

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
002. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
003. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
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007. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
008. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
009. draft	Submission of the White House to Senate Committee (10 pages)	12/10/1995	P5 195
~~010. memo~~	~~Phone No. (Partial) (1 page)~~	~~12/13/1995~~	~~P6/b(6)~~
011. draft	Letter from the Counsel's Office re: communication (2 pages)	ca. 12/1995	P5 196

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8248

FOLDER TITLE:

Whitewater [2]

2009-1006-F

ke693

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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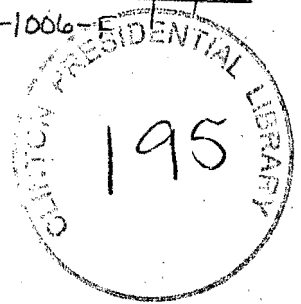
PRIVILEGED AND ~~CONFIDENTIAL~~
DRAFT - December 10, 1995

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ADMINISTRATIVE MARKING
INITIALS: DB DATE: 11/29/12

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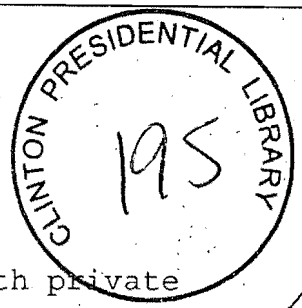
SUBMISSION OF THE WHITE HOUSE
TO THE SPECIAL SENATE COMMITTEE REGARDING
WHITEWATER AND RELATED MATTERS

December 13, 1995



This memorandum sets forth the position of the White House regarding the subpoena to William H. Kennedy, III, formerly Associate Counsel the President, seeking production of notes taken by Mr. Kennedy at a meeting among lawyers at the office of Williams & Connolly on November 5, 1993. In seeking the notes of a meeting among the President's senior advisors and his private counsel, the Committee attempting for the first time, in an investigation that began over eighteen months ago, to invade the privacy of the President's personal attorney-client relationship, *at the same time, it is...* The White House agrees with and supports the argument, set forth in the memorandum submitted by President and Mrs. Clinton's personal counsel, that the notes are protected by the Clintons' personal attorney-client privilege, which should not be invaded. The White House is submitting this memorandum to articulate the important governmental interest at stake in this dispute.

Briefly, if notes of a meeting among White House lawyers and private lawyers for the President are fair game for a Congressional investigating committee, then the White House Counsel cannot communicate with the President's private counsel without severely intruding upon the attorney-client relationship between the President and his lawyer. Such a rule would deprive

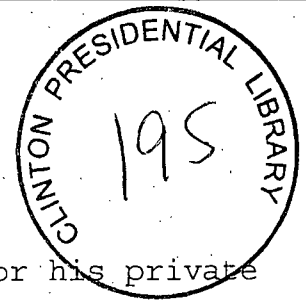


the White House Counsel of the ability to consult with private counsel for the President, and would therefore hinder him in advising the President regarding matters affecting the performance of his constitutional duties. In order that these public purposes shall be considered fully, the President is submitting a letter formally asserting executive privilege with respect to Mr. Kennedy's notes.

I. The President's Official Legal Advisors and his Private Counsel Must Communicate in Order to Provide Full and Informed Advice

Many matters that bear on the President's personal legal interest will also affect his performance of his constitutional duties. The converse is also true: the President's official actions often can affect him personally. Thus, there are many instances where the President must seek advice both from attorneys advising him in his official capacity and from private attorneys.

The White House Counsel, along with his associates, represents the President in his official capacity. The President's private lawyers represent his personal interests. The President's private and public interests are theoretically distinct, and effect a division of responsibility between White House Counsel and outside lawyers. Because of the President's unique Constitutional status, however, his personal and official interests cannot be neatly separated. These interests overlap, and ^{usually} ~~almost always~~ coincide.

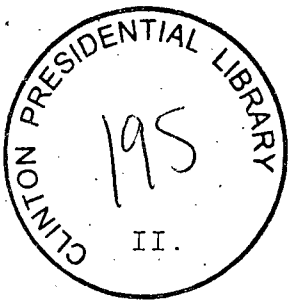


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Neither the President's official lawyers or his private lawyers could function effectively if they could not consult with one another freely. First, they must communicate to ensure that they appropriately divide responsibility for handling legal matters for the President. As several Members of the Committee opined during last summer's hearings, some personal legal work for the President is better handled by private lawyers than by White House counsel.

Second, they must communicate so that both White House counsel and private counsel are fully informed when they render legal advice. Presidents of the modern era must rely on their advisors to collect, analyze, and share information regarding the issues of the day. The President himself must absorb an enormous amount of information, but he cannot be expected to be its main repository, and he can be the vehicle of its transmission only rarely.

Finally, White House counsel and private counsel must communicate because they represent the same man. In matters where their spheres of activity overlap, the President's public and private lawyers must meet and confer to develop advice that, whenever possible, is compatible with both the President's personal interests and his constitutional duties. Otherwise, they may present the President with confusing and dissonant, rather than useful, guidance.



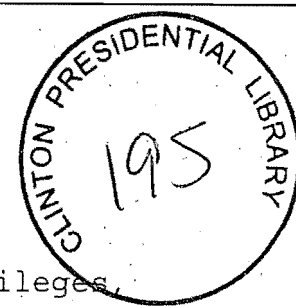
- 4 -

Attendance of White House Officials at the November 5, 1993, Meeting (Furthered a Governmental Interest) and Should Not Vitiating the President's Attorney-Client Relationship With Private Counsel

*Why separated at
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In early November 1993, a series of allegations regarding the relationship between Whitewater Development Corporation and Madison Guaranty, and allegations raised by David Hale, a municipal court judge under indictment in Arkansas, appeared almost daily on the front pages of newspapers across the country. Those allegations began to fuel both cries for a serious investigation to clarify the facts and resolve the matter, and a concert of partisan attacks intended to disable the Presidency. Because the allegations involved President and Mrs. Clintons' personal investments and touched matters occurring before the President entered office, it was necessary and appropriate for private counsel be retained to assist in handling the matter. At the same time, the White House Counsel had to be kept informed, so that he would be prepared to prevent the ensuing inquiries from hampering the President in performing his constitutional duties.

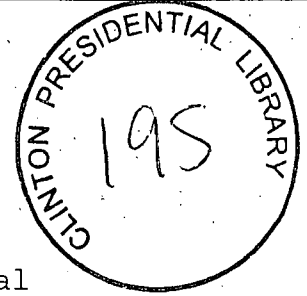
The primary purpose of the November 5 meeting was to give the new lawyers hired by the Clintons, Mr. Kendall and Mr. Engstrom, an opportunity to be briefed by the lawyers who had handled the matter for the President in the past -- Mr. Lyons, Mr. Kennedy, and Mr. Lindsey. The meeting was the starting point of Mr. Kendall's private representation of the Clintons. As explained in the memorandum submitted by Williams & Connolly, it



is protected by the lawyer-client and work product privileges, which allow every American, including the President, to communicate openly with the people they retain to handle their legal problems and allow the lawyers to work effectively.

At the same time, it was very clear that the White House would have an ongoing role in responding to Whitewater-related allegations. Mr. Nussbaum, as White House Counsel, could not be kept in the dark about Williams & Connolly's representation of the President. To do his job -- providing legal advice to assist the President in determining the official response to the matter -- he needed access to information and analysis that Williams & Connolly was assembling on behalf of the President. He also needed to establish an ongoing relationship with Mr. Kendall so that they could apportion responsibilities in the matter properly and effectively. To effectuate this process, Mr. Kendall invited lawyers from the White House Counsel's Office, including White House Counsel Bernard Nussbaum and Associate Counsel Neil Eggleston, to be present at the November 5 meeting. Mr. Kennedy, who had privately represented the Clintons in this matter and was currently serving under Mr. Nussbaum as an Associate Counsel, had a dual role at the meeting. [Should we also say Lindsey had a dual role as former private counsel and current senior advisor?].

Contrary to arguments made by the Committee, the presence of White House lawyers at the meeting does not destroy the attorney-client privilege protecting it. The White House



officials at the meeting themselves had a confidential relationship with the President, deriving from their roles as lawyers for the President and as senior advisors whose deliberations and advice are entitled to protection from disclosure. Like lawyers representing private clients, government lawyers also have a confidential attorney-client relationship with the agencies or officials they represent.¹ In addition, the discussions of senior advisors to the President can be protected by the executive privilege.²

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Because the White House officials present at the meeting were responsible for providing [legal?] advice to the

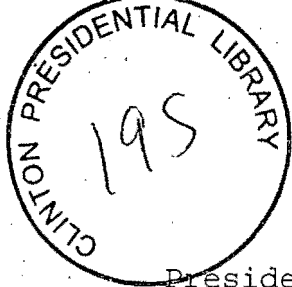
Yes

¹ It is widely accepted that the attorney-client privilege protects communications between representatives of governmental organizations and their attorneys. See generally Rice, Attorney-Client Privilege in the United States § 3:12 (1993):

Provided that the [government] attorney is licensed to practice law in at least one jurisdiction, the attorney-client privilege should protect communications with him by appropriate representatives of his government client for the purpose of obtaining legal advice or assistance.

See also, e.g., Note, The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government, 62 B.U. L. Rev. 1003 (1982); Green v. Internal Revenue Service, 556 F. Supp. 79 (N.D. Ind. 1982) (attorney-client privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("Courts have generally accepted that attorney-client privilege applies in the governmental context").

² [Citations.]



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President in the matters for which Mr. Kendall was beginning his representation, their presence at the meeting did not weaken the attorney-client privilege protecting the meeting. It is beyond dispute that lawyers representing the same client can communicate freely within the bounds of the privilege.³ Moreover, even if one views the White House lawyers as representing a different client than Mr. Kendall -- the Office of the President as opposed to the President in his personal capacity -- their client clearly shared a common interest with Mr. Kendall's client, so that their communications with Mr. Kendall are protected.⁴ Finally, White House staff can serve as agents of the President in communicating information on his behalf to his lawyer. When White House staff talk to the President's lawyer in this manner, their conversations have the same protection as conversations directly between the President and his lawyer.⁵

III. Executive Privilege Protects Communications Among the President's Public and Private Lawyers

The Constitution gives the President the right to protect the confidentiality of material the disclosure of which would significantly impair the performance of the President's

³ [Citations].

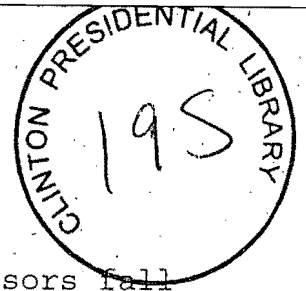
⁴ [Citations]. The case law provides that a government entity and a private party can share a common interest so that communications among their attorneys can be privileged. See United States v. AT&T, 642 F.2d 1285 (D.C. Cir., 1980); Chamberlain Manufacturing Corp. v. Maremont Corp., No. 90 C 7127 (N. D. Ill. July 20, 1993).

⁵ [Citations].

Need to say something about former lawyers here - That's what you purport to say (P. 4)

But was it former PK says Lyons - copying rep etc.

Need more here - what does it take to qualify as agent? why were there for this? Not all sr advisors, right?



lawful duties.⁶ Discussions among the President's advisors fall within the protection of executive privilege. As the Supreme Court has stated, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."⁷ Confidentiality is necessary to ensure that the President receive the full benefit of his advisors' frank advice. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearance for their own interests to the detriment of the decisionmaking process."⁸

It is appropriate for the President to assert executive privilege to prevent the disclosure of notes taken by Mr. Kennedy at the November 5 meeting.⁹ As discussed above, it is crucial to the functioning of the Office of the President that White House counsel be able to engage in open discussions with the

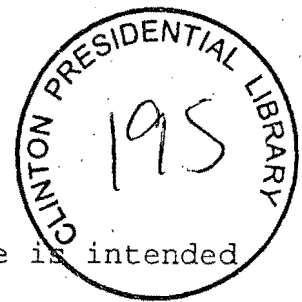
⁶ See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (upholding presidential assertion of executive privilege for documents "that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President"); [additional citations].

⁷ United States v. Nixon, 418 U.S. 683, 708 (1974).

⁸ Id. at 708.

⁹ Although the notes are in Mr. Kennedy's possession, their disclosure can be prevented by a claim of executive privilege. First, the notes were generated while Mr. Kennedy was performing duties as Associate Counsel to the President. Second, the President can by assertion of executive privilege prevent the disclosure of information in the hands of third parties. See United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976).

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President's private counsel. The executive privilege is intended to promote such frank consultation among the President's advisors because they permit the President, in performing his constitutional duties, to receive the best available advice.

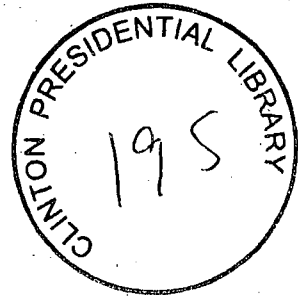
At the same time, the President like any other American is entitled that the privacy surrounding his relationship with his lawyer not be invaded, particularly by those searching for weapons to use against him for partisan purposes. If consultation between White House counsel and his private counsel were used as a means of breaching that privacy, that consultation would not longer be possible. This would either permanently inhibit the advising function of the White House Counsel, or would mean that the President, in times when ad hominem allegations are increasingly used for political purposes, must do without the advice of private counsel.

