

**NLWJC – Kagan**

**Staff & Office – Box 001-Folder 6**

**Paula Jones Kathy Wallman's Files**

**[Elena Kagan Memos]**

Case Number: Kagan

# FOIA MARKER

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Folder Title:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

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CF 814

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21	4	6	3	V

# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (2 pages)	05/22/1996	P5
002. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/08/1996	P5
003. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/07/1996	P5
004. legal brief	re: Reply to Paula Jones' Opposition to the President's Motion (3 pages)	05/07/1996	P5
005. memo	Elena Kagan to Jack Quinn et al. re: Jones Litigation (1 page)	05/06/1996	P5
006a. fax cover sheet	David Strauss to John Quinn; re: Certiorari Petition (1 page)	04/26/1996	P5
006b. memo	Geof Stone and David Strauss to Bob Bennett & Amy Sabrin; re: The Petition (5 pages)	04/26/1996	P5
007. memo	Geof Stone and David Strauss to Bob Bennett and Amy Sabrin; re: The Petition (5 pages)	04/26/1996	P5
008. memo	Elena Kagan to Jack Quinn et al. re: Supreme Court Procedures (1 page)	04/05/1996	P5
009. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Litigators [partial] [page 2 withdrawn in full] (2 pages)	04/05/1996	P5, P6/b(6)
010. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators [partial] [pages 2 and 3 withdrawn in full] (3 pages)	03/11/1996	P5, P6/b(6)

**COLLECTION:**

Clinton Presidential Records  
 Counsel's Office  
 Elena Kagan  
 OA/Box Number: CF 814

**FOLDER TITLE:**

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F

jp2028

**RESTRICTION CODES**

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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012. memo	Elena Kagan to Jack Quinn and Kathy Wallman; re: Paula Jones Petition [partial] (1 page)	01/26/1996	P5, P6/b(6)

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THE WHITE HOUSE

WASHINGTON

June 18, 1996

MEMORANDUM FOR JACK QUINN  
BRUCE LINDSEY  
✓ KATHY WALLMAN

*file*

FROM: ELENA KAGAN *ELK*

SUBJECT: JONES LITIGATION

The Clerk of the Supreme Court told David Strauss that (1) the Jones petition was on the conference list for last Friday and (2) it will be taken up again this Friday.

The possibilities are that (1) one or more Justices wanted to postpone the vote on cert for a week or (2) the Court decided to deny cert and one or more Justices are writing a dissent from the denial. (It is almost unheard of for a Justice to write a dissent from the grant of cert; that is a theoretical, but not a real possibility.)

*file  
Paula Jones*

THE WHITE HOUSE

WASHINGTON

June 17, 1996

MEMORANDUM FOR JACK QUINN  
BRUCE LINDSEY  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

Some ambiguous news on the Paula Jones front.

It seems that the case was on the Court's list for consideration at the Friday, June 14 conference. The Court today issued orders (granting or denying cert) in most of the cases considered at that conference. It did not, however, issue any order in the Jones case.

The worst-case scenario is that the Court has decided to deny cert, but could not issue the order because someone is writing a dissent from the denial.

The best-case scenario is that one or more Justices asked to postpone consideration of the cert petition, possibly until next week (but it is still uncertain whether there will be a conference next week), possibly until next Term (i.e., the first week in October).

David Strauss is going to call Frank Larson (the Clerk of the Court) later today and see what (if anything) he can find out.

*file: Paula Jones*

THE WHITE HOUSE  
WASHINGTON

MEMORANDUM FOR      LEON PANETTA, CHIEF OF STAFF  
                                 HAROLD ICKES, DEPUTY CHIEF OF STAFF

FROM:                      KATHLEEN WALLMAN *KW*

SUBJECT:                  DEPARTMENT OF JUSTICE FILING IN JONES CASE

DATE:                      MAY 24, 1996

You asked this morning about the timing of the Justice Department's filing of its amicus brief. As the attached indicates, the brief has not been filed yet, but will be early next week.

THE WHITE HOUSE

WASHINGTON

May 24, 1996

MEMORANDUM FOR KATHY WALLMAN

FROM: ELENA KAGAN *ek*

SUBJECT: SG BRIEF IN JONES

The SG's office wishes to file its amicus brief in Jones on Tuesday or Wednesday of next week. There is no actual filing deadline. But all the parties' briefs will be filed by Tuesday, and if the SG's brief is to be considered by the Court, it must be filed shortly thereafter.

I will send you and Jack, as soon as I get it, the language in the SG's brief concerning the Soldiers' and Sailors' Act. Expect another memo in a couple of hours.

file

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WASHINGTON

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

**Dear Colleague:**

May 21, 1996

On May 15, 1995, attorneys for President Clinton filed an appeal with the United States Supreme Court seeking to delay the sexual harassment lawsuit filed by Paula Jones, a former Arkansas state employee.

One of the legal arguments used by the President involved **The Soldiers' and Sailors' Civil Relief Act of 1940**, which allows members of the armed forces of the United States to postpone civil litigation while on active duty.

The purpose of the Act is to allow the United States to fulfill the requirements of national defense, by enabling "*persons in the military service...*" to "*devote their entire energy to the defense needs of the Nation.*" According to his pleading, "*President Clinton here thus seeks relief similar to that which he may be entitled as Commander in Chief of the Armed Forces.*"

This Act is quite clear on who is eligible for relief. Only members of the Army, Navy, Marines, Air Force, and Coast Guard, and officers of the Public Health Service when properly detailed, are eligible. Further, this Act defines the term "military service" to include the period during which one enters "active service" and ends when one leaves "active service."

This ignoble pleading is a slap in the face to the millions of men and women who either are serving on active duty, or have served on active duty in the armed forces of the United States. In 1969, President Clinton ran away from his military obligation, dodging the draft, claiming that he "*loathed the military.*" Now, President Clinton by claiming possible protection under **The Soldiers' and Sailors' Civil Relief Act**, makes a mockery of the laws meant to protect the honorable men and women who serve their country in the armed forces of the United States.

In the words of J. Thomas Burch, Jr., Chairman of the National Vietnam Veterans Coalition, "*Bill Clinton was not prepared to carry the sword for his country, but has no hesitancy in using its shield if he can get away with it.*"

Please join us in sending a letter to President Clinton (see the letter on the reverse side), strongly objecting to the use of **The Soldiers' and Sailors' Civil Relief Act** in his defense.

To add your name as a cosigner, please call Mark Katz at 225-3664, or Rachel Krausman at 225-2965 by 12:00 noon on Thursday, May 23, 1996.



