognized as having any immunity from lawsuits seeking remedies for civil liabilities allegedly incurred by them in their personal dealings, it would appear that few such lawsuits have been filed.[10]

While the President himself and his official conduct inevitably have the high visibility that concerned the Court in *Fitzgerald*, 457 U.S. at 753 (noting "the visibility of [the President's] office and the effect of his actions on countless people" as setting him up as "an easily identifiable target for

[10] The parties have identified only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties. *See also Jones v. Clinton*, 869 F. Supp. at 697. Those suits were against Theodore Roosevelt, Harry S Truman, and John F. Kennedy. In each case, the action was filed before the defendant began serving as President, and the suits against Presidents Roosevelt and Truman were already on appeal before those men assumed the office of President. *People ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904) (per curiam mem.); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). It does not appear that either Mr. Roosevelt or Mr. Truman claimed any immunity from suit. In the action against Mr. Kennedy, he asserted, post-election, that he was temporarily protected from suit under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-93 (1988 & Supp. V 1993), given his status as Commander-in-Chief. The court denied Mr. Kennedy's motion for a stay, apparently without a written opinion, and the case eventually settled. *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962); *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. 1962).

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suits for civil damages"), his unofficial, private conduct is on a different footing. Although such conduct may attract widespread attention when someone elects to make it public, the unofficial acts of the person who serves as President, unlike the President's official acts, are not likely to affect "countless people." Rather, unofficial conduct will affect only those who traffic with the President in his personal capacity. Thus the universe of potential plaintiffs who might seek to hold the President accountable for his alleged private wrongs via a civil lawsuit is considerably smaller than the universe of potential plaintiffs who might seek to hold the President accountable for his official conduct; in the latter case, the plaintiff could be virtually anyone who feels aggrieved by presidential action. If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Finally, we reject the notion that presidential immunity in civil cases seeking a remedy for unofficial acts can be conferred on an *ad hoc* basis. There is no constitutional basis for the proposition that a court, in its discretion, could refuse to grant immunity to a President in, for example, suits for arrearages in child support or the case of the "more urgent need" of a plaintiff seeking injunctive relief, Appellant's Reply Brief at 21 n. 14, or of a plaintiff who shows exigent circumstances, while granting immunity from suits for declaratory relief or money damages where the plaintiff demonstrates no exigency. A sitting President is either entitled to immunity from suit for his unofficial acts, or he is not. As we have noted, presidential immunity is not a prudential doctrine fashioned by the

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courts. Mr. Clinton is entitled to immunity, if at all, only because the Constitution ordains it. Presidential immunity thus cannot be granted or denied by the courts as an exercise of discretion. The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances. Again, we have every confidence that the District Court will discharge its responsibility to protect the President's role as our government's chief executive officer, without impeding Mrs. Jones's right to have her claims heard without undue delay. If either party believes the court is failing to discharge that responsibility, the proper course is to petition this Court for a writ of mandamus or prohibition.

To sum up, we hold that the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts. Accordingly, we affirm the District Court's decision denying Mr. Clinton's motion to dismiss Mrs. Jones's suit and the decision to allow discovery in this case to proceed. For the same reason, we reverse the District Court's order granting Mr. Clinton's motion to stay the trial of this matter for the duration of his presidency. Mrs. Jones's appeal of the District Court's post-judgment order staying discovery during the pendency of this appeal is dismissed as moot, as is Mr. Clinton's challenge to our jurisdiction to hear that appeal. The case is remanded to the District Court, with instructions to lift the stays that the court has entered and to allow Mrs. Jones's suit against Mr. Clinton and Trooper Ferguson to proceed in a manner consistent with this opinion and the Federal Rules of Civil Procedure.

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BEAM, Circuit Judge, concurring specially.

I concur in the conclusions reached by Judge Bowman. I write separately to express my views on three matters which are, in my mind, insufficiently discussed by either the opinion of the court or the dissent.

I.

Mr. Clinton and his amicus vigorously present their position on the potential impact of this civil litigation on the office and the duties of the presidency. And, without question, they raise matters of substantial concern given the constitutional obligations of the office. What is missing from their arguments is a coordinate and balanced analysis of the impact a stay of the litigation, including an embargo on all discovery, will have on Ms. Jones and her claims. This should also be of substantial concern because it involves fundamental constitutional rights governing access to and use of the judicial process under the First and Fourteenth Amendments and the right to a timely jury trial under the Seventh Amendment, to identify only a few specific omissions.

It is incorrect, in my view, for Mr. Clinton and his amicus to assert that the delay is of no consequence to Ms. Jones. Aside from the adage that justice delayed is justice denied, Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time. To argue that this problem may be dealt with by episodic exceptions when the risk of loss is apparent is to miss the point. Only rarely does life proceed in such a foreseeable fashion.

The dissent states, "[w]here there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office." *Infra* at 30 [App. 29]. The dissent urges total abeyance of both discovery and trial. I perceive this, perhaps incorrectly, to be an implicit finding that there is, indeed, no real urgency to Ms. Jones's suit for civil damages and, thus, the

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constitutionally based separation of powers doctrine *demands* that this litigation, in all of its manifestations, be abated until Mr. Clinton leaves office -- this to protect the constitutional grant of executive authority given to a sitting President. In my view, this greatly oversimplifies the issues in this appeal and overstates the danger to the presidency. The potential for prejudice to Ms. Jones, as earlier noted, reaches, or at least approaches, constitutional magnitude. If a blanket stay is granted and discovery is precluded as suggested by Mr. Clinton and his amicus, Ms. Jones will have no way that I know of (and none has been advanced by those counseling this course of action),[1] to perpetuate the testimony of any party or witness should they die or become incompetent during the period the matter is held in abeyance. Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal.

It is true that some of Ms. Jones's claims would survive to her guardian, heirs or assigns in the event of her incompetence or death, assuming a way is found to preserve crucial evidence. Her claim of defamation is in a different class. It almost certainly would be totally extinguished should either party die. This would also include her defamation claims asserted against Trooper Ferguson.

From the pleadings, the forum law applicable to her defamation claims is not easily discernible and I have not canvassed the law in every conceivable jurisdiction. It seems appropriate to note, however, that under Arkansas law, for example, the defamation claims would expire on the death of either party. *See* Ark. Code Ann. § 16-62-101(b) (Michie 1987 & Supp. 1993); *Parkerson v. Carrouth*, 782 F.2d 1449,

[1] Only the amicus brief filed by the Solicitor General fleetingly mentions this problem, but it offers no solutions.

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1451-53 (8th Cir. 1986). I think Arkansas expresses the rule of most jurisdictions. Accordingly, one can readily see the irreparable harm that a stay of this claim (assuming its viability as we must at this point) will bring to Ms. Jones. Thus, the total stay requested by Mr. Clinton and his amicus, and embraced by the dissent, will immediately produce a threat of irreparable injury.

Even though a sitting President is not immune from liability for his nonofficial conduct, it is fair to note that some of Ms. Jones's defamation claims, as presently alleged, may well fit within the "outer perimeter" of official responsibility as discussed in *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). Thus, at the very least, absolute immunity defenses to these claims should be immediately taken up and decided by the district court.

The dissent appears to recognize the potential for irreparable harm to Ms. Jones and proposes that her interests -- as balanced against the interests of Mr. Clinton -- be analyzed and weighed by shifting the burden of establishing "irreparable injury" to Ms. Jones, *along with* the additional burden on Ms. Jones of showing "that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office." *Infra* at 30-31 [App. 29-30]. The dissent cites no established authority or case precedent for this burden-shifting strategy, even by analogy to some reasonably comparable situation. I have discovered none. In this regard, there is no way, in my view, that a litigant could ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited. To determine, as a precondition to "immediate adjudication," that at some future time the lawsuit will not significantly impair the duties of the President would be an impossible task. Thus, the dissent's proposed safety valve is valueless, except in its recognition of the potential for irreparable harm to Ms. Jones caused by the total stay.

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Notwithstanding the separation of powers concerns outlined by the dissent, the burden, in my view, should be shouldered, as in any other civil litigation, by the party seeking to delay the usual course of discovery and trial. Otherwise, we will have established requirements of insurmountable proportions for any litigant who may have a viable and urgent civil claim against a sitting President or perhaps, against other important governmental figures with constitutionally established duties.