The November 5 meeting is protected by the attorney-client privilege, which is absolute. Even if executive privilege were the sole basis for protecting the notes from disclosure, however, it could not be overridden here. [Discussion of fact that information available to the Committee satisfies its investigative needs.]

* * *

This White House has devoted enormous resources to cooperation with the Special Committee and other entities investigating Whitewater and Related Matters. In a spirit of openness, the President has produced thousands of pages of

documents and made scores of White House officials available for testimony, foregoing assertion of applicable privileges. The Committee's attempt to push its investigation to invade the relationship between the President and his private counsel, however, goes too far. We cannot responsibly accede to this flagrant abuse of Congress's investigative powers.



To Elaine Ragan



Draft

RA 202-456 1447

Counsel's Office
The White House
Washington, D.C.

Dear White House

engaged in providing legal rep,

You have asked my opinion whether the communications in a meeting between lawyers on the staff of White House Counsel and lawyers privately engaged by the President are protected by the attorney-client privilege. In my opinion they are so protected.

White House engaged in

providing legal representation The facts, in essence, are that a conference was held among lawyers on the staff of White House Counsel and lawyers who had been engaged to represent the President personally. The

conference concerned certain transactions that occurred before the President assumed office but which had significance after he took office. The White House Counsel's office represents the President ex officio. The other lawyers were retained by the President to provide private representation to him. On this basis, it is my opinion that the attorney-client privilege is not waived or lost.

government lawyers were representing

A preliminary question is whether the attorney-client privilege lawyers may be asserted by the President, with respect to communications with White House Counsel, as against other departments and agencies of Government, particularly Congress and the Attorney General. There are no judicial decisions on this question of which I am aware. However, Presidents of both political parties have asserted that the privilege is thus effective. This position is in my opinion correct, reasoning from such precedents as can be applied by analogy. Accordingly, in my opinion the President can properly invoke attorney-client privilege concerning communications with White House Counsel lawyers.

The principal question, then, is whether the privilege is lost when the communications were shared with lawyers who represent the President personally. One way to analyze the situation is simply to say that the "President" has two sets of lawyers, engaged in conferring with each other. On that basis there is no question that the privilege is effective. Many legal consultations for a client involve the presence of more than one lawyer.

Another way to analyze the situation is to consider that the "President" has two legal capacities, that is, the capacity ex officio--in his office as President--and the capacity as an individual. The concept that a single individual can have two distinct legal capacities or identities has existed in law for centuries. On this basis, there are two "clients," corresponding to the two legal capacities or identities.

The matters under discussion were of concern to the President in each capacity as client. In my opinion, the situation is therefore the same as if lawyers for two different clients were in conference about a matter that was of concern to both clients. In that situation, in my opinion the

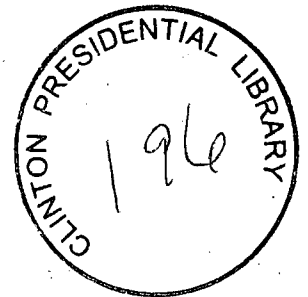
attorney-client privilege is not lost by either client.

The recognized rule is set forth in the Restatement of the Law Governing Lawyers, Section 126 (Tent. Draft No. 2, 1989), as follows:

If two or more clients represented by separate lawyers share a common interest in a matter, the communications of each separately represented client...

(1) Are privileged as against a third person...

Inasmuch as the White House ~~counsel~~ lawyers and the privately engaged lawyers were addressing a matter of common interest to the President in both legal capacities, the attorney-client privilege is not waived or lost as against third parties. ✓



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Michael Shaheen Jr. to the Attorney General re: "Ruby Ridge Report" (5 pages)	06/30/1994	P5 197

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8249

FOLDER TITLE:

Ruby Ridge [2]

2009-1006-F

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RESTRICTION CODES

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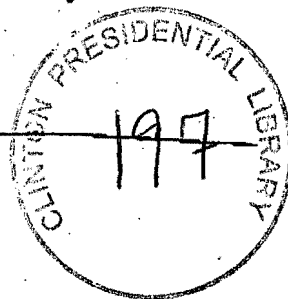
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U. S. Department of Justice

Office of Professional Responsibility

Washington, D.C. 20530



June 30, 1994

MEMORANDUM FOR: THE ATTORNEY GENERAL

THROUGH: Jamie S. Gorelick
Deputy Attorney General

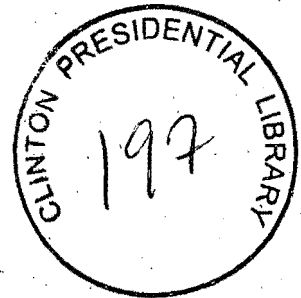
FROM: Michael E. Shaheen Jr. 
Counsel

SUBJECT: "Ruby Ridge Report"

With this memorandum, I am transmitting the Task Force Report of Investigation of Allegations of Improper Governmental Conduct in the Investigation, Apprehension, and Prosecution of Randall C. Weaver and Kevin L. Harris.

The report is based on an investigation that was conducted jointly by a team of attorneys working for this Office and by the Federal Bureau of Investigation. The document was written principally by five attorneys, four from the Criminal Division and one formerly with this Office. The report examines events at Ruby Ridge, Idaho during 1992 that led to the death of three persons and the wounding of two others. It is comprehensive and analyzes in great detail the many contacts between Randall Weaver and representatives of the United States government before and after these events, including the investigation of threats Weaver allegedly made against the President, attempts to secure Weaver's cooperation in infiltrating the Aryan Nations, Weaver's indictment for the sale of illegal firearms, attempts to arrest Weaver for failure to appear for trial, his indictment for conspiracy to murder a federal officer and other charges, and his acquittal at trial.

The report concludes with a number of recommendations that we believe warrant careful attention, especially the recommendation that the Department of Justice develop a policy on the use of



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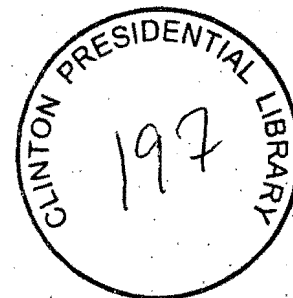
deadly force to govern the Department's law enforcement components and to serve as a model for other agencies.

We take issue, however, with a portion of the final recommendation -- that the report's "findings concerning the events surrounding the shooting of Vicki Weaver by [an] FBI sniper/observer . . . be referred to the appropriate component of the Department [of Justice] for an assessment of its prosecutive merit." Report at 508. That recommendation refers to the second of two shots fired by a member of the FBI's Hostage Rescue Team a day after Weaver's associate, Kevin Harris, had killed a U.S. Marshal. To understand this recommendation and our reaction to it, some background is needed.

As FBI sniper/observers were establishing a perimeter around the Weaver cabin, one of them fired at and wounded an armed man, who, the agent feared, was about to shoot at an FBI helicopter. Ten to twenty seconds later, the marksman fired again and severely wounded a second armed man. That shot also killed Weaver's wife, who was standing behind the open cabin door and was not visible to the marksman. The report concludes that the second shot violated the Constitution in that the agent did not have a reasonable fear of an immediate threat to law enforcement personnel or others because the agent's target was retreating into the cabin when he fired. We disagree with this conclusion.

In briefings before the deployment, the agents were told that they were going to engage in an operation akin to combat. Their superiors explained that the armed group they would attempt to encircle had chased down several federal marshals the previous day, shot and killed one of them, strafed the others with heavy fire, and shot at an aircraft. They had been told that Weaver, the leader of the group, was a survivalist and a former Green Beret, who had amassed a large cache of weapons, including grenades, armor-piercing bullets, and remote-controlled explosives. Weaver had reportedly built bunkers and fortifications around his home, threatened law enforcement officers on several occasions, announced that he was prepared for a confrontation, and declared that he would never surrender. There were also reports that other armed survivalists were planning to reinforce Weaver and his family.

The team was governed by "Rules of Engagement," which the commanders at the site of the crisis "justifiably believed" had been approved by FBI Headquarters. Id. at 204. The rules specified that the agents "can and should" use deadly force against all armed, adult men. Id. at 183. The agent who fired the two shots in question had never before been instructed to operate under such rules, and he understood them as a declaration that he and his fellow agents "were already in danger . . . prior to going on the



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hill."^{1/} Id. The Assistant Director of the FBI who had ordered that the Hostage Rescue Team be deployed believed that Ruby Ridge was "possibly the highest risk situation [the team] could encounter." Id. at 136.

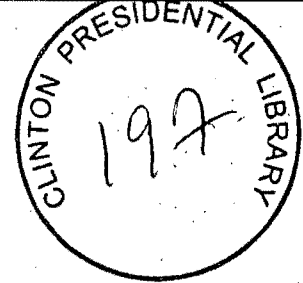
Given the totality of the circumstances, we do not think that the agent was unreasonable in concluding that he faced an immediate threat when he fired the first and the second shot. The report itself concludes that the agent reasonably believed that he faced an immediate threat when he fired the first shot because he feared that the target was about to shoot at an FBI helicopter. We do not believe that circumstances had changed ten to twenty seconds later to the degree necessary to condemn the second shot as illegal.

Just before the agent fired a second time, he saw his target, armed with a long rifle, pause and look in the agent's direction, as if he were looking for the marksman or the helicopter, which the agent heard hovering behind and above him. The agent believed that the target was the same person at whom he had fired earlier after concluding that the target was about to shoot at the helicopter. It was not at all unreasonable for the agent to conclude before firing the second time that his target was about to reach a protected position in the cabin -- into which the agent believed he had been ordered not to fire because of the presence of children -- and that the target would make the agents and the helicopter his own targets. Given these circumstances, we find it difficult to conclude that the agent's instantaneous decision to fire was anything other than a reasonable reaction. The fact that his decision resulted in Mrs. Weaver's death is tragic and sobering, but does not change our judgment.

We are concerned that the report places an impossible burden on law enforcement officials who, facing extreme danger, must make life-and-death decisions instantaneously. We find it unrealistic under the circumstances of this case to expect that the agent could recalculate the immediacy of the threat he faced moments after he had fired legally. To do so could have placed him and other law enforcement officers in grave peril.

We also disagree with the report's legal analysis, which attempts to judge the constitutionality of the marksman's actions according to the factors the Supreme Court has enunciated for determining whether deadly force is legitimate. Because the marksman, in the report's view, did not face an immediate threat of danger when he fired the second time -- one of the factors the Supreme Court has mentioned -- the report declares the shot

^{1/} We agree with the report's conclusion that the Rules of Engagement were unconstitutional, a conclusion that does not affect the agent's belief that his superiors had told him that he would be in imminent danger as he deployed about the Weaver's cabin.



illegal. Thus, under the report's reasoning, an imminent threat of danger is an absolute pre-condition for the legitimate use of deadly force.

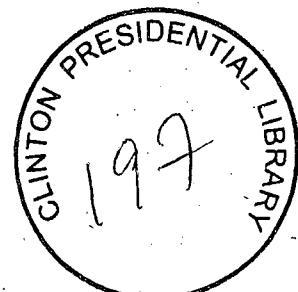
In our view, the Supreme Court has not established such a sharp rule. The relevant precedent requires that the use of force be judged under the totality of the circumstances.² However, the Court has not announced an algorithm for determining whether deadly force is legitimate because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Graham v. Connor, 490 U.S. 386, 396 (1989) (citation omitted).

The immediacy of peril is certainly an important factor in judging whether force is reasonable, but the Supreme Court has also suggested a number of other factors, including "the severity of the crime at issue [and] whether the suspect . . . is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citation omitted). The Court did not hold that these were the only factors to be considered or that each factor must be satisfied for deadly force to be legitimate. Declaring force automatically unconstitutional, as the report does, on the belief that a particular element in the calculus is missing, parses the events at issue in a mechanical fashion and ignores the Court's mandate that the totality of the circumstances comprising the events be examined.³

² Graham v. Connor, 490 U.S. 386, 396 (1989); Tennessee v. Garner, 471 U.S. 1, 7 (1985).

³ The report asserts that its authors "do not believe that the existence of an immediate threat is a precondition for the legitimate use of deadly force." Report at 228. However, the legal analysis undergirding the report's conclusion about the second shot is inconsistent with that statement.

The report's analysis of the second shot is eight pages long. In one paragraph, the report concludes that the shot satisfied two of three factors the Supreme Court has examined in its analyses of deadly force: the agent reasonably believed that "the suspects had been involved in a severe crime and that they were actively resisting arrest." Id. at 218. As a consequence, the report concludes that its "focus must be on whether the target of [the agent's] shot posed an immediate threat to the officers or others." Id. For the next eight pages, the report concentrates on only one question -- whether the agent faced an immediate threat -- before concluding that the second shot was illegal. The facts that the heavily armed suspects had been involved in the slaying of a federal marshal and were actively resisting arrest are never mentioned again. The report has clearly made immediate threat a "requirement" for the legitimate use of deadly force. Id. at 224.