**BOB STUMP**  
Chairman  
House Committee on Veterans' Affairs



**BOB DORNAN**  
Chairman  
Subcommittee on Military Personnel  
National Security Committee

(more)

The President  
The White House  
Washington, DC 20500

Dear Mr. President:

The undersigned Members of the House of Representatives take strong exception to part of your Petition for Writ of Certiorari to the United States Supreme Court in *Clinton v. Jones*. In it, at pages 14-15, you assert the relief you seek in postponing the civil lawsuit against you is similar to that to which you "may be entitled as Commander-in-Chief of the Armed Forces". Certainly, we take no position on the issues being litigated in that case. However, we feel obligated to inform you on behalf of America's veterans that the protections of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. sections 501-25 (1988 & Supp. V 1993), are available only to "persons in the military service of the United States" who are in "Federal service on active duty."

The Act is quite clear and specific about its coverage. The Act's purpose is "to enable the United States the more successfully to fulfill the requirements of the national defense" and to enable members of the military services "to devote their entire energy to the defense needs of the Nation." The Act only applies to members of the Army, the Navy, the Marine Corps, the Air Force, the Coast Guard, and officers of the Public Health Service detailed by proper authority to the Army or the Navy.

Under the Constitution, you are the *civilian* Commander-in-Chief of the Armed Forces. The Founding Fathers wanted to enshrine the principle of civilian control of the military in the Constitution and did so by making the President the civilian Commander-in-Chief of the Armed Forces. You are *not* a person in military service, nor have you ever been.

On the eve of Memorial Day, the most sacred time for honoring our fallen heroes of military service, it is imperative that you rectify this ignoble suggestion that you are now somehow a person in military service. By pursuing this argument, you dishonor all of America's veterans who did so proudly serve. We call upon you to take the honorable course and immediately supplement your Petition for Writ of Certiorari to withdraw your argument regarding the Soldiers' and Sailors' Civil Relief Act.

Sincerely,

---

MAY-20-'96 MON 12:12 IP:

TEL NO:

To: Secretary Brown (80)  
Ed Scott (009)

From: Jim Holley

(80)

# Ten-Hut

**News for Army, Navy, Air Force and Marine Veterans  
From the Republican National Committee**  
20 May, 1996

## WH Seeks Military Cover In Harassment Suit

Washington, D.C. -- Attorneys for Bill Clinton 15 May filed an appeal with the United States Supreme Court seeking a delay in the sexual harassment lawsuit filed against him by Paula Jones, a former Arkansas state employee.

Veterans will be interested to know that the legal argument for the appeal is based on the Soldiers' and Sailors' Civil Relief Act of 1940, which allows members of the armed services to postpone civil litigation while they're on active duty.

The Supreme Court Appeal reads, "President Clinton here thus seeks relief similar to that to which he may be entitled as Commander in Chief of the Armed Forces." (New York Times, 16 May, 1996)

The irony of Bill Clinton's defense did not escape the attention of National Vietnam Veterans Coalition Chairman J. Thomas Burch, Jr., who promptly fired off a letter to the editor of The New York Times. "Bill Clinton was not prepared to carry the sword for his country, but has no hesitancy in using its shield if he can get away with it."

A decision is expected from the court within the month.

## Facts From the Foxhole

Bill Clinton's FY 1997 budget for VA medical care proposes \$17.208 billion. The House Republican budget proposes \$17.3 billion. Even a recruit knows this is an increase!

Bill Clinton's budget would also cut VA medical care funding from \$16.9 billion in FY '96 to \$13 billion by FY '00.

## Words On Watch

Keep this quote at the top of your duffel bag and pull it out the next time you hear scuttlebutt about "mean spirited" GOP cuts in VA programs.

In his 29 March, 1996, testimony before the full House Veterans Affairs Committee, VA Secretary Jesse Brown said of Bill Clinton's VA budget plan, "The president's out-year number and last year's out-year numbers would devastate the VA."

## Mall Call

Vets looking for the straight skinny on VA programs and proposals can get it by writing to Veterans For Dole, 810 1st Street N.E. Suite 300, Washington, D.C. 20002. To enlist in VFD, call 1-800-Bob-Dole. That decodes to 1-800-262-3653. Ask for Ron Miller.

Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness and death."<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> Such relief is deemed necessary to enable members of the armed forces "to devote their entire energy to the defense

<sup>6</sup> 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).

<sup>7</sup> 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.

<sup>8</sup> Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to con-

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

The so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. That stay affects all litigation that "was or could have been commenced" prior to the filing of that petition, 11 U.S.C. § 362 (1994), and ordinarily will remain in effect until the bankruptcy proceeding is completed. *Id.*<sup>9</sup> 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.<sup>10</sup> 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

<sup>9</sup> 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.

<sup>10</sup> 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.

## STATEMENT OF ROBERT S. BENNETT

May 22, 1996

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

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

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

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

THE WHITE HOUSE

WASHINGTON  
May 10, 1996

MEMORANDUM FOR JACK QUINN  
BRUCE LINDSEY  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

As you know, the cert petition must be filed by this coming Thursday; according to Amy Sabrin, that means it should be given to the printers on Monday. Sabrin is currently incorporating Strauss's and Stone's comments. She hopes to have a new draft by very late tonight or (more likely) tomorrow morning. She would like any comments we have by Saturday afternoon.

We should figure out how we want to handle this process: How involved should we be in the editorial process? And if we do want to get involved, how should we coordinate in such short order our own thoughts and comments?

THE WHITE HOUSE

WASHINGTON  
May 8, 1996

MEMORANDUM FOR JACK QUINN  
BRUCE LINDSEY  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

The Eighth Circuit has denied the President's motion for an extension of the stay. The Court acted as soon as it reviewed Jones's opposition to the motion. The Clerk never even had a chance to circulate the reply memo that Skadden filed yesterday.