This approach to staying litigation is a well-established legal concept. Traditionally, an applicant for a stay has the burden of showing specific hardship or inequity if he or she is required to go forward. *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). This may be a *sub silentio* recognition of the terms of the Seventh Amendment. However, great public interest may authorize a stay which is not immoderate or oppressive in its consequences. *Id.* at 256. Thus, while there is a balancing to be done, the presumption is on Ms. Jones's, not Mr. Clinton's, side. When stays are granted, after the petitioner for the stay meets his "heav[]y" burden of showing "the justice and wisdom of a departure from the beaten track," they must be narrowly tailored or they will amount to an abuse of discretion. *Id.* Of course, the justice and wisdom of such a departure will take into account, in this case, that one of the parties is the sitting President of the United States. *See generally United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990). Nonetheless, I agree with Judge Bowman that Mr. Clinton should carry this initial burden, not Ms. Jones.

In determining whether to stay the litigation, Ms. Jones must be given the benefit of the concept that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, *whenever* [s]he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161 (1803) (emphasis added). More recently, and explicitly, access to the courts has been held to be a

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"fundamental constitutional right" founded in the Due Process and Equal Protection clauses. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977). This right is pivotal to our system of governance in that "civil rights actions [such as the 42 U.S.C. § 1983 action at issue here] are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Id.* at 827 (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969)).

Surely, if civil rights actions are of such importance that they may not be impeded or delayed by a person's incarceration, there must be at least an equal public interest in an ordinary citizen's timely vindication of his or her most fundamental right against alleged abuse of power by governmental officials. As noted, Ms. Jones has, in part, brought a 42 U.S.C. § 1983 action, not a mere run-of-the-mill tort claim. The violation of civil rights through the abuse of state government positions of power has been of such great public concern that Congress felt it necessary to enact section 1983 to protect the citizenry and to hold persons with positions of power accountable for its abuse. Thus, this is not a minor civil dispute to which one can assign *no* public interest beside that on the side of the presidency. The balance to be considered, therefore, is not completely one sided. There is a public interest, as well as an individual interest, on Ms. Jones's side of the scale. These interests are of such weight that, at least provisionally, Ms. Jones is entitled to proceed.

II.

I now turn to the potential impact upon the duties of the presidency. The dissent eloquently and properly raises several unanswered questions, *infra* at 29-30 [App. 28-29], concerning judicial branch interference with the functioning of the presidency should this suit be allowed to go forward. Again, I readily admit that these are matters of major concern. In my view, however, these concerns for interbranch interference are greatly overstated by Mr. Clinton and his amicus.

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Indeed, they are not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government. Judge Bowman notes at least three earlier instances in which sitting Presidents have been involved in civil litigation outside of official presidential duties. *Supra* at 14 & n.10 [App. 14 & n.10]. Also in the past, under appropriate circumstances "several American Presidents and former Presidents have given testimony under oath in judicial or quasi-judicial settings." 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 7.1 at 572 (2d ed. 1992). Former and sitting Presidents have previously submitted, either voluntarily or involuntarily, to questions under oath. *Id.* By doing so, they implicitly submitted to the common law rule, expressed by Lord Hardwicke, "that the public has a right to every man's evidence" 8 John H. Wigmore, *Evidence* § 2192, at 71 (John McNaughton ed. rev. 1961) (quoting 12 Cobbett's Parliamentary History 675, 693 (1942)).

> Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of *chief executive* of a state?
>
> There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice.

Id. at § 2370(c) (emphasis in original).

As a sitting President, Richard Nixon was a defendant in at least two civil actions. In one, Mr. Nixon was ordered by the Supreme Court to produce tapes subpoenaed by a special prosecutor. *United States v. Nixon*, 418 U.S. 683, 713 (1974). In the other, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) the court held that a President is amenable to legal process, even in his official capacity, if

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absolutely necessary. Mr. Nixon did not appeal that determination.

Also, as noted by Rotunda and Nowak, President Jimmy Carter gave videotaped testimony during his presidency that was presented at the criminal conspiracy trial of two Georgia state officials. *See* 1 Rotunda & Nowak § 7.1 at 575. Later, then-sitting President Carter provided videotaped testimony for a grand jury investigating charges that Robert Vesco had enlisted White House aid to quash extradition proceedings against him. *Id.* Finally, still-sitting President Carter was interviewed under oath by Justice Department investigators probing "for criminal, civil, and administrative purposes" any offenses resulting from Billy Carter's relations with the Libyan Government. *Id.* Further, President Gerald Ford was *compelled* to testify by videotape deposition in the criminal trial of Lynette (Squeaky) Fromme, who was charged with attempting to assassinate the President. *Id.* at 581. There are numerous other instances in which a *sitting* President has both voluntarily or involuntarily appeared at judicial proceedings and before committees of Congress. Such instances have involved, at least, Presidents Thomas Jefferson, James Monroe, Abraham Lincoln and Ulysses S. Grant. *See id.* § 7.1.

I concede that most of these situations have arisen within the framework of governmental operations. I further concede that there is not a perfect fit between the interests at play in the cited interbranch proceedings and the civil litigation at issue here. My point is that each named President has obviously scheduled these encounters without creating a cataclysmic episode in which the constitutional duties of the office have been compromised.

Ms. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President

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and Ms. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of the litigation with maximum consideration of the President's constitutional duties.

III.

My final concern involves Trooper Danny Ferguson. Even assuming, for sake of argument, the validity of every constitutional claim or defense advanced by Mr. Clinton, I can find no basis for staying discovery or trial of the claims against Trooper Ferguson. Whether private citizen or President, it is unlikely that Mr. Clinton would choose to be present at the deposition of Trooper Ferguson or any sundry witness; certainly he would not be required to attend and no prejudice is likely to result from his absence. Neither would he need to be directly concerned with other discovery directed to Trooper Ferguson although it might, admittedly, affect his interests. Even so, I find no separation of powers or other constitutional basis for a stay for this portion of the litigation, especially the discovery process.[2]

IV.

I in no way seek to downplay the concerns outlined by the dissent. At the same time, I feel that Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the

[2] Any problems that arise from attempts by Trooper Ferguson to depose or otherwise conduct discovery from Mr. Clinton, if resisted, are, in my view, separate from the issues raised in this appeal.

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rights of any party. As I have attempted to stress, nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled. With this understanding, I concur.

ROSS, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion. Instead, I would affirm the judgment of the district court concluding that the civil action should not be dismissed, but stayed during the President's term in office. Further, I would reverse the district court's conclusion allowing discovery to proceed.

In my opinion, the language, logic and intent of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), although set in the context of official acts, applies with equal force to the present factual scenario and directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term.

The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts. The *Fitzgerald* Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages. The Court stated, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751.

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This "diversion of energies" argument refers not only to the concern with whether the President will execute his official duties in a fearless and impartial manner, but also recognizes that the "President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." *Id.* at 749, 750. Article II, § 1 of the Constitution uniquely vests the entire executive power in the President. No other branch of government is entrusted to a single person. It is this singularity of the President's constitutional position that calls for protection from civil litigation.

The unofficial nature of the alleged events would not make defending a private suit for civil damages any less of a burden on the President's time and attention and therefore on his constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. When the President is called upon to defend himself during his term of office, even in actions wholly unrelated to his official responsibilities, the dangers of intrusion on the authority and functions of the Executive Branch are both real and obvious. 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.

Further, the *Fitzgerald* majority was concerned with the possibility that the "sheer prominence of the President's office" makes a President "an easily identifiable target for suits for civil damages." *Id.* at 752-53. In his concurrence, Chief Justice Burger noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763 (Burger, C.J. concurring). While stated in the context of official acts, Chie

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Justice Burger's concurrence applies with equal force to the present case:

> The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. . . . When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.

Id. at 763 (Burger, C.J., concurring).

The same concerns are implicated in the present action as well, where such suits could be pursued merely for the purpose of gaining partisan political disruption, public notoriety, unwarranted financial gain, or potential extortion. Indeed, any number of potential private claims could be contrived to entangle a sitting President in embarrassing or protracted litigation, alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of a pretrial motion.

The *Fitzgerald* Court also recognized that presidential immunity is "rooted in the separation of powers under the Constitution." *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)). The Court noted that the Framers of the Constitution assumed that "the President personally, was not the subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." *Id.* at 751 n.31 (quoting Journal of William Maclay 167 (E. Maclay ed. 1890) (alteration in original). Quoting Thomas Jefferson, the Supreme Court further underscored its concern that exercising jurisdiction over a President would

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create the opportunity for unconstitutional judicial intrusion upon Executive authority:

> [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?

Id. (quoting 10 The Works of Thomas Jefferson 404 (P. Ford ed. 1905)).

In my view, the separation of powers doctrine requires that private civil actions against a sitting President for unofficial acts must be stayed during the President's term in office. Civil lawsuits against a President create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes. It cannot be denied that the potential for such conflicts is inherent in subjecting any President personally to a court's jurisdiction.