In sum, we believe that the report contains many insightful conclusions about the events surrounding the fatal shooting. However, we disagree with the recommendation that the agent's conduct be examined for "prosecutive merit" and with the analysis that led to this recommendation.

Please let us know if you have any questions about the report or our analysis.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	from Jonathan Yarowsky and Cheryl Mills to Judge Mikva re White House Documents on Waco (3 pages)	07/17/1995	P5 198
002. list	DOB and Phone Number (Partial) (1 page)	nd	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8284

FOLDER TITLE:

[Waco - File and Reports] [3]

2009-1006-F

kc138

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

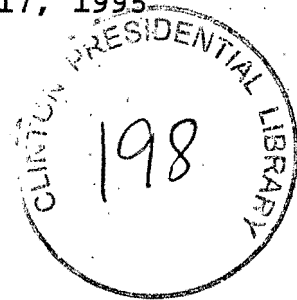
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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- 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]

July 17, 1995

MEMORANDUM FOR JUDGE MIKVA

From: Jonathan Yarowsky, Cheryl Mills

Re: White House Documents on Waco



Today's Washington Post contains an article in the Waco Hearings by John Mintz that ends with some inflammatory statements by "staff members on the Waco committees" who indicate that they might still subpoena White House documents that were show in camera to Members last week. The article ends with the patently faulty assertion by an unidentified staff member that the White House has inadvertently waived executive privilege by allowing some Members to read the documents.

The staff member is most likely Bobby Charles -- Congressman Zeliff's Subcommittee Chief of Staff. There was no indication of such a confrontational approach to the accommodation achieved by the White House and Members when Kevin Sabo, Chairman Clinger's Chief counsel, called this weekend on other matters. McCollum's staffer -- Paul McNulty -- has not taken this type of attitude, either.

It is important that you follow up with Chairman Clinger, Congressman McCollum and Zeliff (as well as the Democrats) today on the two documents which both McCollum and Zeliff indicated they would like to use at the hearings. They expect a resolution of the issue today.

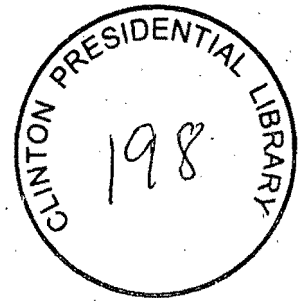
The two documents are:

- 1) March 1, 1993. Memorandum from Secretary Bentsen to the President. re: ATF Operation

The memorandum is Secretary's Bentsen first written communication to the President on the ATF raid one day after the event. McCollum has argued that the memo is important to the Committee because it reflects the contemporaneous "state of mind" at Treasury about the facts of the raid.

The memorandum provides a background of the Branch Davidian "cult", sets out the alleged firearm violations and the necessity for action, and offers justifications for the ATF actions taken on February 28, 1993.

We could provide the undated, unsigned version that Treasury gave us. That seemed acceptable to McCollum last Thursday.



- 2) February 28, 1993. E-Mail from Langdon to
Simpson

This E-Mail reflects how Langdon and others at Treasury were attempting to gather information about the Waco raid on February 28 as events were unfolding. Again, McCollum and Zeliff want this document because of the contemporaneous quality of the description and analysis.

The Committee has a copy of this document, except for a redacted paragraph that contains a reference to a conversation which then-Deputy Secretary Altman had with the President. McCollum has offered to permit the White House to redact that part of the paragraph, but to leave in text the remainder of the paragraph in which Altman describes the rationale for the ATF's taking action on the morning of Feb. 28.

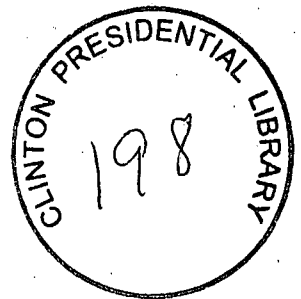
The question to be answered today is whether to release copies of these documents to the Committees and under what "use" restrictions. Because the Committees already have the E-mail in their possession, it would probably serve no purpose to create a confirmation over this particular document or the innocuous Bentsen memorandum. On the "use" issue, there has to be some caution in simply allowing Members to put the documents into the public record. Zeliff's staff would likely view this step as an absolute waiver of executive privilege for all WH documents.

For this reason, it would be preferable to provide a copy of both documents only to the Chairman and Ranking Members of the relevant Full Committee and relevant Subcommittees -- the same group which reviewed the materials in camera. However, once a particular White House document (however innocuous) is publicly discussed, the media's appetite for disclosure will be surely be stimulated. We could soon reach a situation where the Democrats, in their zeal to show "no smoking guns", may press for disclosure as much as the Republicans. In the end, these two documents should probably be released now, to avoid a public retreat later.

However, accommodating McCollum and Zeliff on the two documents described above may lead to Zeliff requesting other documents. He discussed two or three documents with you as being "interesting", but left the request last week at the two

"contemporaneous" memoranda. We need to make clear that the White House cannot accommodate many different voices. Both McCollum and Zeliff need to make a unified request (if there is one), and you will consider the request in light of the arguments presented.

Chairman Clinger is expected in late Monday afternoon. It would be helpful if you could reach him and let him know that Committee "staff" comments in the press about waiving executive privilege are beginning to complicate the mutual effort to reach a responsible accommodation in this matter.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elena kagan to Jack Quinn et al; re: Jones Argument (1 page)	11/19/1996	P5, P6/b(6)
~~002. letter~~	~~Jack Quinn to Edward Ryan, re: Soldiers' & Sailors' Act (partial) (1 page)~~	~~09/22/1996~~	~~P6/b(6)~~
003a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)
003b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)
003c. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)
004. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/08/1996	P5, P6/b(6)
005a. note	To Amy, Geof, & Elena; re: Petition (1 page)	05/10/1996	P5 199
005b. draft	re: Statement of the Case (23 pages)	05/10/1996	P5 200

COLLECTION:

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

FOLDER TITLE:

Paula Jones Case [1]

2009-1006-F

ek2021

RESTRICTION CODES

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

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

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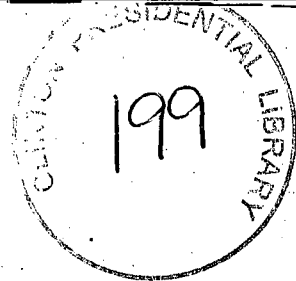
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C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Amy, Geof, and Elena—

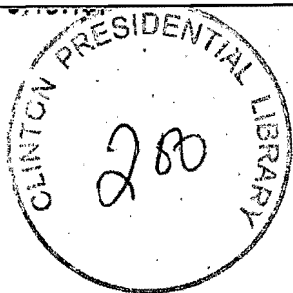


Here is my work. In the "reasons" part I ended up typing things over instead of working on Amy's draft, principally because I could get a better sense of the overall document that way.

I concentrated on making the petition shorter. I know I succeeded at that. Whether it's better is another matter. I'm sure that in addition to various infelicities that I introduced, there are things I left out that should be put back in.

It may make sense for Geof and Elena to wait until Amy gets another copy produced before trying to make sense of this.

C



STATEMENT OF THE CASE

DRAFT

On January 20, 1993, petitioner ^{is the} William Jefferson Clinton became President of the United States. On May 6, 1994, respondent Paula Corbin Jones ^{action} filed ^{this} a civil damages complaint against the President in ^{the United States} federal 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} and therefore, ^{took office} outside the scope of the President's official duties. ^{Respondent} 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 ^{in the complaint} counts. Jurisdiction was founded on 28 U.S.C. §§ 1331, 1332 and 1343A. Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts. ¹

^{where he was in office} Specifically, the first two ^{counts} claims allege that in 1991, when the President was Governor of Arkansas and Mrs. Jones a state employee, he subjected the respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (1988). A third claim alleges that the ^{respondent} President thereby inflicted emotional distress upon Mrs. Jones. Finally, the complaint alleges that in 1994, the President defamed Mrs. Jones through statements attributed to the White House Press Secretary and his lawyer, denying her much-publicized allegations against the President. ^{Respondent} ^{where she named as a co-defendant}

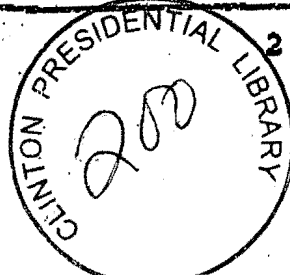
Mrs. Jones further alleges that State Trooper Danny Ferguson, approached her on the President's behalf, thereby conspiring with the President to deprive the respondent of her civil rights in violation of 42 U.S.C. § 1985. Respondent also alleges that Mr. Ferguson defamed her in statements about a woman 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.

Before answering or filing any other response, President Clinton informed the district court that he intended to move to defer the litigation until he completed his service as Chief Executive, and asked the court to resolve this threshold issue before requiring the President to undertake any other burdens of litigation. The court agreed to do so. Jones v. Clinton, 858 F. Supp. 902 (E.D. Ark. 1994).²

The President thereafter ~~promptly~~ moved the court to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office. ^(The President stated) ~~asserting~~ ^{requiring} that such a course was ~~implicit in, and mandated by,~~ the unique and singular nature of the President's Article II duties and ^{by} principles of separation of powers. In so arguing, the President relied in part on the rationale of Nixon v. Fitzgerald, 457 U.S. 731 (1982), which held that Presidents enjoy absolute immunity from civil damages based on conduct within the outer perimeter of their official duties. Recognizing that the present case differs from Fitzgerald in that it is premised in large part on conduct outside the scope of official duties, the President did not seek immunity from liability, but asserted that some limited protection nonetheless was required because the defendant here was a sitting President.

Alternatively, the President asserted that the litigation should be stayed in the public interest, as an exercise of

² Trooper Ferguson answered the complaint, and supported the President's position that the litigation should be stayed pending resolution of the presidential immunity issue.



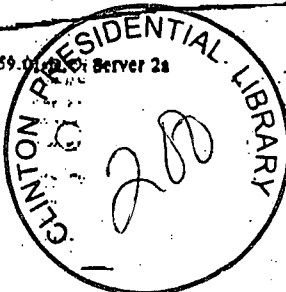
judicial discretion. Moreover, due to the particular allegations in this case, which as a practical matter made the claims against Trooper Ferguson inseparable from those against the President, it was asserted that the entire litigation should be held in abeyance. The Solicitor General filed a Statement of Interest on behalf of the United States, also asserting that an incumbent Chief Executive should not be required to litigate private civil damages suits of this kind, and that the entire litigation should be stayed.

but not The district court ~~denied the President's motion to~~ dismiss, and held that all discovery could proceed immediately. *as to all persons including the President himself (citing)* The court, however, stayed ~~the~~ trial until the President's term of office expired. *Pat App citation* Jones v. Clinton, 869 F. Supp. 690, 698 (D. Ark. 1994). The court found Fitzgerald to be "sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention under the circumstances would be to interfere with the conduct of the duties of the office." *(Pat App. 16)* ~~and that these concerns were not lessened by the fact that the [conduct alleged] preceded his Presidency.~~ *IN CERT A* ~~Id. at 696. Accordingly, the court stayed trial "[t]o protect the Office of President ... from unfettered civil litigation, and to give effect to the separation of powers." Id. at ____.~~ The court also found that staying trial was an appropriate exercise of judicial discretion pursuant to Federal Rule of Civil Procedure 49 and the court's equitable power to manage its own docket. ~~Id. at 698.~~

The district court invoked Rule 40 of the Federal Rules of Civil Procedure and "the equity powers of the Court" and declared that it would

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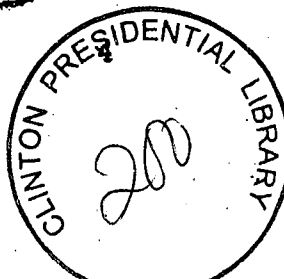
The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found "too much interdependency of events and testimony to proceed piecemeal," and that "it would not be possible to try the Trooper adequately without testimony from the President." Id. ~~The trial court~~

~~further concluded that the plaintiff would not be significantly inconvenienced by delay of trial. Id. Nevertheless,~~ ^{(P) district} the court

~~also concluded, however, that there was~~ ^{also concluded, however, that there was} ~~no reason why the discovery and deposition process could not proceed as to all persons including the President himself.~~

^(stated) Id. The court suggested that this would avoid potential problems ^(lost) ~~that might be caused by the possible~~ ^{over} ~~suppression~~ of evidence with the passage of time. Id.

President Clinton timely appealed those parts of the district court's order denying his motion to dismiss and permitting discovery to go forward. The Solicitor General, representing the United States, submitted an amicus brief in support of the President's position, as did a group of 18 scholars. Mrs. Jones cross-appealed the order staying trial, supported by 11 academicians and the American Civil Liberties Union as amici. In opposition, President Clinton questioned whether the Court of Appeals had jurisdiction to entertain Mrs. Jones' cross-appeal from the stay of trial. Citing Swint v. Chambers County Commission, 115 S.Ct. 1203, 1209-12 (1995), the President argued that Mrs. Jones could not use the President's appeal from a denial of immunity as a vehicle to challenge an otherwise unreviewable decision to stay proceedings.