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**SKADDEN, ARPS, SLATE, MEAGHER & FLOM**  
 1440 NEW YORK AVENUE, N.W.  
 WASHINGTON, D.C. 20005

Telephone No.: (202) 371-7000  
 Facsimile No.: (202) 393-5760

**FACSIMILE TRANSMITTAL SHEET**

FROM: Amy R. Sabrin  
 DIRECT DIAL: (202) 371-7699  
 DIRECT FACSIMILE: (202) 371-7963

DATE: May 7, 1996  
 FLOOR/OFFICE No.: 8/7  
 REFERENCE NUMBER: 140480

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Please deliver the following pages to:

- |  |   |
|--|---|
| <p>1. NAME: <u>Elena Kagan, Esq.</u><br/>         FACSIMILE No.: <u>202-456-1647</u></p>   | <p>FIRM: <u>Asst. White House Counsel</u><br/>         TELEPHONE No.: <u>202-456-7594</u></p> |
| <p>2. NAME: <u>David Strauss, Esq.</u><br/>         FACSIMILE No.: <u>312-702-0730</u></p> | <p>FIRM: <u>The University of Chicago</u><br/>         TELEPHONE No.: <u>312-702-9601</u></p> |

Total number of pages including cover(s): 4

MESSAGE: We would like any comments ASAP. Thanks

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. legal brief	re: Reply to Paula Jones' Opposition to the President's Motion (3 pages)	05/07/1996	P5

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F  
jp2028

### RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
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# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. memo	Elena Kagan to Jack Quinn et al. re: Jones Litigation (1 page)	05/06/1996	P5

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F  
jp2028

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# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006a. fax cover sheet	David Strauss to John Quinn; re: Certiorari Petition (1 page)	04/26/1996	P5

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F  
jp2028

### RESTRICTION CODES

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

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# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006b. memo	Geof Stone and David Strauss to Bob Bennett & Amy Sabrin; re: The Petition (5 pages)	04/26/1996	P5

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F

jp2028

### RESTRICTION CODES

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

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THE UNIVERSITY OF CHICAGO  
THE LAW SCHOOL  
1111 EAST 60TH STREET  
CHICAGO - ILLINOIS 60627-2786

file:  
Paula Jones

DAVID A. STRAUSS  
HARRY N. WYATT PROFESSOR OF LAW

TELEPHONE: 312.702.9601  
FAX: 312.702.0730

Friday, April 26, 1996

BY FAX

The Honorable John M. Quinn  
Counsel to the President  
The White House  
Washington, D.C.  
FAX 202-456-6279

Re: *Clinton v. Jones* (U.S. Sup. Ct.)

Dear Jack:

Here is a memo about the certiorari petition. I've sent a copy to Bob and Amy too.

With all best wishes,

Sincerely,

David

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. memo	Geof Stone and David Strauss to Bob Bennett and Amy Sabrin; re: The Petition (5 pages)	04/26/1996	P5

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F  
jp2028

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

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

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

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

RR. Document will be reviewed upon request.

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. memo	Elena Kagan to Jack Quinn et al. re: Supreme Court Procedures (1 page)	04/05/1996	P5

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F  
jp2028

### RESTRICTION CODES

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

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# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Litigators [partial] [page 2 withdrawn in full] (2 pages)	04/05/1996	P5, P6/b(6)

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

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jp2028

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*file  
Paula  
Jones.*

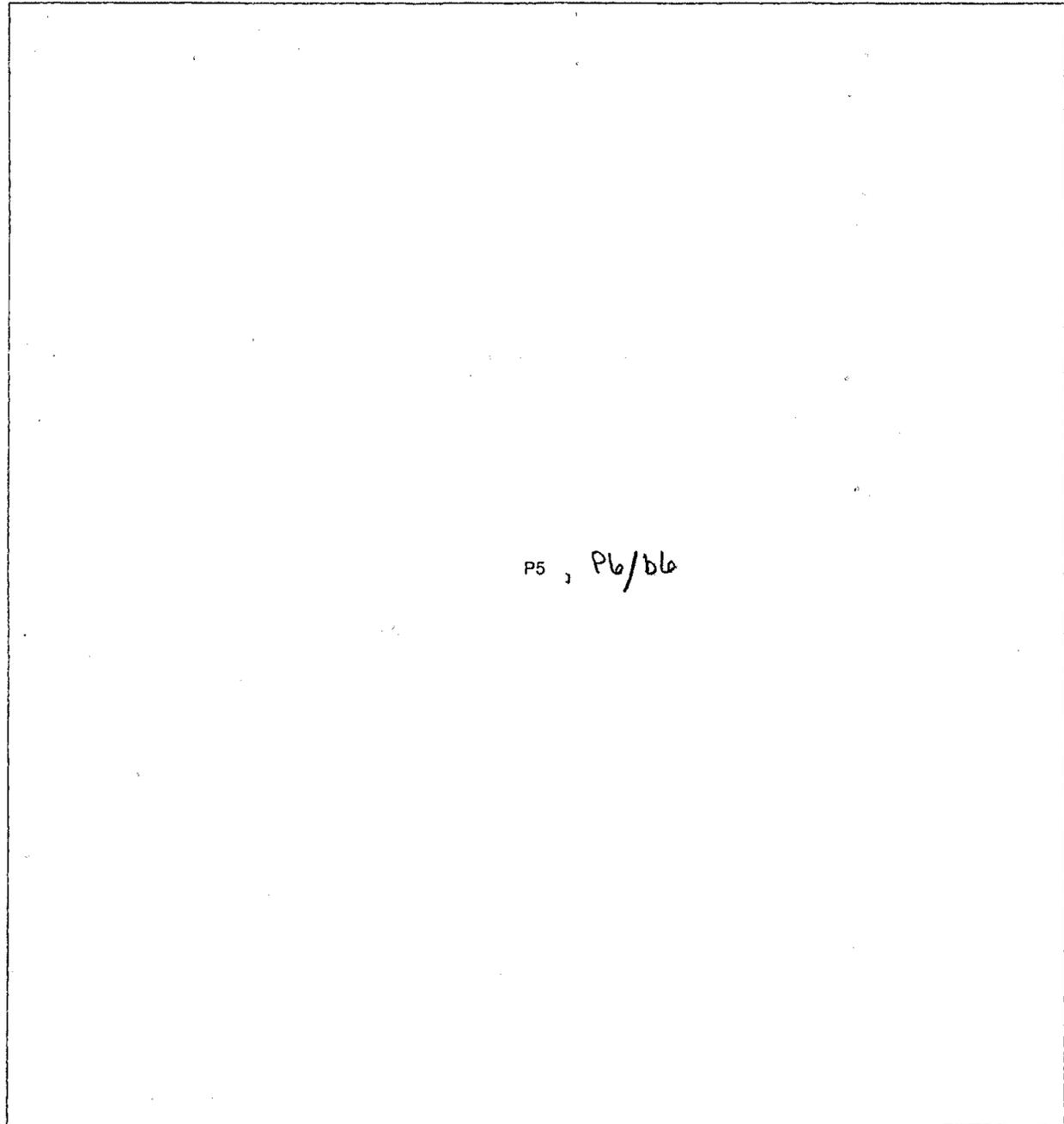
THE WHITE HOUSE  
WASHINGTON  
April 5, 1996