The majority concludes the remedy for interference with the performance of the President's official duties by the demands of discovery and trial preparations and proceedings is the filing of motions with the court for rescheduling, additional time or continuances. *Ante* at 16 [App. 16]. If this route proves to be unsuccessful, the majority suggests the President should be required to petition this Court for a writ of mandamus or prohibition, *id.*, and arguably then to appeal any adverse decision to the Supreme Court. This suggestion, however, clearly epitomizes the separation of powers conflict inherent in a system that subjects a sitting President personally to the court's jurisdiction for the purpose of private civil litigation.

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The majority's decision leaves as many questions unanswered as it answers: Must a President seek judicial approval each time a scheduled deposition or trial date interferes with the performance of his constitutional duties? Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? Finally, can a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict? While the majority would encourage other courts to exercise "judicial case management sensitive to the burdens of the presidency," *ante* at 13 [App. 13], only a stay of civil litigation during a President's term in office will ensure the performance of Executive duties unencumbered by the judiciary and thereby avoid separation of powers conflicts.

While noting that the separation of powers doctrine "does not bar every exercise of jurisdiction over the President of the United States," *Fitzgerald*, 457 U.S. at 753-54, in view of the significant encroachment upon presidential duties and independence that would necessarily accompany litigation, the *Fitzgerald* Court admonished that, before asserting such jurisdiction, a court "*must* balance the constitutional weight of the interest to be served [by the litigation] against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754 (emphasis added) (citing *Nixon v. GSA*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. at 703-13)).

Where there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office. The cause of action should be stayed unless the plaintiff can show that he or she

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will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office.

It is important to keep in mind that the issue here is not *whether* the President may be required to answer claims based on unofficial conduct, but *when*. This conclusion merely delays, rather than defeats, the vindication of the plaintiff's private legal interests, and thus is far less burdensome for a plaintiff than the absolute immunity recognized in *Fitzgerald*. A stay for the duration of the President's service in office would not prevent Jones from ultimately obtaining an adjudication of her claims. Rather, staying the litigation will protect the important public and constitutional interests in the President's unimpaired performance of his duties, while preserving a plaintiff's ability to obtain resolution of his or her claims on the merits. Postponing adjudication of private damage actions will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief. "[W]e do well to bear in mind that the focus must not be simply on the matter of judging individual conduct in a fact-bound setting; rather, in those familiar terms of John Marshall, it is a *Constitution* we are expounding. Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages." *Id.* at 758-59 (Burger, C.J., concurring).

The well-known travail of litigation and its effect on the ability of the President to perform his duties, as well as the subjection of the President to the ongoing jurisdiction of the courts and the attendant impact on the separation of powers, dictate the postponement of non-exigent, private civil damages litigation until the President leaves office.

In my opinion, the stay should include pretrial discovery, as well as the trial proceedings, because discovery is likely to pose even more intrusive and burdensome demands on the

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President's time and attention than the eventual trial itself. Similarly, I would grant a stay of proceedings against a co-defendant of a sitting President where, given all the circumstances, the claims against the co-defendant cannot proceed without materially diminishing the effectiveness of a stay of proceedings against the President. I agree with the district court's conclusion here that a stay of the claims against Trooper Ferguson is essential if the President is to be fully protected.

Out of respect for the separation of powers and the unique constitutional position of the President, I conclude the President ordinarily should not be required to defend himself against civil actions until after the completion of his service in office. Therefore I would hold that to rebut the presumption that private suits against a sitting President should not go forward during the President's service in office, the plaintiff should have to demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Absent such a showing, the litigation should be deferred.

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Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Plaintiff - Appellee,

v.

William Jefferson Clinton,

Defendant - Appellant,

Danny Ferguson,

Defendant,

United States of America, et al.,

Amicus Curiae.

Decided and Filed March 28, 1996

Appeal from the United States District Court
for the Eastern District of Arkansas

The suggestion for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Murphy took no part in the consideration or decision of this case.

McMILLIAN, Circuit Judge, dissenting from the denial of the suggestion for rehearing en banc.

The majority opinion not only has put short pants on President William Jefferson Clinton, but also has succeeded in demeaning the Office of the President of the United States,

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recognized throughout the world as the most powerful office in the world, an office which, at this time, is grappling with world problems in Bosnia, Iran, China, Taiwan, Cuba, Russia, and most third-world nations, not to mention the myriad of domestic problems here at home. Never has there been a question of whether President Clinton is above the law and immune from suit, the question is only "when?" My colleagues, to my dismay, would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the appellant delayed filing for at least *three* years.

The panel opinion is this case unfortunately misinterprets the principles enunciated in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (*Fitzgerald*). The panel opinion will allow judicial interference with, and control of, the President's time, at least in part. The ruling thus violates the separation of powers doctrine and should be reviewed by this court en banc. I dissent from the court's refusal to do so.

My reading of *Fitzgerald* discloses two separate rationales for the immunity granted to former President Richard Nixon. The first rationale focuses on the "public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). This rationale reflects the concern that the threat of a lawsuit could interfere with the President's ability to carry out his or her official duties. *Id.* "Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Id.* at 752 n.32. This is the official action rationale which confers immunity to a president from lawsuits even after completion of his or her term of office.

The second rationale applies to lawsuits, such as the present one, filed during the President's term but arising from conduct or events which are unrelated to the President's offi-

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cial duties. This rationale is not based upon the need for fearless and impartial decision making by the President but rather is based upon the need to allow the President to carry out his or her official duties free from unnecessary interference and distraction. As the Court stated in *Fitzgerald*, "[i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id.* at 753. The historical discussion of presidential immunity in note 31 of the *Fitzgerald* opinion emphasizes that such immunity rests in large measure on avoiding distractions from the official duties of the President. In part that note provides:

> Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits. 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-419 (1st ed. 1833) (quoted *supra*, at 2701-2702). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States v. Burr*, 25 F.Cas. 30 (No. 14,692d) (CC Va. 1807), that a subpoena *duces tecum* can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President: "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each

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> branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404 n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original).

Id. at 750 n.31.

Judge Beam's concurring opinion in the present case illuminates the problem of judicial interference with the President's official duties. The consequence of the panel's decision is that now there will be a trial judge exercising some control over the President's schedule. As Judge Beam concludes:

> I in no way seek to downplay the concerns outlined by the dissent. At the same time, I feel that Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the rights of any party. As I have attempted to stress, *nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled. With this understanding, I concur.*

Slip op. at 25 (emphasis added). Conversely, however, nothing prohibits the trial judge from ordering the President to appear, testify, provide discovery, answer numerous interrogatories and requests for admissions at the trial judge's almost unrestricted discretion. Indeed, figuratively, the courts may "bandy him from pillar to post." If that does not violate the separation of powers between the President and the judiciary, what does?

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The Constitution of the United States provides in Article II, Section 1, "The executive power shall be vested in the President of the United States of America." Even assuming a trial judge of reasonably good judgment, judicial control over the sitting President of the United States as a defendant in an ongoing civil lawsuit must constitute a far greater affront to our separation of powers principles than that which was at stake in the *Fitzgerald* case, where the defendant was not a sitting president.

In my opinion, Judge Ross got it exactly right when he wrote in his dissent:

> The *Fitzgerald* decision was derived from both the functional necessities of the President's execution of Article II duties, and the principle that no branch should be subject to crippling incursions by another branch. The Court's reasoning is highly instructive in the present case because it demonstrates the importance of insulating the President from the disruptive effects of private suits against him, whether based on official or unofficial acts.

Slip op. at 26.

Finally, the impact of the limited presidential immunity sought here by President Clinton is far less drastic than the immunity granted to former President Nixon in *Fitzgerald.* Although President Nixon was no longer in office at the time of that lawsuit, his immunity was absolute. It left the plaintiff without any remedy. That is not the case here. The appellant in the present action can pursue her claims after President Clinton leaves office. While delay may be unfortunate for the appellant, it is not necessarily prejudicial. She still retains her right to sue.[1] What must be of greatest concern in this contro-

[1] Clearly, if the President were granted limited immunity from suit for the duration of his presidency, the applicable statute of limitations would be tolled for the same time period.

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versy is the welfare of this nation -- and indeed of the entire world -- over which the President of the United States exerts such strong influence as "the officeholder [who] make[s] the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Fitzgerald,* 457 U.S. at 752.

Although this court has refused to consider this important case en banc, I have every confidence that the issues of national concern in this case relating to the judiciary's relationship to the presidency will command the attention of the United States Supreme Court.

March 28, 1996

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellant/cross-appellee's motion to stay the mandate of this court is granted pursuant to Federal Rule of Appellate Procedure 41(b).

The issuance of the mandate in this case shall be stayed to and including May 16, 1996. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

April 16, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

President Clinton's motion to extend the stay of mandate has been considered by the Court and is denied. Judge Ross voted to grant the motion.