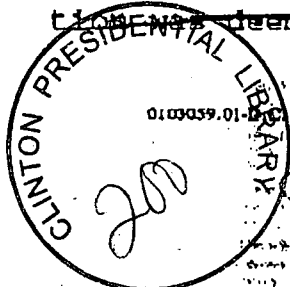


At 2. The President and respondent both appealed.

Trooper Ferguson did not participate in the appeal. Nonetheless, the district court stayed the litigation as to both defendants pending appeal. Jones v. Clinton, 879 F. Supp. 86 (E.D. Ark. 1995). The court again found that "Trooper Ferguson is a defendant, but the case revolves around the alleged actions of then-Governor Clinton, the central figure in this action." Id. at 88. Accordingly, the court could not "imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys." Id.

On January 9, 1996, a divided panel of the Eighth Circuit ^{and} affirmed the district court's decision denying the motion to dismiss and allowing discovery to proceed, ^{the} and reversed the district court's order staying trial. Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996). Three opinions resulted, a majority, a concurrence and a dissent. ^{NOTE} Judge Bowman concluded that

The majority, finding the reasoning in Fitzgerald was "inapposite where only personal, private conduct by a President is at issue," id. at 1360, determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Id. at 1363. At the outset, the opinion stated that President Clinton was seeking "immunity from civil liability for his unofficial acts," id. at 1356, and analyzed the case on that basis. It subsequently acknowledged that President Clinton here sought only to defer litigation, rather than immunity from liability. This distinction was deemed unavailing, however, because the majority found



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

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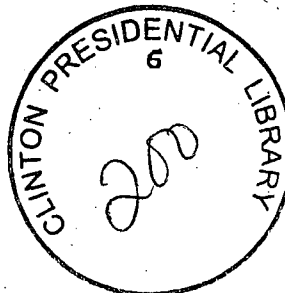
~~that "Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws, and this right overrode any interests asserted by the President. Id. at 1359-60 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137; 2 L.Ed. 60 (1805))."~~

~~The court further held that it would be an abuse of discretion to stay ^{all} ^(proceedings) litigation ~~altogether~~ against an incumbent President where the Constitution, ~~as construed by the majority,~~ did not require it. "[P]residential immunity is not a prudential doctrine fashioned by the courts," the majority found. "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."~~

~~Id. at 1362.~~ (Finally, Judge Bowman put aside the concern

~~The majority also rejected the President's argument that separation of powers could be breached by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial, and the issuance of orders. 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." Id. at 1361.~~

If the President believed that any order of the trial court impeded his ability to function as Chief Executive, the majority continued, his remedy was to seek a writ of mandamus. Id. at 1363. It put the burden on the President to make a particularized showing that court order intruded upon his ability to



perform a specific and clearly articulated presidential duty, and expressed confidence that the district court would exercise its broad discretion to control litigation so as to avoid thwarting the performance of presidential duties. Id. at 1362.

This discretion, however, was not deemed so broad as to sanction the stay of trial ordered here. The Court of Appeals found it had "pendent appellate jurisdiction" to entertain Mrs. Jones' challenge to that stay, id. at 1357 n. 4 (citing Kingcade v. City of Blue Springs, Mo., 64 F.3d 389, 394 (8th Cir. 1995)), and then reversed the stay as an abuse of discretion. "Such relief would be the functional equivalent to a grant of temporary immunity to which. . . Mr. Clinton is not constitutionally entitled," the majority found. Id. at 1361 n.9.

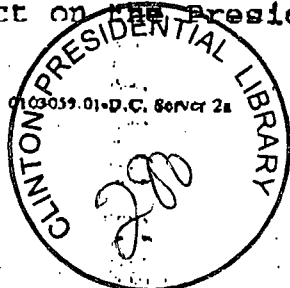
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~~The concurrence was offered to expand on several points. Id. at 1363 (Beam, J., concurring). First, Judge Beam stated his view that civil plaintiffs have "fundamental constitutional rights governing access to and use of the judicial process under the First and Fourteenth Amendments and the right to a timely jury trial under the Seventh Amendment, and that the protection sought by the President would contravene these rights. Id. at 1363-1365. Judge Beam next acknowledged that potential "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" ^(Pet. App.) was a matter of "major concern," but believed the present litigation was "relatively uncomplicated" and could be managed with a "minimum of impact on the President's schedule." Id. at 1365-66. This could~~

He

But he expressed his belief that this

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he suggested,

stated that he was concerned "with the understanding" that the trial judge would have substantial

be accomplished by the President choosing to forego attending his own trial or being involved in discovery, or by limiting the number of pre-trial encounters between the President and ~~Jones~~ counsel. *Authority to manage the litigation in a way that accommodates the interest at stake.* Judge Beam suggested. *Respondent's* Id. at 1366. Finally, Judge Beam felt it necessary to underscore that the majority opinion did not prevent a trial judge from delaying or rescheduling any proposed action by any party if it would imperil the duties of the President even slightly. Id. at 1367.

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~~The dissent would have found that the demands of the President's constitutional duties and principles of separation of powers justified staying the litigation altogether until he leaves office. Id. at 1367-70 (Rosa, J., dissenting). It disputed the majority's interpretation of Fitzgerald, asserting that the "language, logic and intent" of that case strongly supported deferring civil litigation against an incumbent President, even if the claims were based on private conduct. Observing that "no other branch of government is entrusted to a single person," the *observed* dissent found that~~

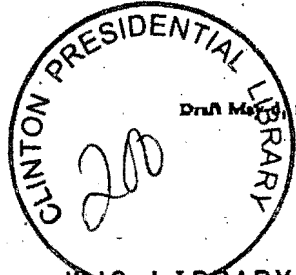
~~the unofficial nature of the alleged events would not make defending a private suit for civil damages any less of a burden on the President's time and attention and therefore on his constitutional responsibilities. . . .~~

no individual suggestion

~~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 deserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution. ✓~~

Id. at 1367.

[re the President]



Judge Ross also was ^(noted) concerned that private civil suits against sitting Presidents would "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." Id. at 1357-68. In this vein, he listed a number of questions left unanswered by the majority about how a district court could manage litigation where the President is a party, without intruding on a President's authority:

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?

~~Id.~~ at 1369. ~~"Where there is no urgency to pursue a suit for civil damages," the dissent concluded, "the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office."~~ Id. ^(NOTE) At the same time,

^(reained) Judge Ross further observed ~~that~~ postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Id. ~~He would permit exceptions in exceptional cases. litigation would be allowed to proceed if a plain-~~



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Accordingly, Judge Ross said, he would allow litigation to proceed against a sitting President only if the

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tiff could "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that it will not significantly impair the President's abilities to attend to the duties of his office." Id. at 1370. INSERT D

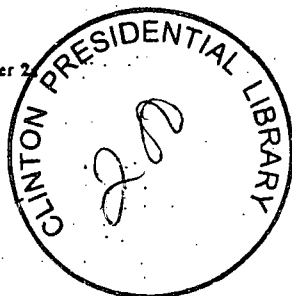
~~On January 23, 1996, President Clinton filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the Eighth Circuit, as did the Solicitor General as amicus. The petition was denied on March 28, 1996, with one judge dissenting.~~

~~"My colleagues," the dissent wrote, "would put all the problems of our nation on a pilot control and treat as more urgent a private lawsuit that even the appellant delayed filing for at least three years." Jones v. Clinton, Order Denying Suggestion For Rehearing En Banc (March 28, 1996) at 2 (McMillian, J., dissenting). Judge McMillian also expressed "every confidence that the issues of national concern in this case relating to the judiciary's relationship to the presidency will command the attention to the United States Supreme Court." Id. at 5.~~

~~REASONS FOR GRANTING THE PETITION~~

~~I. Introduction.~~

~~This case presents issues of profound consequence to both the Presidency and the Judiciary. The question here is how best, consistent with the Constitution and separation of powers, to prioritize the public and private interests that are implicat-~~



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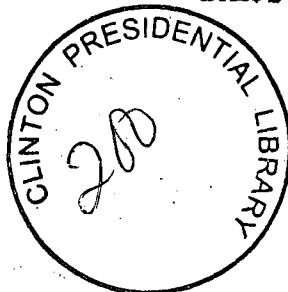
The district court reasoned (Pet. App. xxa) that "the case most applicable to this one is Nixon v. Fitzgerald, [457 U.S. 731 (1982)]," which held that a President is absolutely immune from any civil litigation challenging his official acts as President. See id. at 7xx. The district court noted that while the holding of Fitzgerald did not apply to this case because President Clinton was sued for actions taken before he became President, "[t]he language of the majority opinion" in Fitzgerald "is

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Judge Beam "concur[red] in the conclusions reached by Judge Bowman" (Pet. App. xx). He stated that the issues presented "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. He also

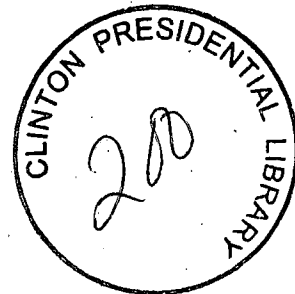
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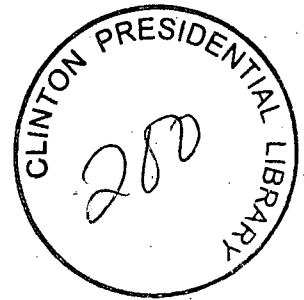
Judge Ross dissented. He stated that "the language, logic and intent of Nixon v. Fitzgerald . . . directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term." Judge Ross noted that



Insert D

The court of appeals denied the President's petition for rehearing with three judges not participating and Judge McMillian dissenting. Judge McMillian said that the panel majority's holding had "demean[ed] the Office of the President of the United States"(Pet. App.); would "treat as . . . urgent a private lawsuit that even [respondent] delayed filing for at least three years"(id. at ; emphasis in original); and would "allow judicial interference with, and control of, the President's time" (id. at).





Reasons for Granting the Petition

This case presents a question of extraordinary national importance that 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 civil litigation directed at him personally. We believe that, exceptional circumstances aside, a sitting President should never be placed in this position. But 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, in addition, erroneous in several respects. It is inconsistent with the reasoning of Nixon v. Fitzgerald, *supra*, and with established separation of powers principles. Moreover, the panel majority's suggested cure for the separation of powers problems its ruling creates—"judicial case management sensitive to . . . the demands of the President's schedule" (Pet. App. xxa)—is worse than the disease; it amounts to giving a trial court a general power to pass judgment on how the President spends his time and energies. Finally, the panel majority has 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 system, and it is routinely afforded in order to protect interests that are not comparable in importance to the interests the President advances here.

1. a. The Executive Branch of government is unique because it is entrusted by Article II to a single individual. The President is never off

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duty, and any significant demand on his time necessarily poses a potential threat to his capacity to carry out his constitutional responsibilities. The courts, accordingly, "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." Fitzgerald, 457 U.S. at 752. Indeed, "[t]his tradition can be traced far back into our constitutional history." Id. at 752 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, much more modest, 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 Fitzgerald provides the President with absolute immunity from a civil damages action challenging his official acts, the President should receive no form of "immunity"—which is how the panel majority characterized the postponement of litigation—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 in part because the threat of liability might inhibit him in carrying out his official duties (457 U.S. 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.

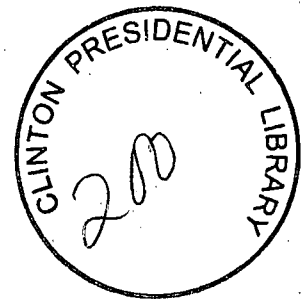
The panel majority ignored this second basis for the holding of Fitzgerald. The first basis of Fitzgerald—that the threat of liability might affect the President's decisions—is, of course, not present here. But in this

C

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case the President does not seek immunity from liability. He seeks protection only from the second risk emphasized by Fitzgerald—the burdens inevitably attendant upon being a defendant in a lawsuit. The court of appeals simply disregarded this “unique risk[] to the effective functioning of government.”

b. The principle that a sitting President may not be subjected to private civil lawsuits has, at the Fitzgerald Court demonstrated, deep roots in our traditions. (insert #1 from Amy's draft, at her pages 26-27, as edited)



Judge Beam concurred separately to attempt to address the gaps in the majority reasoning, emphasizing that nothing in the decision "prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find the duties of the presidency are even slightly imperiled." 72 F.3d at __ (Beam, J., concurring). Conversely, however, "nothing in the majority opinion would prohibit a federal judge" -- or even a state judge, for that matter -- "from ordering the President to appear, testify, provide discovery, answer numerous interrogatories and requests for admission at the trial judge's almost unrestricted discretion." CITE (McMillian, J., dissenting from Denial of Suggestion for Rehearing En Banc).