MEMORANDUM FOR JACK QUINN  
BRUCE LINDSEY  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: SUPREME COURT LITIGATORS

[009]



*P5 , P6/b6*

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators [partial] [pages 2 and 3 withdrawn in full] (3 pages)	03/11/1996	P5, P6/b(6)

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

2009-1006-F  
jp2028

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THE WHITE HOUSE  
WASHINGTON

March 11, 1996

MEMORANDUM FOR JACK QUINN  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: SUPREME COURT LITIGATORS

*Kathy - [unclear] Jones  
New version  
with further  
and Culvahors.  
Eka*

~~SECRET~~

[010]

P5, P6/b6

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators [partial] [page 2 withdrawn in full] (2 pages)	03/11/1996	P5, P6/b(6)

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Elena Kagan  
OA/Box Number: CF 814

### FOLDER TITLE:

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2009-1006-F  
jp2028

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*file: Paula Jones*

THE WHITE HOUSE  
WASHINGTON

March 11, 1996

MEMORANDUM FOR JACK QUINN  
KATHY WALLMAN

FROM: ELENA KAGAN *AK*

SUBJECT: SUPREME COURT LITIGATORS

*Jack + Kathy,  
I've changed this  
to reflect that Rex  
Lee died last night.  
I also took the oppor-  
tunity to make a  
couple of other minor  
changes.*

*Elena*



*P5, P6/bv*

~~██████████~~  
[011]

file: Paula Jones

THE WHITE HOUSE

WASHINGTON

February 6, 1996

MEMORANDUM FOR JACK QUINN  
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: SG'S BRIEF IN PAULA JONES CASE

Attached is a copy of the Solicitor General's amicus brief in support of the petition for rehearing in Jones v. Clinton. It's really pretty good.

The brief (in my view, correctly) downplays the question whether the President has constitutionally mandated immunity from civil suits involving pre-Presidential conduct. It instead focuses on the question whether a trial court, irrespective of any constitutional "entitlement," should be able to use its discretion over its docket to postpone such litigation. It concludes, based on the "obvious public and constitutional interests in the President's undivided attention to his office," that such an exercise of discretion is entirely appropriate.

The brief notes that the appellate court's decision "invites the filing of politically inspired strike suits by persons who are more interested in obstructing a sitting President than in obtaining private redress." The brief also argues that the appellate court's opinion overstates the importance of the plaintiff's interests in prosecuting her suit without delay.

*Amy Leber  
Melissa have copies*

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

<hr/>	
PAULA CORBIN JONES,	)
	)
Plaintiff-Appellee/Cross-Appellant,	)
	)
v.	)
	)
WILLIAM JEFFERSON CLINTON,	)
	)
Defendant-Appellant/Cross-Appellee,	)
	)
and	)
	)
DANNY FERGUSON,	)
	)
Defendant-Appellee.	)
<hr/>	

No. 95-1050  
No. 95-1167

**MOTION OF UNITED STATES FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF SUGGESTION OF REHEARING EN BANC**

The United States of America hereby moves for leave to file a brief as amicus curiae in support of the pending suggestion of rehearing en banc in this case. Copies of the amicus brief are being lodged with the Court concurrently with the filing of this motion. The reasons for the motion are as follows:

1. On January 9, 1996, a divided panel of this Court issued a decision (i) affirming the district court's denial of a stay of pretrial proceedings and (ii) reversing the district court's stay of trial proceedings. On January 23, 1996, President Clinton filed a timely motion for rehearing and suggestion of rehearing en banc.

2. The United States has reviewed the panel decision and the rehearing petition filed by President Clinton. Based on that

review, the United States has concluded that the issues addressed by the panel should be reheard by the full Court. The United States has prepared an amicus brief that explains why, in our judgment, rehearing en banc is appropriate.

3. Throughout this litigation, the United States has participated as an amicus curiae to represent the interests of the office of the Presidency. The United States has similarly participated as amicus curiae in past cases involving the interests of the Presidency, such as Nixon v. Fitzgerald, 457 U.S. 733 (1982). The points made in our amicus brief do not merely repeat the views expressed in the President's rehearing petition, but rather address the legal issues from the institutional perspective of the Presidency. The United States therefore believes that this Court's consideration of whether to rehear this case en banc would be assisted by hearing the views of the United States.

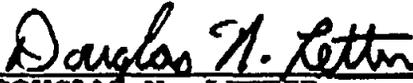
For the foregoing reasons, the Court should grant the United States leave to file an amicus brief in support of the suggestion of rehearing en banc.

Respectfully submitted,

DREW S. DAYS, III  
Solicitor General

EDWIN S. KNEEDLER  
Deputy Solicitor General

MALCOLM L. STEWART  
Assistant to the Solicitor  
General

  
DOUGLAS N. LETTER

  
SCOTT R. MCINTOSH  
Attorneys, Appellate Staff  
Room 3127, Department of Justice  
10th & Pennsylvania Ave., N.W.  
Washington, D.C. 20530  
(202) 514-4052

January 30, 1996

**CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 1996, I served the foregoing MOTION OF UNITED STATES FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF SUGGESTION OF REHEARING EN BANC by mailing true copies, first-class postage prepaid, to:

Robert S. Bennett  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue NW  
Washington DC 20005

Joseph Cammarata  
Gilbert K. Davis  
9516-C Lee Highway  
Fairfax VA 22031

Robert Batten  
1412 West Main  
Jacksonville AR 71004

Bill W. Bristow  
216 E. Washington  
Jonesboro AR 72401

Stephen Engstrom  
Wilson, Engstrom, Corum, Dudley & Coulter  
809 West Third Street  
Little Rock AR 72202

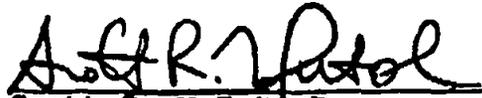
Kathlyn Graves  
Wright, Lindsey & Jennings  
220 Worthen Bank Building  
200 West Capitol Avenue  
Little Rock AR 72201

Christopher A. Hansen  
American Civil Liberties Union Foundation  
132 West 43rd Street  
New York NY 10036

Ronald D. Rotunda  
University of Illinois School of Law  
216 Law Building  
504 East Pennsylvania Avenue  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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NOS. 95-1050 & 95-1167

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PAULA CORBIN JONES,

Plaintiff-Appellee/Cross-Appellant

v.