May 8, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed July 21, 1994

MEMORANDUM AND ORDER

Plaintiff Paula Corbin Jones seeks civil damages from the President of the United States for actions that, with one exception, are alleged to have occurred prior to his assuming office. The matter is before the Court on motion of the President for permission to file a motion to dismiss on grounds of Presidential immunity and to defer the filing of any other motions or pleadings until such time as the issue of immunity is resolved. The plaintiff has responded in opposition to the motion.[1] For the reasons that follow, the Court finds that the President's motion should be and hereby is granted.

I.

This complaint, which was filed on May 6, 1994, arises out of an alleged incident that is said to have occurred on May

[1] During a telephone conference held on June 16, 1994, separate defendant Danny Ferguson stated that he had no position with respect to the matter now before the Court.

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8, 1991, when President Clinton was Governor of the State of Arkansas. The plaintiff was a state employee at the time, and she claims that the President sexually harassed and assaulted her during a conference being held at a hotel in Little Rock, Arkansas.

The plaintiff asserts four claims in her complaint against the President. In Counts I and II, she alleges that President Clinton conspired to and did deprive her of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution. She contends that the President discriminated against her because of her gender by sexually harassing and assaulting her, by imposing a hostile work environment on her, and by causing her to fear that she would lose her job. She further claims that she was subjected arbitrarily to the fear of losing her job or experiencing other adverse actions in relation to her job and work environment. In Count III, plaintiff asserts a claim of intentional infliction of emotional distress or outrage, and claims in Count IV that the President, through his press aides and attorney, defamed her by denying the allegations that underlie this lawsuit.[2]

The President informs the Court that he will file a motion to dismiss the complaint without prejudice to its reinstatement after he leaves office, on grounds that sitting Presidents are constitutionally immune from having to litigate private suits for civil damages. He states that the immunity motion will raise serious issues which go to the constitutionality of compelling a sitting President to litigate private civil damages claims, as well as to this Court's authority to proceed in this case in the first instance. The President argues the Court should allow him initially to assert the immunity issue alone, thereby permitting that question to be resolved prior to filing any other pleadings in the case.

[2] Plaintiff also asserts conspiracy and defamation claims against separate defendant Ferguson.

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II.

The President states that his immunity motion will be based substantially on the Supreme Court's decision in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), a case decided on a narrow 5-4 margin. The plaintiff in that case, a former employee of the Department of the Air Force, had alleged that then-President Nixon abolished his position in retaliation for his testimony before a Congressional Committee. The District Court rejected President Nixon's claim of immunity, and the Court of Appeals dismissed his collateral appeal. The Supreme Court granted certiorari to decide the "important issue" of Presidential immunity. 457 U.S. 731, 741. Referring to the plaintiff's claim as "this merely private suit for damages," *id.* at 754, the Court held that "[i]n view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. In so holding, the Court identified immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

Fitzgerald involved official actions by a sitting President while the allegations here relate to conduct that purportedly occurred prior to President Clinton's assumption of office. The President acknowledges this distinction and states that his motion will not assert absolute immunity such as was afforded in *Fitzgerald,* but will recognize the plaintiff's right to reinstate the lawsuit after he leaves office. In asserting such a claim of immunity, the President will seek entitlement to a fundamental protection from suit previously unrecognized in any court. This claim may or may not succeed. Nevertheless, because of the "singular importance of the President's duties," *Fitzgerald,* 457 U.S. at 751, and because suits for civil damages "frequently could distract a President from his public duties, to the detriment of not only the President and his office

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but also the Nation that the Presidency was designed to serve," *id.* at 753, the Court concludes that the issue of Presidential immunity deserves threshold consideration, prior to the filing of any other motions or pleadings.

In allowing the President to first assert the issue of immunity, the Court is permitting a procedure that is entirely consistent with the principles underlying absolute immunity. The "essence of absolute immunity is its possessor's entitlement not to have to answer for his [alleged] conduct in a civil damages action." *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985) (citing *Fitzgerald*, 457 U.S. 731). "The entitlement is an *immunity from suit* rather than a mere defense to liability," and "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (Emphasis in original.) *See also Siegert v. Gilley,* 500 U.S. 226, 232 (1991) (noting that one of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending an extended lawsuit); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687 (1993) (same). Because the entitlement is an immunity from suit, the Supreme Court has stressed that immunity questions should be resolved at the earliest possible stage in litigation. *Hunter v. Bryant,* 112 S.Ct. 534, 536 (1991).

Moreover, the immunity that will be asserted in this case is of a unique character and does not require an analysis of the allegations of the complaint. The Court thus has no need for dispositive motions at this time. Were the President asserting a defense of qualified immunity, the Court might well agree with the plaintiff that the substantive allegations of her complaint must be addressed. In such cases, courts are required to determine whether the alleged actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To decide whether an official is protected by qualified immunity, a court must determine whether the

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official's action was objectively legally reasonable in the light of the legal rules that were clearly established at the time the action occurred. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). This inquiry involves a two-step process. First, the court must determine as a threshold matter whether the plaintiff has alleged a violation of a constitutional right. *Munz v. Michael*, No. 93-1865, 1994 WL 288376, at *4 (8th Cir. July 1, 1994) (citing *Beck v. Schwartz*, 992 F.2d 870, 871 (8th Cir. 1993) (per curiam)). *See also Siegert*, 500 U.S. at 232. Second, the court must determine whether that constitutional right was clearly established at the time that the officials acted. *Munz*, 1994 WL 288376, at *4 (citing *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993)).

The immunity that will be asserted by the President, however, is premised on his status as President and does not require the Court to review the legal sufficiency of the complaint. Indeed, the allegations of the complaint are irrelevant. This Court "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law." *Forsyth*, 472 U.S. at 528.[3]

Nevertheless, plaintiff argues that the Federal Rules of Civil Procedure require every defendant, including the President of the United States, to either answer a complaint or file a single dispositive motion raising all available grounds for dismissal, including absolute immunity. Certainly, that is one way to handle a case, but it is not the only way it can be done.

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[3] It is true that for some officials, the question of absolute immunity will depend upon the particular function the official is performing. Such an inquiry involves application of a "'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993) (citations omitted). In such cases, it may be necessary to examine the substantive allegations of the complaint. In the case at bar, however, the immunity that will be asserted by the President is premised on his status as President and does not require application of the "functional approach."

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Plaintiff asserts, however, that the briefing schedule sought by the President is "nothing less than a categorical suspension of the Federal Rules of Civil Procedure." To the contrary, Rule 12 specifically allows for successive motions to dismiss for failure to state a claim. *Sharma v. Skaarup Ship Management Corp.*, 699 F.Supp. 440, 444 (S.D.N.Y. 1988), *aff'd*, 916 F.2d 820 (2nd Cir. 1990), *cert. denied*, 499 U.S. 907 (1991). "Although defenses of lack of jurisdiction over the person, improper venue and insufficiency of process are waived if not raised in a party's first responsive pleading, 'A defense of failure to state a claim upon which relief can be granted ... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.' " *Id.* (citing Fed.R.Civ.P. 12(h)). *See also* 2A Moore's Federal Practice ¶ 12.07[3] at 12-102 (2d ed. 1994) (affirmative defenses not enumerated in Rule 12(b) may be made by motion under Rule 12(b)(6)); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 at 447-48 (1990) (Rule 12(b)(6) motions are exempted by Rule 12(g) from the consolidation requirement). The briefing schedule sought by the President is in conformity with the Federal Rules of Civil Procedure and does not afford him privileges unavailable to other defendants.[4]

To be sure, the plaintiff's interest in seeking prompt relief for the alleged violation of her rights is certainly legitimate and not to be minimized. The Court, however, finds that plaintiff's concern that the briefing schedule proposed by the President will entail undue delay is unfounded. Should the

[4] Plaintiff also argues that the cases cited by the President require that every defendant either answer a complaint or file a single dispositive motion raising all available grounds for dismissal. However, the courts in those cases did not specifically require the concurrent filing of all motions but simply addressed the particular procedure in which the litigants before them happened to proceed. Those cases do not stand for the proposition that the briefing schedule proposed by the President is inappropriate or otherwise precluded.

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Court deny the President's claim of immunity, such order would be immediately appealable. *Forsyth,* 472 U.S. at 525; *Puerto Rico Aqueduct & Sewer Authority,* 113 S.Ct. at 687. This would be so regardless of the Court's ruling on any other Rule 12(b) motions.