The debate below only serves to illustrate the magnitude of the issues raised by this case and the fact that they go to the heart of the proper relationship between the Judiciary and the Presidency. The differences between the majority and dissent, moreover, underscore the need for this Court to speak to these separation of powers issues.

C. The Court Of Appeals Overlooked Relevant Historical Sources.

The Eighth Circuit wholly failed to address important, germane historical sources that were quoted with approval in Fitzgerald. See 457 U.S. 751 n.31. If anything, these sources present a stronger case for the protection sought by an incumbent President here than they did for the damages immunity extended to former President Nixon in that case. Chief among these is

Justice Story's comment that stated that "[t]he

[t]here are incidental powers, belonging to the executive department, which are necessarily implied from the

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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 § 1563, pp. 418-19 (1st Ed. 1833) (quoted in Fitzgerald, 457 U.S. at 749) (emphasis added).

(agreed?)

Similarly, Senator Ellsworth and then Vice President John Adams, both delegates to the Constitutional Convention, ~~are quoted by Story~~ reported to have stated that

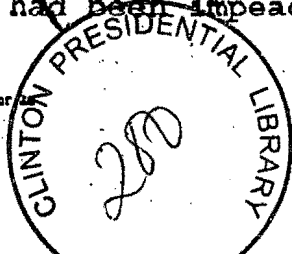
the President, personally, was not subject to any process whatever. . . . For [that] would . . . put in the power of a common justice to exercise any authority over him and stop the whole machine of Government.

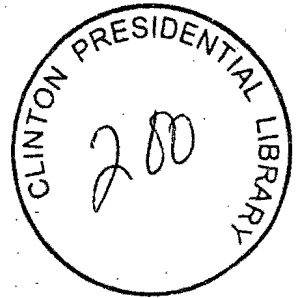
Journal of William Maclay 167 (E. Maclay ed. 1890) (quoted in Fitzgerald, 457 U.S. at 751 n.31.). President Jefferson also ~~made relevant observations about the proper relationship between the Judiciary and the President:~~ was even more emphatic:

The leading principle of our Constitution is the independent 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 withdrawn him entirely from his constitutional duties?

10 The Works of Thomas Jefferson 404 n. (P. Ford. ed. 1905) (quoting a letter from the President to the prosecutor in the trial of Aaron Burr). WJ

Moreover, the historical records shows that the Framers believed that a President could not be prosecuted criminally, until after he had been impeached or otherwise removed from of-



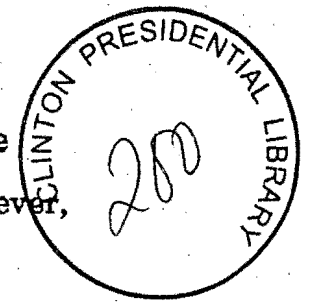


As the Court said in Fitzgerald, "nothing in [the Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." citation

c. The panel majority attempted to minimize these concerns that so troubled the Framers by citing the few occasions on which Presidents have testified in judicial proceedings—something that has been done only in cases of exigent need, and then only under carefully controlled circumstances. But there is an enormous difference between being a third-party witness in a case 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 than those of the President. "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). Judge Learned Hand once commented: "I must say that as a litigant I should dread a lawsuit beyond anything else short of sickness and death." In this regard a President is no different from any other litigant—except that a President's litigation, like a President's illness, becomes the nation's problem.

2. The panel majority ruled that these problems can never be addressed by postponing litigation against the President. See Pet. App. xxa (quote from slip op. 16). Instead, the panel majority's solution was "judicial

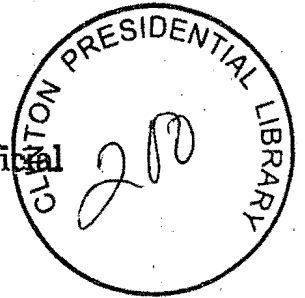
case management sensitive to the burdens of the presidency and the demands of the President's schedule." This proposed solution, however, only makes matters worse. It exacerbates the separation of powers problems raised by allowing a suit against a sitting President to go forward.



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." 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." In other words, under the panel's approach, a trial court—federal, state, or local—could insist, before considering a request by the President for an adjustment in the litigation schedule, that the President provide a "specific, particularized" explanation of why he was unable to devote his attention to the litigation at that time. The court would then be in the position of repeatedly evaluating the President's scheduling priorities.

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 on its day-to-day activities. This tension is already severe enough on those rare occasions when the courts have sought testimony from the President. The courts have heeded Chief Justice Marshall's admonition not to "proceed against a President as against other witnesses"; out of respect for the separation of powers, the courts have required a heightened showing of need for the President's testimony, and they have permitted it to

be obtained only in a manner that does not disrupt the President's official functions.



When the President is not a witness but a defendant in a personal damages action, however, this tension increases exponentially. The courts will face the problem of how to balance the President's responsibilities against the demands of litigation not once, as they do when he is a witness, but repeatedly. The constant struggle between the Chief Executive and a trial court is precisely what Jefferson feared: "[T]he several courts could hardly him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties[.]" But even if the trial courts discharge their responsibilities with the greatest judiciousness, it is difficult to think of anything more inconsistent with the separation of powers than to put courts in the position of continually passing judgment on whether the President is spending his time in a way they find acceptable.

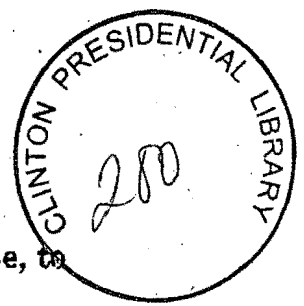
3. The court below appears to have viewed the President's claim in this case as extraordinary, both in the relief that it sought and in the burden that it imposed on respondent.¹ In fact the relief that the President seeks—the temporary deferral of litigation—is far from unknown in our system, and the burdens it imposes on plaintiffs are not at all extraordinary. There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation they have brought so that important institutional interests can be protected.

¹The panel majority, for example, declared that Article II "did not create a monarchy" and that the President is "cloaked with none of the attributes of sovereign immunity."

For example, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app §§ 501-25 (1988 & Supp. 1994), provides that civil suits by or against military personnel are to be tolled and stayed while they are on active duty. As a result, servicemembers who are sued while on active duty can, in appropriate circumstances, obtain precisely the relief that the President seeks here.² Section 362 of the bankruptcy code, the so-called automatic stay provision, provides that litigation against a party is to be stayed as soon as that party files a bankruptcy petition. That stay will ordinarily remain in effect until the bankruptcy proceeding is completed. [check] 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, limited by the constitutional limit on a President's tenure of office.

The abstention doctrine established by Pullman [full citation] requires district courts to stay, or to dismiss without prejudice, certain cases, while the plaintiff—who has a right to pursue his or her federal claims in federal court—is instead required to seek relief in state courts. It is far from unheard of for Pullman abstention to precipitate delays of six or eight years in federal litigation [Douglas in England; see Hart & Wechsler]. Few Presidents serve as many as eight years in office, and even then only plaintiffs who sue at or before the outset of the President's term will face a delay of that length.

²Specifically, the Act provides that the litigation is to be stayed unless it can be shown that the servicemember's status would not be adversely affected by reason of military service. citation



In fact, any government employee who unsuccessfully raises a qualified immunity defense in a trial court is entitled, in the usual case, to a stay of discovery (cite Harlow) while he or she pursues an interlocutory appeal. That will routinely delay litigation for a substantial period, possibly for several years. The common requirement that a plaintiff exhaust administrative remedies can impose extensive delays, sometimes as much as several years, before a plaintiff is able to proceed in court. [cite? maybe KC Davis treatise?] The doctrine of primary jurisdiction, where it applies, forces plaintiffs to postpone the litigation of their civil claims while they institute administrative proceedings, and potentially judicial review of the administrative determination, even though the administrative proceedings may not be able to provide relief—a process that can of course take several years. And district courts often exercise their discretion to stay civil proceedings, over the objection of the plaintiff, while a related criminal prosecution goes forward.

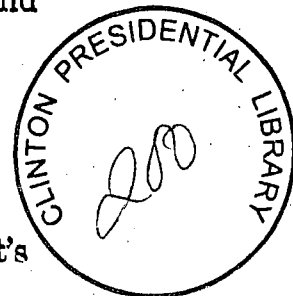
We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself "above the law." More specifically, these examples demonstrate that what the President is seeking—the temporary deferral of litigation—is something that our system is prepared to do when significant institutional interests are at stake, as they manifestly are here. If litigation is deferred in order to protect an agency's interest in the uniformity of its regulatory programs, or to provide for the orderly administration of a bankrupt's estate, we submit

that a fortiori it should be deferred in order to allow the President to attend to his unparalleled responsibilities.

4. [My section on the cross-appeal.]

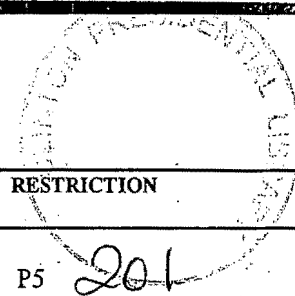
5. This is the only opportunity for this Court to review the President's claim and grant adequate relief. If this Court denies review at this point, the case will proceed in the trial court, and the President's right to have the litigation deferred—a right “rooted in the constitutional tradition of the separation of powers” (Fitzgerald, 457 U.S. at 749)—will be irretrievably lost. Should the President prevail on the merits below, this Court will not even have the opportunity to provide guidance for future cases.

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. 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; footnote omitted). As we have shown, it has been assumed, since the earliest days of the Republic, that a sitting President cannot be sued. Now, for the first time, a court has breached that understanding. In these circumstances, the fact that there is “no historical record of numerous 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. The Court has recognized that a “special solicitude [is] due to claims alleging a threatened breach of essential Presidential prerogatives under



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/07/1996	P5 201
001b. legal brief	Amy Sabrin to Elena Kagan & David Strauss; re: Paula Jones v. William Jefferson Clinton (3 pages)	05/07/1996	P5 202
~~002a. memo~~	~~Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)~~	~~05/06/1996~~	~~P5, P6/b(6)~~
~~002b. memo~~	~~Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)~~	~~05/06/1996~~	~~P5, P6/b(6)~~
~~003. note~~	~~Elena Kagan to Jack, Bruce, & Kathy; re: Motion (1 page)~~	~~n.d.~~	~~P5, P6/b(6)~~
004a. memo	David Strauss to Amy Sabrin; re: The Extension Application (2 pages)	05/01/1996	P5 203
004b. legal brief	re: Paula Jones v. William Jefferson Clinton (4 pages)	05/01/1996	P5 204
~~005. memo~~	~~Elena Kagan to Jack Quinn & Kathy Wallman; re: Thursday Lawyers' Meeting (1 page)~~	~~04/30/1996~~	~~P5, P6/b(6)~~
~~006. memo~~	~~Elena Kagan to Jack Quinn & Kathy Wallman; re: Thursday Lawyers' Meeting (1 page)~~	~~04/30/1996~~	~~P5, P6/b(6)~~
007. memo	Geoffrey Stone to Robert Bennett; re: The Petition (4 pages)	04/26/1996	P5 205
~~008. letter~~	~~Robert Bennett to Geoffrey Stone & David Strauss; re: Retention as Counsel (partial) (1 page)~~	~~04/23/1996~~	~~P6/b(6)~~
009a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5 206

COLLECTION:

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

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F

ek2022

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5 207
009c. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	04/18/1996	P5 208
010. memo	Elena Kagan to Jack Quinn et al; re: Conversation with Walter Dellinger (1 page)	04/11/1996	P5, P6/b(6)
011a. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)
011b. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)
011c. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators (2 pages)	03/11/1996	P5, P6/b(6)
012. memo	Elena Kagan to Jack Quinn & Kathy Wallman (2 pages)	02/14/1996	P5, P6/b(6)
013a. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Rex Lee (1 page)	03/05/1996	P5, P6/b(6)
013b. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Rex Lee (1 page)	03/05/1996	P5, P6/b(6)
013c. note	re: Handwritten Notes - Rex Lee (1 page)	03/05/1996	P5, P6/b(6)
014. notes	re: Handwritten Notes - Mandate (partial) (1 page)	n.d.	P6/b(6)

COLLECTION:

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

FOLDER TITLE:

Paula Jones Case [2]

2009-1006-F

ex 2022

RESTRICTION CODES

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

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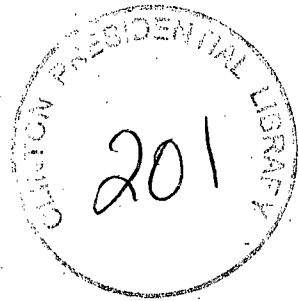
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RR. Document will be reviewed upon request.