WILLIAM JEFFERSON CLINTON,

Defendant-Appellant/Cross-Appellee,

and

DANNY FERGUSON,

Defendant-Appellee.

---

ON PETITION FOR REHEARING  
AND SUGGESTION OF REHEARING EN BANC

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

---

STATEMENT

This Court has before it a petition for rehearing and suggestion of rehearing en banc filed by the President of the United States. The United States has participated in this case as an amicus curiae to protect the interests of the institution of the Presidency. In that capacity, we now submit this brief in support of the suggestion of rehearing en banc. For the reasons set forth below, the United States believes that the legal issues presented by this appeal are sufficiently important, and the resolution of those issues by the divided panel sufficiently questionable, to warrant consideration by the full Court.

1. The central issue in this appeal is one of first impression in the federal courts: whether a sitting President should be compelled to defend himself during his term of office against a private civil action based on pre-Presidential conduct. In the view of the United States, he should not. Courts enjoy the general power to stay their proceedings, see Landis v. North American Co., 299 U.S. 248 (1936), and that power normally should be exercised in favor of staying the litigation until the completion of the President's term. A stay would prevent the litigation from interfering with the President's discharge of his constitutional duties under Article II, while preserving the plaintiff's ultimate ability to have his or her claims resolved on the merits. See generally Op. 26-32 (Ross, J., dissenting). The rule we suggest is not an inflexible one: in the exceptional case where a plaintiff will suffer irreparable injury without immediate relief, and it is evident that prompt adjudication will not significantly impair the President's ability to attend to the duties of his office, a stay properly may be withheld. Ordinarily, however, the obvious public and constitutional interests in the President's undivided attention to his office will demand a stay.

The panel rejected this view, on the ground that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Op. 16-17. As Judge Ross's dissent shows, that holding rests on a reading of Supreme Court precedent and constitutional history that is debatable at best. See id. at 26-27. In particular, the majority's reasoning does not give adequate weight to the consti-

tutional concerns identified by the Supreme Court in Nixon v. Fitzgerald, 457 U.S. 731 (1982). Fitzgerald holds that "[t]he President occupies a unique position in the constitutional scheme" (457 U.S. at 749); that the President should not be diverted from attending to the duties of his "unique office" by "concern with private lawsuits" (id. at 749, 751); and that where the public interest in the President's attention to his official responsibilities conflicts with a private litigant's interest in obtaining redress for legal wrongs, the private interest must yield. Id. at 754 n.37. Those principles argue strongly in favor of recognizing a generally applicable constitutional bar against the prosecution of private suits against sitting Presidents.

But even if the majority's constitutional analysis were correct on its own terms, that is not the end of the matter. The issue in this case is not confined, as the majority seems to have thought, to whether the Constitution ex proprio vigore renders the President "immune" from civil actions during his term of office. Instead, the question is whether the constitutional and practical demands of the Presidency should lead a court to exercise its undoubted authority over its docket to postpone the litigation. The majority opinion fails to come to terms adequately with that question.

The panel majority appears to have been led astray by the concept of Presidential "immunity." The majority opinion reasons that Presidential immunity "is not a prudential doctrine fashioned by the courts," but rather is a rule that applies, "if at all, only because the Constitution ordains it." Op. 16; see also id.

at 7 (official immunity "is not to be granted as a matter of judicial largesse"). As a general matter, that is simply not correct.<sup>1</sup> But even if immunity from liability had to be constitutionally grounded, the "immunity" asserted by the President in this case is fundamentally different. No one has suggested that the President is immune from liability for pre-Presidential conduct. What is at issue here is simply a question of timing: when, not whether, the President must participate in judicial proceedings based on allegations concerning his private conduct. On that score, a court enjoys inherent authority to control the progress of cases on its docket, regardless of whether there is a constitutional imperative for it to do so. See, e.g., Landis, supra.

The panel majority acknowledged that the district court has "broad discretion in matters concerning its own docket." Op. 14 n.9. Nonetheless, the majority held that exercising that discretion in favor of a stay here constitutes reversible error. Op. 14 n.9. The majority reasoned that because (in its view) the President "is not constitutionally entitled" to "temporary immunity," it was "an abuse of discretion" for the district court to grant a stay on equitable grounds. Ibid.

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<sup>1</sup> The Supreme Court has not confined official immunity to cases where "the Constitution ordains it" (Op. 16). To the contrary, the Court has stated that "the doctrine of official immunity from § 1983 liability \* \* \* [is] not constitutionally grounded." Butz v. Economou, 438 U.S. 478, 497 (1978) (emphasis added). The Court has looked to common law immunity rules, rather than to the Constitution, as the benchmark for official immunity in Section 1983 actions. See, e.g., Pierson v. Ray, 386 U.S. 547 (1967).

That reasoning, we submit, is a non sequitur. Rarely, if ever, are parties "constitutionally entitled" to postpone litigation. But it hardly follows that the lack of a constitutional "entitlement" makes granting a stay an abuse of discretion. To the contrary, courts enjoy broad authority to stay civil proceedings in order to accommodate public and private interests that would be unfairly prejudiced by immediate litigation. For example, courts may stay civil actions in order to accommodate related criminal prosecutions -- not because the Constitution compels a stay, but simply because the public interest calls for one. See, e.g., United States v. Mellon Bank, N.A., 545 F.2d 869 (3rd Cir. 1976); 2 Beale & Bryson, Grand Jury Law and Practice § 8:07 (1986). The panel majority disregards this long-recognized authority.

The majority opinion is thus significant not only for the importance of the questions it addresses, but also for the extreme character of the answers it adopts. The panel decision, it must be emphasized, does not merely hold that courts are not required to stay private civil suits against a sitting President. Instead, the panel holds that courts are prohibited from staying such suits.

This holding is difficult to fit together with the surrounding legal landscape. For example, the available evidence strongly indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting

President.<sup>2</sup> The panel's decision thus gives greater priority to private civil actions than criminal law enforcement proceedings would be entitled to. Yet as the Supreme Court noted in Fitzgerald, "there is a lesser public interest in actions for civil damages than \* \* \* in criminal prosecutions." 457 U.S. at 754 n.37.