Furthermore, it must be recognized that the relief plaintiff seeks is of a purely personal nature, the delay of which will affect but a single individual who waited two days short of three years in which to file her lawsuit. The President's claim to immunity from suits for civil damages, on the other hand, is equally legitimate and may affect "not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald,* 457 U.S. at 753.[5] Indeed, the amenability of a sitting President to suits for civil damages raises significant and important constitutional issues, the resolution of which will directly impact the institution of the Presidency. That being so, and because the President's constitutional responsibilities and status require this Court to exercise judicial deference and restraint, *Fitzgerald,* 457 U.S. at 753, the Court finds that the President should be allowed to defer the filing of any other motions or pleadings until such time as the issue of immunity has been resolved by this Court.

III.

For the foregoing reasons, the Court will allow the President to file a motion to dismiss on the grounds of presidential immunity on or before August 10, 1994, and to defer and preserve the filing of any other motions or pleadings that may or must be filed under the Federal Rules of Civil Procedure until

[5] As was previously noted, the Supreme Court has expressed concern that suits for civil damages could distract a President from his public duties. *Fitzgerald,* 457 U.S. at 753. In this regard, the Court noted that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. *Id.* at 754 n.37.

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such time as the issue of presidential immunity has been resolved by this Court.[6]

IT IS SO ORDERED this 21st day of July 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[6] Nothing in this Order should be construed as indicating how the Court will rule on the President's soon-to-be-filed immunity motion. This Order only addresses the procedural issue, not the substantive questions relating to immunity.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

The Court is in receipt of amicus briefs which have been submitted for filing in this case. Because the Court has been well briefed by the President, Plaintiff Paula Corbin Jones, and the United States Department of Justice[1] on the issue of presidential immunity, it does not now intend to accept any amicus briefs for filing. Any amicus briefs that are submitted to the Court will be made a part of the correspondence file in the case.

DATED this 27th day of October 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[1] Pursuant to 28 U.S.C. § 517, the United States filed, on August 19, 1994, a Statement of Interest in this case. Section 517 provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

Separate defendant President Clinton seeks leave to file a reply brief on the issue of presidential immunity. Neither the co-defendant nor the plaintiff objects.

The Federal Rules of Civil Procedure do not provide for the filing of a reply to a response to a motion to dismiss, and district courts are not obligated to consider a reply in such circumstances. The Local Rules do not permit or prohibit filing of replies to responses. Since the Court has not requested a reply brief in this case, the motion is denied.

IT IS SO ORDERED this 27th day of October 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed November 23, 1994

ORDER

On November 1, 1994, separate defendant William Jefferson Clinton filed herein a motion requesting oral argument [Doc. # 28] on the issue of presidential immunity, which is the only issue now before the Court. For the reasons that follow, the motion is denied. Also denied is plaintiff Paula Corbin Jones' motion to file an affidavit under seal [Doc. # 29].

This Court seeks to follow some semblance of order in its conduct of cases. In this case in particular, the Court believes it must keep a tight rein on the proceedings to ensure the case progresses in a timely manner with a minimum of distractions and fanfare. A brief review of recent developments in this case will illustrate the Court's concerns.

The defendant's request for oral argument and the plaintiff's request to file an affidavit under seal are the latest motions that seek actions by the Court which are not part of this Court's usual conduct of cases. It is not the regular practice of this Court to hear oral argument on motions to dismiss.

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The Federal Rules of Civil Procedure do not mandate oral arguments on motions at the district court level.[1]

The plaintiff, meanwhile, seeks to file an affidavit under seal, the contents of which may not be disclosed, even to the Court, without the prior approval of the plaintiff. This is an extremely unusual request, and the plaintiff has presented no persuasive argument why it should be granted. Rule 26 of the Federal Rules of Civil Procedure provides for the filing of documents under seal in certain circumstances, but under that rule the court, not the parties, directs when the sealed documents will be opened. There is no provision in the Federal Rules of Civil Procedure for such a filing as the plaintiff requests.

The previous motion for leave to file a reply brief and the submission of amicus briefs were also outside the usual progression of a case in this Court. Neither the federal rules nor local rules of this Court provide for amicus briefs at the district court level or for a reply to a response.[2]

To revisit the facts with regard to the amicus briefs and reply briefs, the last pleading due in this case was a response and brief filed on October 21, 1994, by the plaintiff. On the same date, a motion and amicus brief were submitted by the American Civil Liberties Union, and after the due date of plaintiff's response, another amicus brief was submitted by a group of prominent professors of constitutional law from

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[1] As the Court and parties are aware, the Federal Rules of Appellate Procedure do set forth circumstances in which oral argument will be permitted. *See* Fed. R. App. P. 34.

[2] As the Court and parties are aware, there are provisions in the Federal Rules of Appellate Procedure concerning filing amicus briefs in cases on appeal. *See* Fed. R. App. P. 29. The filing of a reply to a response is not unheard of in this Court, but because such a reply is not provided for in the Federal Rules of Civil Procedure, the Court is not obligated to consider reply briefs in making its rulings unless the Court directs the parties to file the replies.

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various American law schools. By recent Order, those two amicus briefs were refused filing with the Clerk of the Court and were placed in a correspondence file available to the Court along with other correspondence which the Court has received about this case. Documents in the correspondence file are not included as part of the official record of the case.[3]

Further, subsequent to the filing by the plaintiff of her response and brief, one of the Court's clerks was contacted by a local attorney for President Clinton, who requested to file a reply brief to the plaintiff's response and who sought a mid-December due date for the reply. Presumably, plaintiff Jones would have wished to file a response to the President's reply brief. The Court would certainly have had to permit the plaintiff to respond if a reply were accepted from the defendant. The Court, acting through the clerk, informed President Clinton's local counsel that the Federal Rules of Civil Procedure do not provide for replies to responses. Through his attorneys, the President then sought leave to file a reply brief, which the Court denied. Presumably, the parties would have wanted to respond to the amicus briefs had they been made a part of the record. It is clear to the Court that without orderly management of this case, briefing could have continued unabated for months.

After this case was filed in May 1994, the Court set up a briefing schedule agreeable to the parties. The amicus briefs were not submitted until the conclusion of that schedule, even though the schedule had been established in mid-summer and was readily available from the Court. Both the questions of

[3] Correspondence relating to cases before the Court is often placed in the official case file. However, in cases which generate correspondence not only from the parties but also from interested members of the public, a separate correspondence file is sometimes maintained. If a district court's decision is appealed, the Eighth Circuit Court of Appeals has discretion to decide whether the correspondence file is sent to the Court of Appeals along with the case file.

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reply briefs and oral argument were raised after the briefing schedule had been concluded.

The Court has been thoroughly informed about the issue pending before it as the result of well-researched, well-documented briefs filed herein by the attorneys for the parties and by the Department of Justice.[4] It has received and believes it would benefit from the scholarly amicus briefs submitted.

The Court intends to act on the issue before it in a timely manner, recognizing the extreme importance of the case as well as the intense interest in it. To prolong the decision through oral argument and further briefs would not, in the view of the Court, prove of any benefit to the Court and would only serve to needlessly delay resolution of the issue.

In sum, the defendant's motion for oral argument is denied, and the plaintiff's motion to file an affidavit under seal is denied.

IT SO ORDERED this 23rd day of November 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

[4] The United States filed a Statement of Interest in this case on August 19, 1994, pursuant to 28 U.S.C. § 517.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed December 28, 1994

MEMORANDUM OPINION AND ORDER

The Plaintiff, Paula Corbin Jones, filed a damage suit against the Defendants William Jefferson Clinton and Danny Ferguson to recover for acts which were alleged to have taken place primarily while Defendant Clinton was Governor of Arkansas and Defendant Ferguson was a Trooper with the Arkansas State Police assigned to the Governor. Subsequently, in the General Election of November, 1992, Mr. Clinton was elected President of the United States and assumed that office on January 20, 1993.

The complaint was filed on May 6, 1994, and was predicated on an alleged incident which was said to have occurred on May 8, 1991. The action alleged sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, which are provisions included in civil rights legislation of the reconstruction era. It also alleged state law claims of defamation and outrage.

Defendant Ferguson responded to these allegations by, in essence, denying any which might involve questionable ac-

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tivities on his part. Defendant Clinton responded with a motion to bifurcate the briefing schedule so as to permit the question of Presidential immunity to be argued on a motion to dismiss before any other questions were presented. On July 21, 1994, the Court entered a Memorandum and Order allowing President Clinton to file a motion to dismiss on the basis of Presidential immunity and deferring and preserving the filing of any other motions or pleadings until the issue of Presidential immunity had been resolved. *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994). The Court noted that this order was purely procedural in nature and addressed only the question of whether Presidential immunity would be considered as a threshold issue. *Id.* at 907 n.6.

The basic issue, therefore, which this Memorandum Opinion and Order addresses is whether a civil action may be asserted against the President of the United States while he is in office when the fact situation alleged in the complaint arose before his election and assumption of office.