THE WHITE HOUSE

WASHINGTON
May 7, 1996

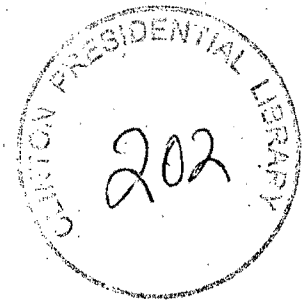


MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *ek*
SUBJECT: JONES LITIGATION

1. Attached is a draft reply to Jones' opposition to our motion for a stay. It's OK. David tells me he's going to try to recast the first paragraph slightly (I think it sounds disingenuous as written) and insert a paragraph on our need for the extension.

2. I've told David and Geof that they should do a serious, full edit on the draft of the cert petition.



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

PAULA CORBIN JONES,

Appellee/Cross-Appellant :

v. :

WILLIAM JEFFERSON CLINTON,

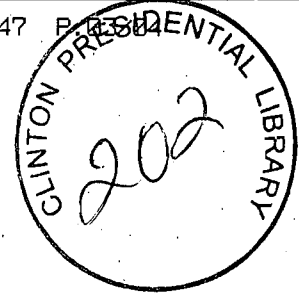
Appellant/Cross-Appellee :

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

**PRESIDENT CLINTON'S REPLY
TO PAULA JONES' OPPOSITION TO THE PRESIDENT'S MOTION
TO EXTEND THE STAY OF MANDATE**

Counsel for Ms. Jones contend that the President is effectively seeking a 113-day stay, not a 30-day stay, and that if the President's request for an extension is denied, the Supreme Court will rule on the certiorari petition before it recesses for the summer, thereby ending the stay. This argument misapprehends both the nature of the stay and the procedures of the Supreme Court.

1. The stay, as embodied in the current order and in Rule 41(b), is effectively indefinite. Once the President notifies the Court that he has filed his petition, the stay will continue until the Supreme Court disposes of the matter. If the high Court grants the President's petition, this means that the stay will continue until it ultimately rules on the merits, which could be considerably longer than 113 days. If it denies the petition, the

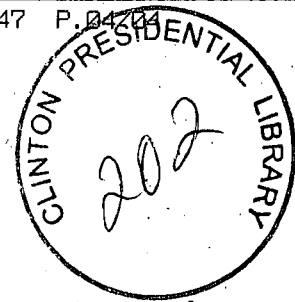


stay will expire with that denial, whenever it occurs. This situation will not be affected by whether this Court forces the President to file on May 16 or June 17, 1996. ~~_____~~

2. It is highly unlikely that the Supreme Court would rush to decide the significant issues presented by the petition before the summer recess. Even if the extension were denied, and even if Mrs. Jones' counsel believe they can do justice to the issues in this case under the expedited deadline they set for themselves, this would mean only that there is an opportunity for the high Court, as Mrs. Jones' counsel are careful to state, to "consider" the matter.

3. Nor is there any certainty that the Supreme Court would deny the petition, as the Opposition assumes. In initially granting the stay, this Court implicitly found that there was a reasonable possibility that certiorari would be granted, and we of course are confident, as was Judge McMillian, that it will be. In that case, the stay would continue indefinitely. The point is that neither the parties nor this Court can predict with certainty what the Supreme Court will do, and we respectfully submit that this Court should not base its judgment on speculation about how the high Court will handle its docket.

4. Mrs. Jones' counsel renew their attempt, denied by the district court and this Court previously, to sever the claims against State Trooper Ferguson from those against President Clinton.



We will not here repeat the findings of the district court on the inseparable nature of those claims, which were quoted in our previous reply brief on the stay, but call the Court's attention to those pleadings.

Respectfully submitted,

By: _____

Robert S. Bennett, Esq.

Carl S. Rauh, Esq.

Alan Kriegel, Esq.
Amy R. Sabrin, Esq.
Stephen P. Vaughn, Esq.

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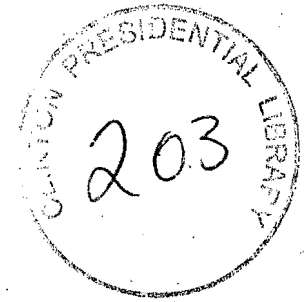
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Counsel to President William J. Clinton

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
MEMORANDUM



Wednesday, May 1, 1996

To: Amy Sabrin
FAX 202-371-7936

From: David A. Strauss

Copy: Elena Kagan
202-456-1647

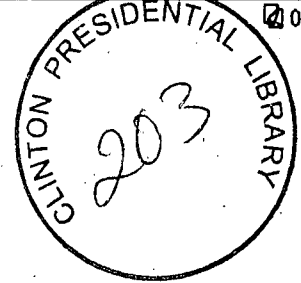
Re: The extension application

Amy—I thought I'd take a stab at recasting the memo slightly. I agree with all your main themes; this is just a slightly different way of making the same points that maybe can add to the mix. By way of explanation:

1. I see what you're getting at in saying what they "implicitly held" in granting the stay, but I'm a little concerned that this group of judges, some of them anyway, might take umbrage at (what they may perceive as) being told what they held. I do completely agree with your idea: they've already cleared the major hurdle by granting a stay, and what we're asking for now is relatively insignificant. See what you think about how I tried to implement your idea.

2. I thought that rather than suggesting that the rules contain an anomaly, we should say that the rules may be fine for the usual case but this is an unusual case.

3. Frankly I'd very much rather not have the publicity, but I think it will be more effective if we mention Geof's and my names and titles. If we don't mention names, it looks as if you might just have brought in a couple of people in the firm opportunistically in order to provide an excuse for an extension. The fact that we're academics might heighten the impression that you all are really rethinking from the ground up about what a certiorari petition should say, and may lend credibility to the point that Geof and I have to get up to speed on the case.



Anyway here is a rough cut at the passages I'd add:

INSERT A:

Rule 41(b) explicitly envisions, however, that the stay of the mandate may be "extended for cause shown." We respectfully submit that, for reasons we state below, there is ample cause for extending the stay of the mandate in this case for an additional 30 days. We note that we will accordingly file a petition for a writ of certiorari well before the expiration of the period established by the applicable statutes and Rules of the Supreme Court. [citations]

1. As the judges on the panel in this case stated, this case presents a "novel question" (panel maj. op.), that "raise[s] matters of substantial concern given the constitutional responsibilities of the office" of the Presidency. Beam op. The case has already produced four divergent opinions from the judges of this court, in addition to the opinion of the district court. We are most reluctant to present a case of such importance to the Supreme Court on a rushed basis. Ordinarily a petitioner has at least 90 days, and possibly as much as 150 days, to prepare a petition for a writ of certiorari. [citations] Even if the court grants this request for an extension of the stay, we will draft, revise, and print our petition in substantially less time than that.

2. Because of the intrinsic significance of the issues and because of the importance of presenting them to the Supreme Court in the way that will best enable the Court to determine whether to review them, we have engaged [names and titles], to assist us in the preparation of the petition. Neither Professor Strauss nor Professor Stone was involved with this case in this court or in the district court.

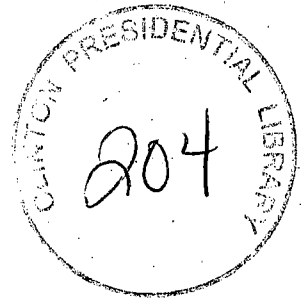
INSERT B

3. As we explained in our application for a stay of the mandate, without a stay the President's claim will essentially be forfeited in whole or in part. President Clinton's claim is precisely that he should not have to defend himself against a lawsuit while he is in office. Without a stay of the mandate, the opportunity for the Supreme Court to review the decision of this court and, should it decide to do so, to grant full relief to the President, will be compromised.

4. We recognize that Rule 41(b) contemplates that ordinarily, when a stay is in effect, a certiorari petition will be filed within 30 days. But we respectfully submit that this is anything but an ordinary case. It is, we believe, beyond fair dispute that the issues in this case are far more important, and the likelihood of a grant of certiorari significantly higher, than in the ordinary case in which this court grants a stay of the mandate. We accordingly request this additional brief extension of the stay.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167



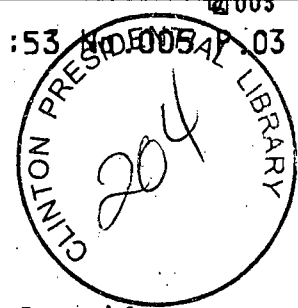
PAULA CORBIN JONES, :
Appellee/Cross-Appellant : Cross-Appeals from the United
v. : States District Court for the
WILLIAM JEFFERSON CLINTON, : Eastern District of Arkansas
Appellant/Cross-Appellee :

PRESIDENT CLINTON'S MOTION
TO EXTEND THE STAY OF MANDATE

President Clinton, through undersigned counsel, hereby moves to extend the stay of mandate issued by the Court in the above-captioned matter until June 17, 1996.

On April 16, 1996, the Court stayed the mandate for 30 days, until May 16, pursuant to Federal Rule of Appellate Procedure ("FRAP") Rule 41(b). As provided in that rule and in the order, once the President notifies the Court that he has filed a petition with the Supreme Court, the stay would be extended indefinitely until the Supreme Court disposes of the matter.

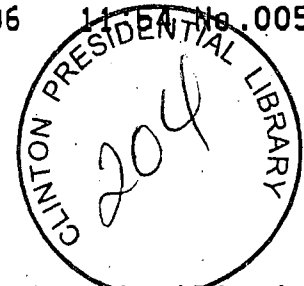
~~In issuing this order, the Court implicitly found that the present case satisfies all the criteria for a stay, chief among them that the appellant would suffer irreparable harm if a stay were not granted. In particular, this is a case where pro-~~



~~ceeding with the mandate could expunge the very rights President Clinton seeks to vindicate by Supreme Review, and deprive the high Court of a meaningful opportunity to speak to the important issues raised by this case.~~

~~Under the Supreme Court rules, a petitioner normally has 90 days to file a petition for writ of certiorari. FRAP Rule 41(b) provides for a stay of mandate for 30 days. The interplay of the Supreme Court rules and Rule 41(b) thus creates an anomaly in cases such as this, in that it requires a petitioner to file earlier than otherwise would be necessary, in order to assure that his rights are fully protected. While President Clinton does not here seek to extend the stay for the full time he otherwise would have had to file a petition in this case, he does seek to extend the stay until Monday, June 17, 1996. Rule 41(b) permits extensions for good cause.~~

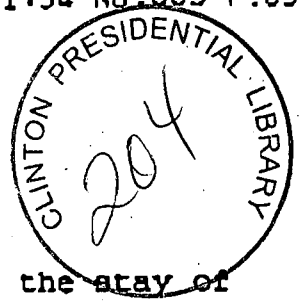
~~The reason for the President's request is as follows: This case raises novel issues of law with momentous consequences for the Presidency and the Judiciary, which deserve to be briefed carefully and thoroughly, and not in a rushed manner. Moreover, to ensure that these issues are analyzed and briefed in a manner sensitive to all their ramifications for both the Executive and Judicial branches, two attorneys with extensive experience before the Supreme Court have been added to the President's team of lawyers at this stage of litigation. The additional time is~~



needed to ensure that these new attorneys are able to familiarize themselves fully with the case, the issues and the large body of relevant case law, and to ensure that they and the President's existing counsel have sufficient time to thoroughly and appropriately address these issues in a petition to the high Court.

~~The cross-appellant's rights would not be altered by this relief. The date by which the petition will be filed under this regime is still earlier than had President Clinton used his full 90 days. Moreover, this court, by granting the original stay, already has found implicitly that the plaintiff's interests would not be significantly impaired by a stay and that whatever impairment there was did not outweigh the harm to the President's interests that would be occasioned by failing to stay the mandate. Moreover, the Court ordered the mandate to be extended automatically upon notification that the President had filed his petition with the Supreme Court, as provided in Rule 41(b). Accordingly, staying the mandate another 30 days with the same provision would not significantly change the plaintiff's situation.~~

1WJEF



Accordingly, we respectfully seek to extend the stay of
mandate for another 30 days. Because a 30-day extension would
fall on a Saturday, we ask that the stay be set to expire on the
following Monday, June 17, 1996.

Respectfully submitted,

By: _____

Robert S. Bennett, Esq.

Carl S. Rauh, Esq.

Alan Kriegel, Esq.
Amy R. Sabrin, Esq.
Stephen P. Vaughn, Esq.

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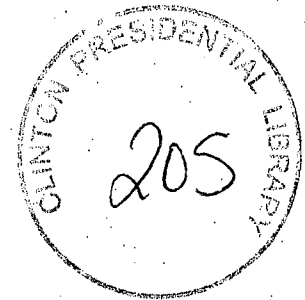
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Counsel to President William J. Clinton

THE UNIVERSITY OF CHICAGO

THE LAW SCHOOL

MEMORANDUM



Friday, April 26, 1996

To: Robert S. Bennett
Amy R. Sabrin

From: Geoffrey R. Stone
David A. Strauss

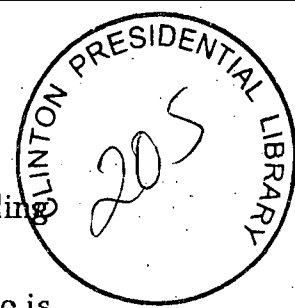
Re: The petition

Here are some thoughts on the certiorari petition. DAS has already talked with Amy Sabrin about several of these and we all seem to be on the same page.