The panel's holding is similarly at odds with the public policies reflected in the Soldiers' and Sailors' Civil Relief Act ("SSCRA"), 50 U.S.C. App. §§ 501 et seq. Section 201 of that Act requires federal and state courts to grant a stay in any suit involving "a person in military service," if the court determines that "the ability of the plaintiff to prosecute the action or the defendant to conduct his defense [would be] materially affected by reason of his military service." 50 U.S.C. App. § 521. If the court makes the necessary finding regarding the impact of military service on the litigation, Section 201 mandates a stay of proceedings regardless of the effect of the stay on other litigants. See, a.g., Sawler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943); Coburn v. Coburn, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982). The policy considerations that underlie the SSCRA apply with far greater force to a civil action that threatens to impair the

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<sup>2</sup> See, a.g., 2 Farrand, Records of the Federal Convention of 1787 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction \* \* \* removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law"). In In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

attention to duty of the President, who is the Commander in Chief. U.S. Const. Art. II, § 2. Yet far from adopting a comparable rule in favor of staying civil actions against sitting Presidents, the panel has adopted precisely the opposite rule.

Not only is the panel's holding debatable as a legal matter, but it is highly troubling as a practical one. However unintentionally, the panel decision invites the filing of politically inspired strike suits by persons who are more interested in obstructing a sitting President than in obtaining private redress. It is hardly reassuring that, as the majority opinion notes, "few such lawsuits have been filed." Op. 14. Prior to this case, no federal court had ever held that such suits could go forward during the President's term of office. Now, this Court has held not only that they may go forward but that they must. The consequences of that unprecedented holding, both for the office of the Presidency and for the American people, are potentially severe.<sup>3</sup>

2. The panel decision is also problematic in its handling of the other interests involved in this case. The majority opinion and Judge Beam's concurrence express concern for the possible adverse impact of delay on the plaintiff in this case and on plaintiffs as a class. The United States does not suggest that

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<sup>3</sup> The majority opinion reasons that the "universe of potential plaintiffs" who might bring suit against a sitting President for his private actions is relatively small. Op. 15. We respectfully disagree. Every President in this century has held one or more prominent positions before ascending to the Presidency. In each case, the inevitable result is a large class of persons with whom the President has had prior social, professional, or business dealings that could give rise to litigation.

the potential consequences for plaintiffs are irrelevant. But in several important respects, the majority and the concurrence overstate those consequences.

The majority opinion suggests that delaying litigation until the President leaves office would infringe on the plaintiff's constitutional right of access to the courts. Op. 10. But a stay affects only the timing of the litigation, not whether the plaintiff receives her day in court. As a result, the plaintiff's asserted constitutional interest in access to the courts is unaffected. We note in this regard that while the Bill of Rights guarantees the right to a speedy trial in criminal cases, it conspicuously lacks a similar guarantee for civil litigation.<sup>4</sup>

The concurring opinion cites the risk that testimony may be lost because of the death or incompetence of witnesses during the pendency of a stay. Op. 18. But as the United States noted in its amicus brief in this Court, and as the district court itself recognized when it granted a stay of discovery pending appeal, there is no reason why the parties cannot make arrangements to preserve evidence when necessary. Cf. Fed. R. Civ. P. 27(a),

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<sup>4</sup> The concurring opinion is similarly mistaken when it suggests that staying the litigation would infringe on the plaintiff's Seventh Amendment right to trial by jury. Op. 18. The Seventh Amendment concerns who will decide contested issues of fact, not when such issues will be decided. In the words of the Fifth Circuit, "[n]othing in the seventh amendment requires that a jury make its findings at the earliest possible moment in the course of civil litigation; the requirement is only that the jury ultimately determine the issues of fact \* \* \*" Woods v. Holy Cross Hospital, 591 F.2d 1164, 1178 (5th Cir. 1979) (emphasis in original); see also Capital Traction Co. v. Hof, 174 U.S. 1, 23 (1899) (Seventh Amendment "does not prescribe at what stage of an action a trial by jury must \* \* \* be had").

27(c) (perpetuation of testimony). Moreover, even if there were concrete reasons to think that evidence might be lost in the absence of discovery -- and no such reasons are evident in this case -- that risk would hardly justify reversing the district court for staying trial, as distinct from pretrial, proceedings.

In sum, the panel decision in this case addresses issues of considerable significance to the Presidency and the public, and disposes of those issues in ways that are both legally and practically problematic. Before a sitting President is compelled for the first time in the Nation's history to stand trial as a defendant in a private lawsuit, review of these issues by this Court en banc is called for.

#### CONCLUSION

For the foregoing reasons, the cross-appeals in this case should be reheard by the Court en banc.

Respectfully submitted,

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January 30, 1996

**CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 1996, I served the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE by mailing true copies, first-class postage prepaid, to:

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012. memo	Elena Kagan to Jack Quinn and Kathy Wallman; re: Paula Jones Petition [partial] (1 page)	01/26/1996	P5, P6/b(6)

### COLLECTION:

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Elena Kagan  
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Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

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### RESTRICTION CODES

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

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- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE  
WASHINGTON  
January 26, 1996

*file:  
Jones*

MEMORANDUM FOR JACK QUINN  
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: PAULA JONES PETITION

This past Tuesday, Robert Bennett filed a petition in Paula Jones v. Clinton for rehearing or, alternatively, for rehearing en banc before the full Eighth Circuit.

The petition notes that the case presents novel and important questions and argues that the panel decision erred in deciding these questions. Specifically, the petition claims:

- The panel decision misconstrued the critical Supreme Court precedent -- Nixon v. Fitzgerald -- in holding that the Constitution offers the President no protection against civil suits alleging private misconduct. The panel read Fitzgerald to protect the President against only those civil damage suits involving official conduct. But the reasoning of Fitzgerald -- particularly, its concern about diverting the President's time and attention for the sake of a suit brought for private interest -- applies equally well to suits involving non-official conduct.
- The panel decision failed to fully take into account that the President seeks not full immunity, but only postponement of the suit until he finishes his term in office.
- The panel decision disregarded evidence that the Framers intended the President to be immune from all civil claims.
- The panel decision erred in holding that a stay of the suit would constitute an abuse of the trial court's discretion. Even assuming that the President has no constitutional immunity, the trial court should retain discretion to consider the President's special status, and the public interests that status implicates, when exercising its discretion to control its docket.
- The panel decision provides the courts with unprecedented and sweeping powers over the Presidency, effectively enabling courts to determine whether the President will spend his time attending to the national business or participating in litigation.