I.

Absolute Immunity of the President from Civil Suit

The President has asserted that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office. This, of course, is a claim of absolute immunity. The President would have the Court dismiss the complaint while preserving through some equitable tolling of the statute of limitations the right of Ms. Jones to sue him civilly as soon as he left office. The Justice Department in its Statement of Interest of the United States also argued for immunity, but urged the Court in the alternative simply to stay the proceedings until the President had left office. Ms. Jones argued against immunity, but also argued alternatively for dismissal with an automatic reinstatement on the Court's docket on the last day of his Presidency and against a stay. All briefs discussed at some length the intent of the framers of

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the Constitution and interpretations of various scholars and judges relating to this subject, and all were thorough and well researched.

A. The English Legacy

The Court believes that the place to begin this discussion, before coming to the vital question of constitutional interpretation, is in English law and the development of the rights and liberties of the English people. The rights and liberties of England became our inheritance. The Constitution of the United States and the constitutions of the states contain provisions that come directly from that source.

Almost all of the states adopted "reception statutes" receiving into state law the English common law and acts of Parliament as they existed as of a certain date -- which was usually 1607, 1620, or 1776 -- except to the extent that they were contrary to our federal or state constitutions or statutes or were contrary to our form of government. Arkansas adopted such a statute shortly after becoming a state. Ark. Code Ann. § 1-2-119 (Michie 1987); Ark. Stat. Ann. § 1-101 (1976 Repl.); discussed in *Moore v. Sharpe,* 121 S.W. 341 (1909). The statute adopted the English common law, subject to the stated limitations, as it existed prior to the fourth year of James I. Various English statutes or common law rules passed into Arkansas law as a result. *E.g. Biscoe v. Thweatt,* 74 Ark. 545, 86 S.W. 432 (1905) (Statute of Charitable Uses); *Horsley v. Hilburn,* 45 Ark. 458 (1884) (Rule in Shelley's Case implicitly recognized but not applied to fee tail pursuant to superseding Arkansas statute); *Moody v. Walker,* 3 Ark. 140 (1840) (Rule Against Perpetuities). Also received were those portions of the Magna Carta relating to due process of law, equal protection, trial by jury, and rights unrelated to the feudal system.

The Magna Carta was largely a restatement of feudal law pertaining to land tenures and their incidents, and thus most of it has no application here. However, in addition to enshrining

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in English law some of our basic rights and liberties, it constituted a series of limitations placed upon the King and his authority. There would follow in English history a long and bloody struggle to define the rights of the monarchy as opposed to Parliament and the citizenry and also to the common law itself.

The tension between the King and Parliament, on the one hand, and the King and the common law, on the other, reached its heights with the ascension to the throne of the Stuart monarchy in the person of King James the First (who was James the Sixth of Scotland). Friction soon arose between the King and the House of Commons. At the root of the disagreement, once again, was the Magna Carta. *See generally* William Swindler, *Magna Carta: Legend and Legacy* 169-176 (1965).

An important participant in all of this was Sir Edward Coke, whose writings had an enormous influence on English and American law, and who had served as Solicitor General and later Attorney General under Queen Elizabeth I and also as Chief Justice of the Court of Common Pleas. He subsequently would become Chief Justice of the King's Bench under King James I. *See* 3 Roscoe Pound, *Jurisprudence* 428 (1959). Under Elizabeth, as her attorney, Coke had been a staunch defender of the Crown, but as a judge, he would quote Bracton to King James: "The King ought to be under no man, but under God and the law." Swindler, *supra*, at 172. He also stated in *Dr. Bonham's Case,* 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (1610): "And it appears in our bodies, that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void" if they are "against common right and reason." William B. Lockhart et al., *The American Constitution* 251 (5th ed. 1981). That was unlikely to be a true statement of the law in the early 17th Century, but to the extent that it was precedent, it may be said to be an early expression of judicial review.

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None of this and other frictions set well with the King, and Coke was dismissed from the bench, turning his efforts to Parliament. The continuing friction between Parliament and James' successor, King Charles I, ultimately led to the adoption of the Petition of Right, which in essence ratified and extended the Magna Carta, and in effect further limited the prerogatives of the Crown. A defining moment came when the House of Commons rejected a proposal of the House of Lords that would add a clause recognizing the sovereignty of the King. Coke gave this fulmination:

> I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto -- Magna Carta is such a Fellow, he will have no Sovereign.

Swindler, *supra,* at 185.

The Petition of Right was one of the foundation stones of the English Constitution. It enlarged upon the Magna Carta as a constitutional limitation upon the power of the monarchy. It made it apparent that the King's prerogative was limited. *Sub Deo et Lege*[1] was the law of the land.

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[1] In *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64, 65 (K.B. 1608), Lord Coke wrote:

> [B]ut His Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in

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quoted in DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 203 (1963).

In Catherine Drinker Bowen's book, *The Lion and the Throne*, the situation which led to this opinion is discussed in some detail. The events of this period in English legal and political history were conclusive in determining the end of "the divine right of Kings" and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside of the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution. It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century.

Despite these statements by Lord Coke that the King was subject to the law, there existed contemporaneously in England the rule that "the King can do no wrong," a relic presumably rooted in the divine right of Kings. Blackstone expressed it this way:

> Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute *perfection*. The King can do no wrong: which ancient and fundamental maximum is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.
>
> The King, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Chitty ed. 1855) (emphasis in the original).

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B. The American Experience

In the formulation of Article II of the Constitution, there were varying viewpoints as to the office of the President.[2]

Of course, when Blackstone published his *Commentaries,* this idea was already ludicrous in the light of the history of the English monarchy. A litany of the wrongs, weaknesses and sins of English kings would establish that they were not only capable of "doing wrong" but also of "thinking wrong" and were replete with folly and weakness.

The English concept of kingship never entered into the law of the United States, although in England it apparently "exists today to give the Queen an absolute immunity from being sued for personal torts in the civil courts." R.J. Gray, *Private Wrongs of Public Servants,* 47 CAL. L. REV. 303, 307 (1959). *See also* Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique,* 72 NW. U. L. REV. 526 (1977).

States did not adopt through the reception statutes those aspects of English law relating to the monarchy since kings and queens are contrary to our form of government. Thus what remains of our English heritage on this point are the basic documents of English liberties -- the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights.

Moreover, as Chief Justice John Marshall pointed out in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), the King is subject to being "sued" in the form of a petition "and he never fails to comply with the judgment of his court."

[2] Russell Kirk cites Sir Henry Maine for the proposition that "the office of the President really is the office of a King -- the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." He adds: "Maine even suggests that the framers of the Constitution may have had in mind the powers of George III, when they established the powers of the American presidency." He continues in that vein discussing how powerful an office it is. He adds, however, that the restraint exercised by the first six presidents prevented the reduction of the legislative and judicial branches "to insignificance." RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 427-428 (1974). This seems to be an exaggeration, however, since during that period of time, the opinions of Chief Justice John Marshall sufficed to prevent the Executive Branch from subverting the Judicial Branch, although the first six presidents did exercise substantial restraint, particularly Washington and Adams. It seems much more likely that in providing for

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Some, such as Roger Sherman of Connecticut, believed that the President should be "nothing more than an instrument for carrying the will of the Legislature into effect," while others, such as Gouverneur Morris of Pennsylvania, thought the President should be "the guardian of the people, even of the lower classes, against Legislative tyranny." Arthur Schleinger, Jr., *The Constitution: Article II, in An American Primer* 121-22 (Daniel J. Boorstin ed., 1968). What resulted was the compromise that we have today, amended only sightly from the original. It sets out the powers and duties of the Executive Branch (*i.e.,* the President and the administrators he appoints), but it does not address the immunity question.

A large part of the problem, aside from the silence of the Constitution, is that for all practical purposes, the Executive Branch, unlike the Congress and the Supreme Court, consists of only one person. His administrative appointees serve at his pleasure. Thus, a large part of the President's assertion may be summarized in the proposition that, without immunity, to cripple the Presidency in one way or another in civil litigation is to deliver a blow to and weaken the effectiveness of the entire Executive Branch of government which in effect is only one person, the President.

The importance of unimpeded, independent branches of government is discussed by Alexander Hamilton[3] in *The Federalist No. 51:*

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the Executive Branch, the founders did not have George III in mind at all, except in an unfavorable sense. The "George" that they likely had in mind was George Washington. The Executive Branch was probably modeled for the first man to occupy it -- which may explain why even the insertion of an impeachment provision for criminal offenses was a matter of debate.

[3] Some attribute this paper to James Madison. In I THE PEOPLE SHALL JUDGE 312 (University of Chicago Social Science Staff 1949), its author is listed "Hamilton *or* Madison."