First, a general thought. Perhaps the biggest single hurdle for us to overcome is the sense that our approach would place the President "above the law" and would give him a special privilege that no one else has. To deal with this, it might be worth emphasizing, to a greater degree than we have so far, this point: in seeking a deferral of the litigation, the President is simply asking for something that the legal system already provides to other parties in a variety of situations. There are numerous well-established legal doctrines that already, in various contexts, require plaintiffs to defer the prosecution of their claims, sometimes for several years. These include abstention doctrines, exhaustion doctrines, doctrines allowing interlocutory appeals, automatic stay doctrines in bankruptcy, as well as the examples mentioned in the court of appeals briefs (the Soldiers' and Sailors' Civil Relief Act and the deferral of civil proceedings in favor of a parallel criminal prosecution). There are probably other examples that we can dig up.

Our papers in the court of appeals do a terrific job of making the argument—which will obviously be central to our position before the Supreme Court—that the President has extraordinary responsibilities and is therefore entitled to protection from civil litigation while in office. But the emphasis on the extraordinary nature of the President's job, while completely justified, may tend to create the impression that we're asking for an extraordinary form of relief. This in turn feeds the other side's "above the law" sloganeering. In fact, the relief we're seeking is entirely comparable to what the courts already afford in many other contexts—and

our reasons for asking for a deferral of the case are much more compelling than the reasons present in those other contexts.



2. Ordinarily, in a certiorari petition, the explanation of why the case is "cert. worthy"—important enough to warrant the Supreme Court's attention—is at least as important as the argument that the lower court erred. In this petition it seems to us to be a better idea to spend more time on the merits and relatively less on the importance of the case. In the usual case, the Court is willing to let errors go uncorrected if there is no conflict among the circuits, or if the issue seems not to be very important. In this case, though, it is hard to believe that the Court will deny certiorari if it thinks the decision below is wrong. We should explain why the case is important, but mostly we should use the petition as the first step in persuading them to rule in our favor on the merits.

Here are some specific thoughts on how the petition might unfold:

Questions Presented. Tentatively at least, it seems to us that the questions presented should be along these lines: (1) Whether, in the absence of exceptional circumstances, a district court is required to defer the trial of a civil suit against the President. (2) Whether a district court has discretion to defer the trial of a civil suit against the President.

Three comments:

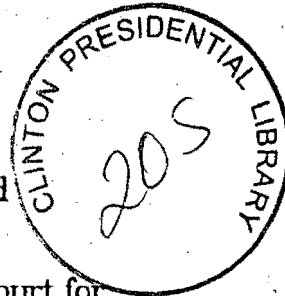
i. At least in the petition, we should follow the lead of *Nixon v. Fitzgerald* where the plurality did not explicitly say that Presidential immunity was required by the Constitution. (The *Fitzgerald* formulation was that immunity is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers." 457 U.S. at 749.) We should use the same formulation, or one like it. It might look like overreaching to go further than *Fitzgerald* did.

ii. We will obviously have to work out how to characterize the presumption in favor of deferral. If it's too strong, we look as if we're overreaching; if it's too weak, we risk trivializing our claim. But for the most part this can wait until the merits brief.

iii. Also, it would be a good idea, we think, to avoid calling this an "immunity," given the way the court below tried to capitalize on that term. (Also, what we're asking for isn't technically an immunity at all—it's just a continuance, or the equivalent.)

Jurisdiction. There is of course a question whether the court of appeals had jurisdiction over Jones's appeal. A district judge's decision to postpone a trial is not an appealable final order; relief if any is by mandamus. The court of appeals decided it had "pendent" jurisdiction over the claim, but that is questionable in light of the Supreme Court's recent decision in *Swint v. Chambers County Commission* (The Eighth Circuit said that the two

issues were inextricably intertwined; but our two questions presented disentwine them. Analytically they're entirely distinct.)



We should renew this jurisdictional objection in the Supreme Court for two reasons (in addition to the fact that it's jurisdictional): the Court will have a harder time denying certiorari if there is a serious jurisdictional issue in the case; and we might save the district court's order deferring the trial even if we lose the discovery part of the case.

Statement. This should be pretty straightforward. It should make the panel majority opinion look extreme (not a difficult task) and highlight the dissent and division below. We can use the dissenting opinions to make several of our points.

Reasons for granting the petition. We should start off with a paragraph or so summarizing our principal arguments. As we see it, there are four:

1. The court of appeals' decision is inconsistent with *Nixon v. Fitzgerald* and with "the constitutional tradition of the separation of powers."

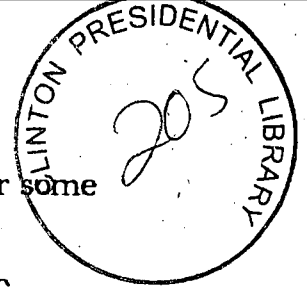
a. Here we should emphasize the language of *Fitzgerald* and the historical sources cited by the *Fitzgerald* opinion (Story, Jefferson, and the Framers). The main pitch should be that the court of appeals simply ignored one entire aspect of *Fitzgerald*—that immunity is needed not just to ensure fearless decision-making but to protect the President against distraction and harassment while he is in office. We should rely on Justice Powell's language to make our arguments to the maximum extent possible.

b. This might be a good place to quote the famous Learned Hand aphorism to the effect that, illness aside, being involved in litigation is the worst thing that can happen to anyone. It's no different for a President, except that his litigation, like his illnesses, becomes the nation's problem.

c. Our argument on the second question is that even if the President didn't have a right to have the litigation deferred, the district judge certainly had the discretion to defer the trial. We should make this argument not as an explicit fallback, but along the lines of: the court of appeals' ruling on this point was an even more egregious error. This discussion should be short; we want to heighten the impression that the court of appeals was off the rails, but we don't want to make a compromise decision by the Supreme Court (essentially reinstating the district court's decision) seem too attractive to the Justices.

2. The cure prescribed by the court of appeals—"judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule" (slip op. 13)—is worse than the disease. District judges—or state trial judges—will literally be passing judgment on whether the President is spending his time in the right way. We should be as concrete as possible in giving examples. We should consider, if not here

then in the merits brief, describing the President's actual schedule for some period of time to make the point as concrete as possible.



3. The relief we seek—deferral of the litigation—is, contrary to the panel majority, far from extraordinary and unknown. In fact deferral is required in many other contexts, for reasons that do not approach in importance the reasons we assert here. This is the point we described at the beginning of this memorandum.

4. This is an issue of obvious national importance. It would be utterly incongruous for this issue to be decided by a fragmented panel of the Eighth Circuit. For the court not to decide it now would mean that the President would have to undergo discovery and a trial—even though he might have a constitutionally based right not to. If he prevailed at the trial the Court would never even have an opportunity to vindicate his claim. These are, of course, precisely the reasons that the Court has recognized a right to an interlocutory appeal in cases of this kind, and they call for a grant of certiorari here.

Finally, there are two points that we will want to make in some form—perhaps briefly in the petition, subsidiary to point 1 above, then at greater length in the merits brief—but that have to be handled with delicacy.

a. We want to make the point that unless we prevail here, suing the President—in the hope of forcing him to give a deposition, interrogating his associates, requiring him to hand over his family's financial records, and so on—will become a popular sport. People will do it to pursue partisan objectives, to extract a settlement, or just to gain publicity for themselves. The problem is that there of course haven't been a lot of suits like this. To some extent the language of *Fitzgerald* will make this point for us. Also, we may want to cite material on the abuses of civil litigation generally—how it's used to harass CEOs and celebrities, for example, if there is material to this effect.

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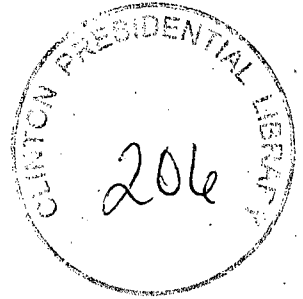
b. We have to deal with the argument that standard devices, already in place, will protect the President against harassing litigation—Rule 11, summary judgment, and (if the suit relates, as this one does, to prior official conduct) qualified immunity. One possible answer, which we say in one of our court of appeals briefs, is that it's easy to draft a complaint that raises factual issues that can't be resolved without a trial. I believe there has been litigation about this issue in the qualified immunity context, and it may be possible to show that this problem—complaints that raise credibility questions and thus can't be resolved without a trial, but that appear in some instances to be insubstantial and designed for harassment—is in fact a vexing and so far unresolved issue. Thus we simply cannot say that the devices in place will already protect the President against harassing litigation.

they

THE WHITE HOUSE

WASHINGTON

April 18, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

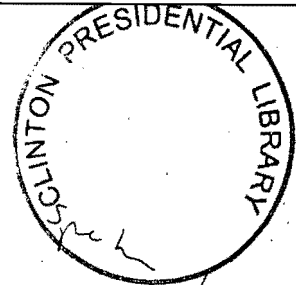
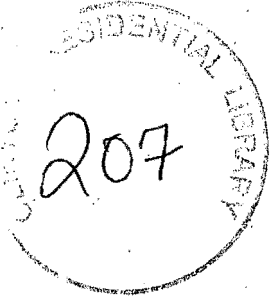
SUBJECT: JONES LITIGATION

1. The stay the Eighth Circuit gave us runs through May 16. Assume the worst-case scenario: we file a cert petition on that day and Jones's attorneys file their opposition to cert very soon thereafter -- say, May 20. We then get 10 days to file a reply, which brings us to about May 30. At that point, the petition gets put on the next "cert list." A new cert list circulates to the Court every week, and the Court considers all petitions on the list about 10 days after the list circulates. This means (again, assuming the above worst-case scenario) that the Court will certainly consider our petition at its June 21 conference and possibly at its June 14 conference. *Free*

2. Given the above, I recommend we take David Strauss's advice and ask the Eighth Circuit for some more time on the ground that the President has hired new attorneys and that 30 days is insufficient for them to learn the case and prepare a petition. We should ask Bennett, consulting with Strauss, to prepare and file these papers immediately. *Free*

3. Jack: You had indicated that it made sense to meet on April 26 (when Geof Stone is coming to town) only if we had a draft brief to discuss. I think we should talk about the mechanics of when we want a brief and who should write it. (Recall that David is now doing a memo on the case, as you asked.) But even if we do not have a draft on April 26 (that would be 8 days from now and 20 days from the filing date), I think it might be a good idea to get all the lawyers together for an hour or so, to deal with matters of both substance and process. *Free*

4. I have a call in to Amy Sabrin to ask her to prepare retention agreements for Strauss and Stone so that there will be no worries about privilege issues. *Free*



THE WHITE HOUSE
WASHINGTON
April 18, 1996

MEMORANDUM FOR JACK QUINN
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KATHY WALLMAN

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THE WHITE HOUSE

WASHINGTON

April 18, 1996



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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. notes	re: Handwritten Notes - From Elena Kagan (partial) (1 page)	n.d.	P6/b(6)
002. 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)
003. 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)
004. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Procedures (1 page)	04/05/1996	P5 209
005. notes	re: Handwritten Notes - John Roberts/Hogan (4 pages)	n.d.	P5 210

COLLECTION:

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

FOLDER TITLE:

Paula Jones Case [3]

2009-1006-F

eK 2023

RESTRICTION CODES

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

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

- 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]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- 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]

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.

WJC LIBRARY PHOTOCOPY

THE WHITE HOUSE

WASHINGTON
April 5, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

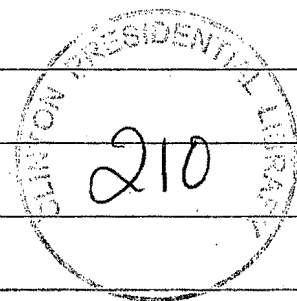
FROM: ELENA KAGAN *EX*

SUBJECT: SUPREME COURT PROCEDURES

1. There are no limits on the ability of a party to change counsel, even after the filing of a brief on the merits.
2. Conferences to consider cert petitions will be held weekly between now and **June 21**.
3. This Term's calendar is entirely full. So far, the Court has granted cert in 15 cases to be argued next Term. The Court rarely hears more than 20 cases in a single session (and sometimes considerably less); thus, assuming the Court fills up the calendar in order (which it usually though not invariably does), the October session (October 7, 8, 9, 15, 16) is nearly full already. The Court also will hear argument on November 4 and 5 -- that is, the day before and the day of the election.f

- John Roberts
Hogan

Trish
off



Council ~~press~~ charter?

cert pet → went for.

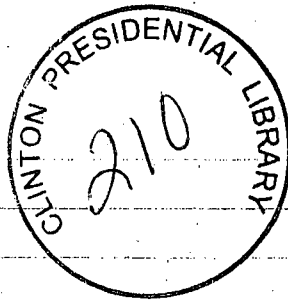
must to ~~be~~ ^{do} day?

alendar - October ^{corrs} already?