P5 / P6, B6

[02]

Jones

cc: Elera

**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF LEGAL COUNSEL  
WASHINGTON, D.C. 20530**

**FACSIMILE TRANSMISSION SHEET**

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**REMARKS:**

For EUNA

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

Page 1

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

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

§ 511. Definitions

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

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

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

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

CREDIT(S)

1990 Main Volume

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

1996 Interim Update

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

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

**HISTORICAL AND STATUTORY NOTES**

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Walter - note various people held not to  
be within statute

50 App. USCA § 511

Page 8

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

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

#### 40. — Employees of independent contractors

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

#### 41. — Heirs of servicemen

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

#### 42. — Merchant seamen

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

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

#### 43. — Retired servicemen

A retired Army officer, not being entitled to benefits of § 501 et seq. of this Appendix, was not entitled to have opened default judgment against him for arrears of alimony or to have attorney appointed to protect his interests in absence of any showing of prejudice to him in defense of action, or that he had a legal defense to the proceedings. *Lang v. Lang*, N.Y.Sup.1941, 25 N.Y.S.2d 775, 176 Misc. 213.

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

#### 44. — Spouses of servicemen

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



MESSAGE CONFIRMATION

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FAX to Elean

What about civil proceedings brought by U.S. DOJ? No compelling public interest?

is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests -- giving a trial court the power to manage the President's priorities to accomodate personal damages litigation -- pushes the separation of powers well past the breaking point.

Finally, even in cases where only testimony or evidence has been sought from a President, this Court repeatedly has drawn a clear line between criminal proceedings -- ~~where a compelling public interest is involved~~ -- and civil proceedings. See Nixon v. Fitzgerald, 457 U.S. at 754 & n.37; United States v. Nixon, 418 U.S. 683, 712 n.19 (1974). The fact that Presidents on occasion appear as witnesses in criminal proceedings, therefore, does not support the conclusion that a President is required to participate in a <sup>(private)</sup> civil damages action in any capacity -- and certainly not as a defendant.

3.a. The brief in opposition also attempts to create the impression that the President seeks to be held absolutely immune from liability for actions he took while he was not President. The President seeks no such thing, and respondent's elaborate arguments against that proposition (Br. in Op. xx, xx, xx) are simply a determined effort to confuse the issue. Rather, throughout this case, the President has asserted that the responsibilities of the Presidency warrant deferring this litigation until he leaves office. He does not seek to extinguish the

fair trial"), aff'd, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).



*Jones*

*Elena (JR) KW/*

*PL*

# WHITE HOUSE WEEKLY

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Monday, July 29, 1996

WHW Volume 17, Number 30

## CAPITAL DIARY

### *Immigrants And Strange Animosities*

BY LLEWELLYN KING

Peter Jennings, who reads the news on ABC-TV in an avuncular and concerned way, is, one presumes, rolling in money. This is just as well, because the welfare reform bill, which is about to leave Capitol Hill for 1600 Pennsylvania Avenue, is aimed at people like Jennings, among others.

Jennings is a Canadian citizen who has not changed his nationality. He once said that his mother would never forgive him if he became an American, although he has lived here for many years and achieved great success.

The Republican welfare bill censures people like Jennings. They cannot draw welfare under it and their children can be denied school lunches. The bill implies that there is some sort of moral failure in people who do not become citizens; that they have an overriding loyalty to some other power and are here for no better purpose than to rip off our social services.

It is one more unpleasant aspect of this unpleasant piece of legislation, this bill designed—like three strikes, you're out—to produce a crueller, harsher America.

This bill, which is supposed to turn layabouts into productive citizens imbued with a work ethic, has at its heart a desire not only to make the poor, the stupid and

*(Continued on page 2)*

### Vets May Resurrect Attack On White House Paula Jones Defense

BY TONY CAPACCIO

A veterans' group is considering filing an *amicus curiae* brief with the Supreme Court in order to press its opposition to what has been widely seen as a claim by President Clinton that, as the nation's commander-in-chief, he is on "active-duty" status.

The group spearheaded a Memorial Day weekend attack on the president for purportedly using such a claim in an alleged attempt to delay the progress of the Paula Jones sexual harassment case. The controversy neatly captured the fact that, although the Cold War is over and his Pentagon team is credited with good management credentials, Clinton remains vulnerable on the "commander-in-chief" issue.

A Supreme Court filing by the Coalition of American Veterans could tap that vulnerability—and might in the process elevate national defense, now fairly dormant in the presidential campaign, as a campaign issue. Currently, the coalition is assessing whether to bring its fight to the nation's highest court; seven attorneys are scheduled to meet on either Thursday or Friday to

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### Israel Among Most 'Extensive' In Economic Espionage—CIA

BY TONY CAPACCIO

For the first time on the public record, the CIA has identified the governments of France and Israel as among a handful of nations it says are "extensively engaged in economic espionage" against the United States, *White House Weekly* has learned.

In contrast, the CIA concluded in the just-released testimony that Japan—an ally viewed by some as among the most unscrupulous in trying to steal U.S. technology—engages in "mostly legal" collection efforts.

"We have only identified about a half-dozen governments that we believe have extensively engaged in economic espionage as we define it," said the CIA in May 10 written material provided to the Senate Select Committee on Intelligence.

"These governments include France, Israel, China, Russia, Iran and Cuba. Japan and a number of other countries engage in economic

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discuss the group's legal options.

Retired Marine Corps Col. William "Lucky" Luchsinger, the coalition's chairman, this week acknowledged the organization's hope that a filing might influence both general public opinion and the court's verdict, even if that filing missed prescribed legal deadlines.

"We are processing it now. We are looking at people who would take the case *pro bono*," Luchsinger said. "It's a question of timing. We may do it anyway because if we don't, who will?"

Luchsinger said his coalition, unlike most veterans' organizations, gets actively involved in political and even legal issues.

Time appears to be on the coalition's side. The Supreme Court on June 24 agreed to hear the case, effectively delaying Jones' high-profile lawsuit until after Election Day. Clinton's attorneys have 45 days from June 24 to file a "brief on the merits." The document's preparation is on schedule, the president's attorneys confirmed yesterday.

Interested parties then have 30 days in which to file *amicus curiae* or "friend of the court" briefs supporting Jones or Clinton, the court clerk's office said. "I think public opinion is important.... They are cognizant of public opinion," Luchsinger said of the Supreme Court.

Luchsinger also acknowledged that his organization, once nearly bankrupt, has leveraged its Memorial Day roll for fund-raising purposes.

In attacking the White House, veterans' groups, GOP lawmakers and *New York Times* columnist Maureen Dowd interpreted Clinton's legal defense, as offered in a May 15 Supreme Court brief, as resting largely on purported "active service" status as commander-in-chief.