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> Were the executive, magistrate, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal. . . [We must give] to those who administer every department the necessary constitutional means and personal motives to resist encroachments of the others. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I *The People Shall Judge* 312, 313 (University of Chicago Social Science Staff 1949). He is speaking of independence from other branches, but also of the responsibility that goes along with it.

The President and his lawyers, in arguing the immunity issue, seem to place substantial reliance on the intention of the framers of the Constitution. Much of what they argue relates to the impeachment process. For example, they seize in their brief upon this commentary by Hamilton from *The Federalist No. 69:* "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." Of course, Hamilton was talking about *impeachment* under Article II, Section 4, under which the President may be "removed from

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Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." That has nothing to do with immunity from civil suit. Article II, and Hamilton, were addressing criminal conduct on the part of the President.

This is not to say, however, that the question of Presidential immunity from suit was not discussed at the Constitutional Convention or during the years immediately following. Justice Lewis Powell addresses this in speaking for the majority of the Court in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982):

> [T]here is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams -- both delegates to the Convention -- that 'the President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.' Journal of William Maclay 167 (E. Maclay ed. 1890).

457 U.S. at 751-52 n.31.

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Justice Powell also quoted from Justice Joseph Story's *Commentaries on the Constitution of the United States* to this effect:

> '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 J. Story, Commentaries on the Constitution of the United States Sec. 1563, pp. 418-419 (1st ed. 1833).

457 U.S. at 750.

But just as the English law moved from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law, the situation in American law prior to *Fitzgerald* had proceeded essentially in the same direction with regard to the office of President. For example, it has been pointed out that when Hamilton made the statement quoted previously from *The Federalist No. 69,* "he was referring to his own plan" rather than reciting faithfully what had been proposed. Raoul Berger, *Selected Writings on the Constitution* 46-47 n.94 (1987). Moreover, the discussion at the Constitutional Convention revolved around the impeachment process, the basis for which was the commission of "high crimes and misdemeanors." Although Justice Story, writing several decades later, discusses civil cases, as previously quoted, he is writing from the perspective of someone who was a boy at the time of the Convention -- although admittedly he was rather close in time to those proceedings. He was successful in that what he wrote was embodied in *Fitzgerald.* There was much opposition even to the

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impeachment provision; some thought that the Supreme Court should conduct the trial rather than the Senate. James Madison was an advocate of that view, although Gouverneur Morris thought that "no other tribunal than the Senate could be trusted" and believed that the Supreme Court "were too few in number and might be warped or corrupted." 2 *Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 535 (reported by James Madison) (Gaillard Hunt & James Brown Scott, eds., 1987).

The disagreement over Presidential immunity at the Constitutional Convention carried over into the years that followed. In *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), Chief Justice John Marshall ruled that a *subpoena duces tecum* could be issued to President Thomas Jefferson. Jefferson protested strongly, arguing that the three branches of government had to be independent of each other, including independence by the executive from the judiciary. (Discussed in *Nixon v. Fitzgerald,* 457 U.S. at 751 n.31.) In *Livingston v. Jefferson,* 15 F.Cas. 660 (C.C.D. Va. 1811) (No. 8,411), damages were sought for alleged trespass committed by a federal officer at the direction of Jefferson, but a federal court dismissed it for having been brought improperly in Virginia. The immunity issue was not reached. Of course, even before these cases, the argument of total independence of the Executive Branch from judicial action had been settled in large part by *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). This case is remembered for the recognition and use of judicial review by the Supreme Court of an Act of Congress, but it also directed by mandamus that Secretary of State James Madison deliver Marbury's justice of the peace commission to him contrary to the desires of President Jefferson. While not bearing upon the immunity question directly, it was apparent that the Executive Branch was not immune from action by the Judicial Branch in enforcing mandates of the Constitution. In fact, Chief Justice Marshall said of Marbury's rights and remedies: "The very essence of civil liberty cer-

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tainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163.

However, in *Mississippi v. Johnson,* 71 U.S. 475 (1867), the Supreme Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Chief Justice Salmon P. Chase, writing for a unanimous Court, declined to enjoin enforcement of the legislation even though it was allegedly unconstitutional. He distinguished *Marbury* by stating that it only related to *ministerial duties* involving no discretion while these Acts related to "executive and political" duties involving broad discretion. To enjoin the President would be to restrain him from carrying out his constitutional responsibility to execute the laws. Enjoining him would threaten the separation of powers between the branches and the independence of the President. *See similarly, Kendall v. United States,* 37 U.S. 524, 610 (1838), and *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 608-612 (D.C. Cir. 1974).

Of course, the complaint of Paula Corbin Jones in this civil case relates neither to the ministerial nor the executive duties of the President. The allegations relate to alleged conduct of the President while he was Governor of Arkansas. (The allegations, it might be noted, also do not relate to any ministerial or executive duty of the Office of Governor.) The Justice Department, in its brief, stated that it knew of only three private suits based on pre-presidential conduct which had been adjudicated during the President's term in office. These three were (1) an action against Theodore Roosevelt and the Board of Police in New York City, which was resolved in the Board's favor in 1904, *People ex rel. Hurley v. Roosevelt,* 179 N.Y. 544 (1904); (2) A damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, *Devault v. Truman,* 194 S.W.2d 29 (Mo. 1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim

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from an automobile accident occurring during the 1960 campaign, which was ultimately settled, *Bailey v. Kennedy,* No. 757,200 (Cal. Super. Ct. 1962).

However, the case most applicable to this one is *Nixon v. Fitzgerald,* cited previously. In a 5-4 decision, the Supreme Court decided that President Nixon had absolute immunity from a suit brought by A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, whom the President ordered fired because he had given congressional testimony on cost overruns which embarrassed his superiors in the Department of Defense (and presumably embarrassed the President also). Fitzgerald sued for damages. The district court rejected President Nixon's assertion of Presidential immunity. The court of appeals affirmed, but the Supreme Court reversed, holding that the President had absolute immunity from a civil suit for damages resulting from official actions taken by the President while in office. The majority opinion of Justice Lewis Powell was hotly disputed in a dissent by Justice Byron White, in which Justices Blackmun, Brennan and Marshall joined. The majority opinion was in accord with the view of the scholar, Edward S. Corwin, in discussing the President's immunity from judicial process. Edward S. Corwin, *The President: Office and Powers* 138 (3d ed. 1948).

But the facts of *Fitzgerald,* as stated previously, are not the same as those in this case. Mr. Nixon was President when he fired Mr. Fitzgerald and was acting in his capacity as the head of the Executive Branch. Mr. Clinton was not President and was not even the President-elect when the alleged cause of action arose in this case.

The Constitution, of course, is silent on all of this. The framers debated even the subject of whether the President should be subject to impeachment for criminal acts and, if so, who should conduct the trial. There is nothing in the document relating to civil actions. Justice Story, *supra*, was of the

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mind that the President possessed immunity from civil suit, and the Supreme Court in *Fitzgerald* agreed in a severely divided opinion that the President was civilly immune from suits brought for official actions taken while in office.

Thus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judicial Branch, particularly the Supreme Court. This District Court is not activist in nature and is not inclined to "make law" where none exists. As stated by Chief Justice John Marshall in *Marbury v. Madison,* however: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

This Court recognizes the reasoning of Justice Powell and his thin majority in *Nixon v. Fitzgerald* that the President has absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Therefore, the President's Motion to Dismiss on Grounds of Presidential Immunity is denied.

II.

Limited or Temporary Immunity from Trial

The question does not end here, however, because the intent of the Supreme Court in *Nixon v. Fitzgerald* would seem to carry this case beyond the question of absolute immunity from civil suit. The language of the majority opinion by Justice Powell is sweeping and quite firm in the view that to disturb the President with defending civil litigation that

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Justice Powell states unequivocally the following: "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751. He adds:

> In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance 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.

457 U.S. at 754.

Chief Justice Burger expressed the same theme in his concurring opinion: "Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment." 457 U.S. at 762.

Of course, in the preceding part of this opinion, this Court has pointed out that President Clinton's alleged acts took place before he was President and that he was not acting in the scope of Executive authority. Nonetheless, the concerns expressed by a majority of the Supreme Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same -- the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situa-

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tion, as stated by Justice Powell in one of the preceding quotations from *Nixon v. Fitzgerald,* could have harmful effects in connection not only with the President but also with the nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

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

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. Her complaint, in ¶¶ 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in *The American Spectator,* in which the author purportedly obtained his information from state troopers, including Defendant Ferguson. 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. For want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require

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due to the fact that the primary defendant is the President. The Court believes that such ruling is also permitted under Rule 40 of the Federal Rules of Civil Procedure allowing district courts to place matters upon the trial calendar "as the courts deem expedient." Further, such limited immunity from trial would seem to be justified under the equity powers of the Court.

By putting the case on hold, as far as trial is concerned, the Court avoids any tolling of the statute of limitations problems which might otherwise be presented if the case were dismissed without prejudice. Despite the fact that the President considers himself estopped to object to a refiling, the Court believes that a delay of the trial is the better way to proceed.

This does not mean, however, that the case is put on the shelf for all purposes. There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself. This approach eliminates the problem that witnesses may die, disappear, become incapacitated, or become forgetful due to the passage of time.

Because there is too much interdependency of events and testimony to proceed piecemeal, the allegations against the trooper will be tried at the same time as those against the President. His case is integrally related to the allegations against the President; both cases arose out of the same alleged incident; and while the suit against the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident, it would not be possible to try the Trooper adequately without testimony from the President.

III.

Conclusion

The Court has attempted to follow its understanding of *Nixon v. Fitzgerald* and other cases as well as to adhere to the

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historical framework involved. Most importantly, the Court has sought to give effect to the full meaning of the separation of powers doctrine originally enunciated by Montesquieu and implicit in the founding fathers' structure of the Constitution. Essential Presidential prerogatives are "rooted in the separation of powers under the Constitution." *United States v. Nixon,* 418 U.S. 683, 708 (1974).

On the other hand, in situations in which the President was not the holder of his office when the action allegedly arose, there would seem to be no immunity against civil litigation. The rights of Plaintiff Jones as an American citizen must be protected. *Sub Deo et lege* is our law as well as the law of Great Britain. No one, be he King or President, is above the law.

To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office. President Clinton's term in office, if he is re-elected in 1996, would end no later than January 20, 2001. An earlier termination might come on January 20, 1997, which is only slightly over two years away. By permitting discovery as to all including the President, the Court is laying the groundwork for a trial shortly after the President leaves office.

In granting limited or temporary immunity from immediate trial to President Clinton, the Court wishes to emphasize that it holds no brief for alleged sexual harassment, a matter of important concern to many people. The importance of such issue is another reason why there should be no absolute immunity in this case, but only a temporary Presidential immunity from trial.

Finally, the Court must express its awareness that this case is one in which new law is being made. All of the references to historical events and to other cases do not change that

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fact. In making such a ruling, the Court is also not unmindful of the fact that to this extent the separation of powers has been breached. But it has happened before in many cases including *United States v. Nixon, supra,* and many of the landmark decisions of Chief Justice John Marshall. In the end, the decision must be made by the courts when there is doubt and only limited precedent.

As previously noted, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury,* 5 U.S. (1 Cranch) at 177. *United States v. Nixon* reaffirmed that statement: "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." 418 U.S. at 707. That is what this Court has tried to do, keeping in mind the words of Chief Justice John Marshall that "we must never forget that it is *a constitution* we are expounding." *McCulloch v. Maryland,* 17 U.S. (4 Wheaton) 316, 407 (1819),[4] and that it is intended to endure for generations and to be applied to the various crises of human affairs.

The President's motion seeking immunity from suit is denied. The court will issue a scheduling order in due course.

IT IS SO ORDERED this 28th day of December 1994.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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[4] As explained by Judge Robert H. Bork, Chief Justice Marshall was pointing out that "there are differences in the way we deal with different legal materials. . . . By this [Chief Justice Marshall] meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, 'partake of the prolixity of a legal code.'" ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990).

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-94-290

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

Decided and Filed February 24, 1995

ORDER

On December 28, 1994, this Court entered a Memorandum Opinion and Order denying the motion of Defendant William Jefferson Clinton to dismiss on the grounds of presidential immunity. The Court found, however, that trial of the entire matter should be delayed until after President Clinton leaves office. In spite of ordering a delay in setting the case for trial, the Court found that discovery could proceed as to all persons, including the President.

Both sides have appealed the Court's Order, and President Clinton has filed a Motion for Stay Pending Appeal. Plaintiff has responded in opposition to the motion, and the President has filed a reply to Plaintiff's response. For the reasons stated below, the Court grants the motion for stay.

I.

The denial of the President's motion to dismiss on the grounds of presidential immunity constitutes a "final" order that is immediately appealable under 28 U.S.C. § 1291. An

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appeal from a denial of official immunity requires a stay of all proceedings pending resolution of the appeal. As stated in *Johnson v. Hay,* 931 F.2d 456, 459 n.2 (8th Cir. 1991), upon the filing of a notice of appeal in an immunity case, "[j]urisdiction has been vested in the court of appeals and the district court should not act further." Thus, this Court no longer has jurisdiction over those aspects of the case involved in the President's appeal to the Eighth Circuit.[1]

The parties agree and there is no question that the Court is required to stay discovery against the President pending appeal. There is, however, a separate defendant in this case, Arkansas State Trooper Danny Ferguson, who has filed an answer to the complaint and has nothing to appeal. The President moves the Court to stay all proceedings against Ferguson as well, arguing that the issue of whether the case should go forward against Ferguson is one of the "'aspects of the case involved in the appeal.'" *Johnson v. Hay, supra.*

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[1] The issues on appeal, as stated in the President's Certificate Regarding Transcript and Notice of Issues on Appeal, are as follows:

1. Whether the Constitution and principles of separation of powers require the dismissal without prejudice of this civil damages suit against an incumbent President and his co-defendant, and the tolling of any statutes of limitation applicable to the claims asserted therein, until such time as the President is no longer in office;

2. Whether the District Court's Order of December 28, 1994, erred in holding that the Supreme Court's decision in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), requires that sitting Presidents be immune only from trial, and not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the office of the President; and

3. Whether the District Court's Order of December 28, 1994, erred in refusing to stay the proceedings in their entirety until such time as the President leaves office.

See Docket Entry # 38.

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Plaintiff responds that while the effect of the President's appeal is to halt proceedings related to him, there is no reason or right to stop the case as it relates to Ferguson. Plaintiff contends that just as immune and non-immune claims arising in the same lawsuit may proceed on separate tracks, so too may immune and non-immune defendants proceed separately. Plaintiff also urges that the President has two roles in this case, one as a defendant and another as a witness. Even though all proceedings against him in his role as defendant may be stayed pending appeal, Plaintiff asserts the President may still be subject to discovery on other claims as a witness.

II.

The Court rejects the President's attempt to, in effect, claim immunity on behalf of Ferguson, who has advanced no such right. The President's argument goes beyond any authority this Court has been able to find. The Court is unwilling to extend the effects of the President's immunity to Ferguson and finds that it retains jurisdiction over the case as to the Plaintiff's claims against him.

While the Court is not convinced by the President's argument that Plaintiff's claims against Ferguson are part of the aspects of the appeal, it will, nevertheless, grant President Clinton's motion to stay all proceedings in this case pending the appeal for another reason.

The Court cannot imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys. The claims are so inextricably intertwined that in order to protect the President to the full extent that his claim of immunity would provide, the Court finds that the motion should be granted. The pragmatic fact is that if discovery were allowed to proceed against Ferguson, he could only testify to action on his part, and other deponents would have to limit their testimony to Ferguson. Trooper Ferguson's testimony is among the most important in this case, but if he could not testify as to then-Governor Clinton's

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1050
No. 95-1167

Paula Corbin Jones,

Appellee/Cross-Appellant,

v.

William Jefferson Clinton,

Appellant/Cross-Appellee.

United States of America, et al

Amicus Curiae

Appeal from the United States District Court
for the Eastern District of Arkansas

Decided and Filed April 17, 1995

Appellants' motion to expedite the briefing schedule and place this case on the June oral argument calendar, appellee's response in opposition and appellant's reply thereto have been referred to the Court for decision. After review, the Court hereby denies appellant's motion to expedite briefing and placement on the oral argument calendar.

This case shall proceed upon the established briefing schedule absent the filing of any parties' brief before the scheduled deadline. Counsel is reminded that any early filing will automatically advance the briefing schedule. This case shall be placed on the oral argument calendar in the ordinary course.

April 17, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

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U.S. CONST. art. II, § 3

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 4

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. CONST. amend. XXV

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such

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powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

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42 U.S.C. § 1983 (1994)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 (1994)

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully,

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and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

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50 U.S.C. app. § 510 (1988)

§ 510. Purpose; suspension of enforcement of civil liabilities

In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act [sections 501 to 591 of this Appendix] remains in force.

50 U.S.C. app. § 521 (1988)

§ 521. Stay of proceedings where military service affects conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix] unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

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50 U.S.C. app. § 525 (Supp. V 1993)

§ 525. Statutes of limitations as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

FED. R. CIV. P. 40

Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

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