According to this view, Clinton was claiming to be eligible under the Soldiers' and Sailors' Civil Relief Act of 1940 for a delay of the sordid civil case. Critics and reporters failed to mention, however, that as far back as August 1994 Clinton legal briefs maintained that he was *not* relying on the act.

Instead, according to Clinton attorneys, the act has been

referenced to illustrate a defense theory: If the act grants soldiers temporary legal relief while on active service, then the president, by dint of his greater responsibilities, should enjoy similar status.

"It is arguable that the Act expressly applies to the President as Commander-in-Chief but we do not press the argument here," said an Aug. 10, 1994, filing.

Who is right can be debated on *Geraldo*. What is evident is that the issue is not as clear-cut as the Memorial Day firestorm suggested.

For its part, the coalition spent \$144,300—nearly its entire budget—placing, in 24 major and regional papers, full- and quarter-page ads featuring a May 27 letter of criticism signed by five Congressional Medal of Honor winners.

The papers included the *Washington Times*, the *Orange County Register*, the *Philadelphia Inquirer*, *Stars and Stripes*, the *St. Petersburg Times* and the *Detroit News*. Luchsinger said the coalition wanted to "straighten the record"

over what he claimed was the Clinton legal team's continued reliance on the Soldiers' and Sailors' Act.

"I understood Clinton's attorneys ain't giving up," said Vietnam War veteran Elliot Williams, past president of the Congressional Medal of Honor Society. "They are dropping the issue of the 1940 Sailors' Act. It's new words, but it's going to be the same claims."

Williams said the letter reflected one step aimed at politically energizing veterans' groups—not on behalf of any one candidate, but simply to get more involved. "There are 18 chartered groups out there and they are not getting together. They are guarding their turf for membership. They won't admit that, but it's the truth," Williams said, adding that he hopes the coalition's past and future involvement will bring the groups together.

Williams said the May 27 letter, to which he is a signatory, reflected language he and another Vietnam medal winner and former Army Public Affairs chief, Maj. Gen. Patrick Brady, had drafted. Adding some confusion, however, Brady said in an interview that he never talked to Williams and can't remember who called him asking him to sign the letter.

"I drafted the letter, but a lot of stuff was drafted by Brady," Williams said. "Then collectively we came out with one letter. The coalition got some things in there, too. They were full partners. Let's put it that way."

"To retreat from the call to arms and then later embrace its code when it is convenient is an outrage to all who served," said the letter in recounting Clinton's 1960s draft history.

"It is a distasteful irony that you would invoke the Act at a time when we remember those who gave their lives while wearing the uniform of the American military you once professed to loathe," the letter added.

The phrase about "loathing the

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*'It's a question of timing. We may do it anyway because if we don't, who will?'*

## 'Extensive' In Economic Espionage... *(Continued from page one)*

collection, but we believe their efforts are mostly legal and involve seeking openly available material or hiring well-placed consultants," the CIA said in its testimony.

The new material was released without fanfare yesterday as part of a declassified hearing volume on "Current and Projected National Security Threats to The United States."

Until the new CIA statement, the U.S. government had never publicly confirmed that Israel has engaged in clandestine attempts to gain U.S. technology.

Israel Embassy spokesman Gadi Baltiansky said yesterday he was not aware of the CIA material, but he stated: "Israel is not engaged in any form of espionage in or against the United States."

Economic espionage has been a hotly debated topic in national security and defense industry circles.

So concerned was the Clinton administration that, in 1994, it set up a National Counterintelligence Center (NACIC) to pool FBI, CIA, Defense Intelligence Agency, State Department and National Security Agency resources.

It was NACIC's research that led to a listing of the governments, according to the material. "The Center has narrowly defined economic espionage to include a government-directed or orchestrated clandestine effort to collect U.S. economic secrets or proprietary information," the testimony said.

"The Counterintelligence Center has examined a

number of countries from the standpoint of their willingness to conduct economic espionage against U.S. interests," said the CIA in the material released yesterday.

"We see government-orchestrated theft of U.S. corporate science and technology data as the type of espionage that poses the greatest threat to U.S. economic competitiveness."

News of the CIA characterization of Israel comes as that nation is reacting with anger to the Clinton administration's denial of a pardon for convicted spy Jonathan Pollard.

A widely publicized—and equally criticized—Defense Investigative Service (DIS) "Counterintelligence Profile" on Israel, disclosed in February, recounted public-record examples of industrial espionage.

"Israel aggressively collects military and industrial technology. The United States is a high-priority collection target," said the profile, which also implied that U.S. citizens with ethnic ties to Israel are prone to betray U.S. technology.

CIA Director John Deutch in Feb. 22 testimony hit the DIS profile as "a terrible document."

In a Feb. 28 report, the General Accounting Office, without explicitly naming Israel—which it identified only as "Country A—said it "conducts the most aggressive espionage operation against the United States of any U.S. ally."

The new CIA material tends to corroborate rather than to debunk the DIS and GAO assessments.

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military" was in Clinton's now infamous Dec. 3, 1969, letter to Arkansas ROTC official Col. Eugene Holmes. Three years earlier, then-Boatswain's Mate First Class Williams won his Medal of Honor for taking on 10 Viet Cong junks and sampans in a savage river firefight.

"Mr. President,...withdraw your use of the Soldiers' and Sailors' Civil Relief Act," the letter said.

Clinton's attorney, Robert Bennett, acknowledged in an interview the conclusions of a May 22 Congressional Research Service opinion relied on by Republicans to attack Clinton: that the commander-in-chief title does not imply "active duty."

"I agree, but we've never argued that. We are not saying he is on active duty," Bennett said.

"Everybody has been over the papers," said an exasperated Bennett when asked why the issue had not surfaced two years ago, when the 1940 Act was first brought up in his legal briefs. "At no time did any-

body raise a question, no print or television reporter. The point was never made an issue."

Just one excerpt illustrates the case's complexity:

In a June 5, 1995, reply brief, for example, lawyers for Clinton wrote: "The President does not rely directly on the Act, choosing instead to invoke the constitutional protection due the presidency. Nonetheless, we feel compelled to address certain statements about the Act [made] in the opposing briefs..."

"Although the Act does not expressly include the commander-in-chief, a review of the legislative history reveals no intent to exclude him and it would be consistent with the overall purpose of the Act to extend its coverage to the commander of the armed forces...."

"In any event, the Act provides a useful example of another instance in which our legal system subordinates the interests of individual litigants to overriding national interests when circumstances require."

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