Add to
Shane
Shawes

Kathleen re ^{Walter}
Further

AGT US



For Us

Burke
Cohen (Hart)
Kramer
Meritt
Miller
Najel
Zander
Powe
Presser
Rohda ←
Van Alstyne

Anwar
Block
Harold Boruff (GW)
Estrich
Fallon
Farber
Frickey
Gervitz
[Gunter]
[Jeffries]
Lerner
Marshall +
Resnick
Sherry
Schickel
Sullivan
Tribner

centrist
affect
rep

C. Powell's
big Liopapher

Council
→
reund

Shapiro
Meltzer

Filed today

30-day
✓

Benjamin
↓
Thomas

cert. petition due -
end of this mo.

80-wish in
on stay issue

"hays in every ward"

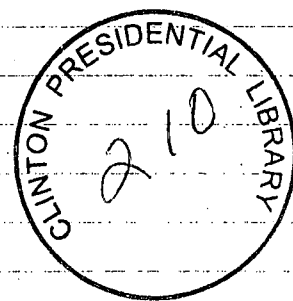
2) walker
like
this

-David Shapiro -
excellent choice
- - - CF's Deputy - - -

Amicus - Ford + Carter??

~~There~~

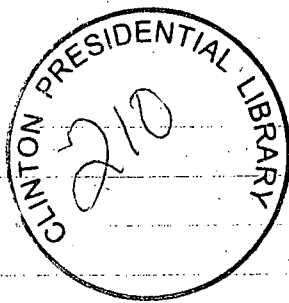
Meltzer??



John Roberts
40/1155
Rehnquist club
Assoc Counsel to Pres 82-86
Deputy SG 89-93



October 11?



4 each
2 a 7

avg schedule

Oct 789 1516

Nov 456, 1213

this year 33
Covers printed
into summer
11 cover 1 in Oct

15/
~~12~~ grants beyond
this term
(each mo -
could do 20)

12 who left -
avg'ing 2 cover
per wk.
Fit June 21

Clark's Office

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 211
002. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/13/1996	P5 212
003. notes	re: Handwritten Notes - Amy Sabrin (1 page)	n.d.	P5 213
004. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/29/1996	P5 214
005. legal brief	re: Soldiers' & Sailors Civil Relief Act (5 pages)	05/24/1996	P5 215

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [1]

2009-1006-F

e/2024

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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RR. Document will be reviewed upon request.

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

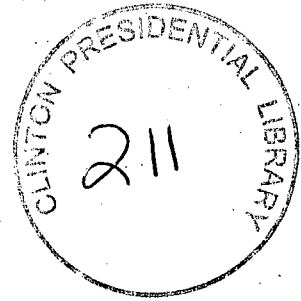
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WJC LIBRARY PHOTOCOPY

THE WHITE HOUSE

WASHINGTON

May 22, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: JONES LITIGATION

As the Washington Times reported today, Reps. Dornan and Stump are attacking the President for claiming an entitlement to a deferral of litigation under the terms of the Soldiers' and Sailors' Relief Act. I am attaching the materials they are circulating, as well as the relevant pages of the cert petition.

I believe the problematic sentence on the top of page 15 was the result of the SG's office suggesting to Bennett, after reviewing a draft of the brief, that the President could ask for relief directly under the Soldiers' and Sailors' Act. Bennett liked the idea and inserted the sentence.

In the Washington Times, Bennett notes that the reference to the Act is fleeting, says "we're not pushing that argument," but acknowledges that the petition argues that the Act is applicable to the President. I do not think we should say even this much. I think we should say that the cert petition is not requesting relief on this basis and that the petition used the Act (along with several other legal rules) as a simple analogy to show that courts often grant deferrals of litigation.

I would therefore recommend a response to the Dornan/Stump charges that goes something as follows:

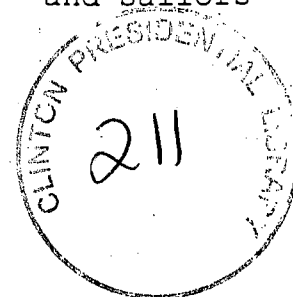
These charges are a deliberate -- and desperate -- misreading of the President's legal papers in hopes of gaining political mileage.

In a 21-page petition, discussion of the Soldiers' and Sailors' Civil Relief Act is limited to three sentences.

That Act is mentioned in a section of the petition arguing that it is not unusual for courts to do what the President seeks -- to defer litigation in order to serve important public interests. The Soldiers' and Sailors' Act is simply an example -- the petition also offers five others -- of a rule of law that commands such a deferral. All of these are analogies; they are not the basis for the petition for a stay of litigation.

The President asked for a stay under established principles

of constitutional law, in order to protect the ability of a President to perform his constitutional duties free from the distraction of harassing litigation. He did not claim -- even though as a technical point of law he might have been able to do so -- ~~for~~ ^{any} relief under the Soldiers' and Sailors' Act.



THE WHITE HOUSE

WASHINGTON

May 13, 1996



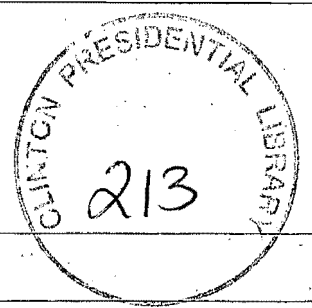
MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *ek*

SUBJECT: JONES LITIGATION

Attached is the version of the cert petition going to the printers this morning. We can make small changes over the next couple of days. You should let me know if you have any edits.

Bruce: I just noticed that Bob and Amy have removed from the cover page the names of the Arkansas-based attorneys. Bob and Amy think that it looks unseemly for the President to have so many lawyers working on this case. (I tend to agree.) I asked Jack to ask you about this. Is it OK?



Amy Salvin -

SG - Ed. Needles.

Review to ensure no heartburn.

Q of that nature

1. Jurisdictional Issue -

Think we're right.

too prominent.

- less pure / less certifying.

Sentence -
postponed/
at minimum
"

2. Other stays - abstentive doctrine -

docs where there was altern
forum.

take some out?

abstentive?

primary juris?

3. Why not rely more explicitly on failure/failures
more explicitly.

Not more likely to make
them grant cert.

Sentence -

(?)

trying to draft
except of this

4. Bigger point - most glaring defect -
Pres immune exist ^{in Court} or doesn't exist at all.

THE WHITE HOUSE

WASHINGTON

May 29, 1996

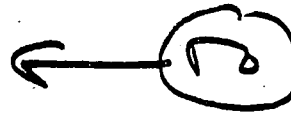


MEMORANDUM FOR JACK QUINN

BRUCE LINDSEY
KATHY WALLMAN

FROM:

ELENA KAGAN *EL*

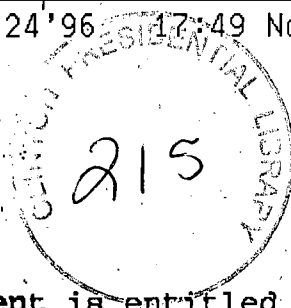


SUBJECT:

JONES LITIGATION

Attached is a draft op ed that Geof Stone wrote over the weekend. He wondered whether he should (1) throw it out or (2) try to place it in the Chicago Tribune. I have marked one clause of one sentence that we probably will want to edit. Aside from that, the question is whether any further mention of this issue does us more harm than good. I guess I vote for having Geof try to place the piece, but I have no great confidence in this judgment. Let me know what you think.

*I think we want to
put this whole affair
behind us asap. It's
just keep this in file
Rush
Jane*



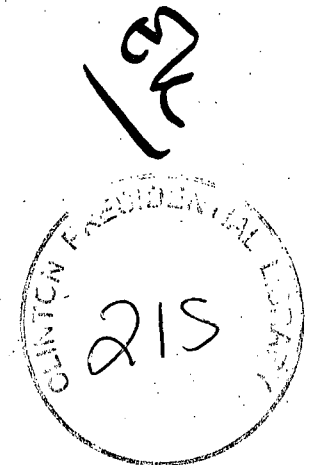
EK

The respondent suggests that the President is entitled to the relief sought here only if provided for in an act of Congress. (Br. in Op. 11). We disagree. The relief sought here is required by the singular nature of the President's constitutional duties and principles of separation of powers. The President does not rely on the Soldiers' and Sailors Civil Relief Act (50 U.S.C. app. §§ 501-525 (1988 & Supp. V 1993)), or any other legislation.

d. It is recognized in several other contexts that the public interest may require a stay of civil litigation for extended periods. For example, a postponement or stay is or may be appropriate during the pendency of administrative proceedings, see, e.g., Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 306-07 (1973), criminal proceedings, see, e.g., Koester v. American Republic Invs., 11 F.3d 818, 823 (8th Cir. 1993), or bankruptcy proceedings, 11 U.S.C. 362 (1994). A lengthy stay of a federal suit may be required where a federal claim "is premised on an unsettled question of state law," so that "the state courts [may have] an opportunity to settle the underlying state law question." Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975). In such cases, federal litigation of the federal question must await determination of the embedded state law issue in another forum. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). Similarly, the Soldiers' and Sailors' Civil Relief Act (SSCRA), 50 U.S.C. App. 501 et seq., requires federal and state courts to grant a stay in some circumstances in suits involving "a person in military service." See, e.g., Semler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943); Coburn v. Coburn, 412 So. 2d 947, 949 (Fla. Dist. Ct. App. 1982).

Resulting delays under any of these doctrines or statutory schemes may be lengthy, sometimes as long or longer than a President's term in office. Such delays are nevertheless tolerated because the policies requiring them are deemed sufficiently strong.

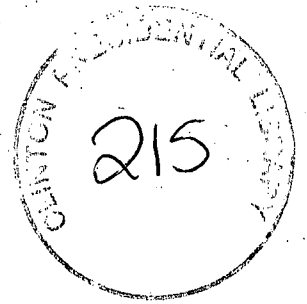
The constitutional demands of the office of the Presidency require all of the President's attention and energy so long as he



serves. We submit that the need to avoid substantial distractions from the President's constitutional duties is compelling, and is clearly of sufficient magnitude to require a stay of civil litigation absent unusual circumstances not present here. Due regard for the institution of the Presidency calls for the Court to decide that issue now, before President Clinton or a successor is forced to undergo further litigation.

Conclusion

The petition for a writ of certiorari should be granted.



d. It is recognized in several other contexts that the public interest may require a stay of civil litigation for extended periods. For example, a postponement or stay is or may be appropriate during the pendency of administrative proceedings, see, e.g., Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 306-07 (1973), criminal proceedings, see, e.g., Koester v. American Republic Invs., 11 F.3d 818, 823 (8th Cir. 1993), or bankruptcy proceedings, 11 U.S.C. 362 (1994). A lengthy stay of a federal suit may be required where a federal claim "is premised on an unsettled question of state law," so that "the state courts [may have] an opportunity to settle the underlying state law question." Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975). In such cases, federal litigation of the federal question must await determination of the embedded state law issue in another forum.

See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

in some circumstances
~~No~~ Similarly, the Soldiers' and Sailors' Civil Relief Act (SSCRA), 50 U.S.C. App. 501 et seq., requires federal and state courts to grant a stay in ~~any~~ suit involving ~~a~~ person ⁱⁿ military service, ~~"unless the court determines that 'the ability of the plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'"~~ 50 U.S.C. App. 521. *active* ~~If the court finds military service will have the necessary impact on the litigation, the Act mandates a stay of proceedings regardless of the effect on other litigants.~~

See, e.g., Semler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943):

*testis in relevant
unless you're arguing
for app. of statute
in some circumstances*

- no* ← 1. Shd argument have its own ¶?
yes ← 2. Shorten?
3. Others to consult?

Resulting delays under any of these doctrines or statutory schemes may be lengthy, sometimes as long or longer than a President's term in office. Such delays are nevertheless tolerated because the policies requiring them are deemed sufficiently strong.

The constitutional demands of the office of the Presidency require all of the President's attention and energy so long as he serves. We submit that the need to avoid substantial distractions from the President's constitutional duties is compelling, and is clearly of sufficient magnitude to require a stay of civil litigation absent unusual circumstances not present here. Due regard for the institution of the Presidency calls for the Court to decide that issue now, before President Clinton or a successor is forced to undergo further litigation.

Conclusion

The petition for a writ of certiorari should be granted.

We don't contend that
POZUS

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 (1 page)	05/29/1996	P5 216
002. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/29/1996	P5 217
003. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/29/1996	P5 218
004. draft	re: William Jefferson Clinton v. Paula Jones (15 pages)	05/23/1996	P5 219
005. memo	Elena Kagan to Jack Quinn; re: Jones Brief et al (1 page)	05/22/1996	P5 220
~~006. notes~~	~~re: Handwritten Notes - Meeting (1 page)~~	~~n.d.~~	~~P5, P6/b(6)~~
007. notes	re: Handwritten Notes - Draft Under Review (1 page)	n.d.	P5 221

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [2]

2009-1006-F

ek2025

RESTRICTION CODES

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

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

P1 National Security Classified Information [(a)(1) of the PRA]
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P3 Release would violate a Federal statute [(a)(3) of the PRA]
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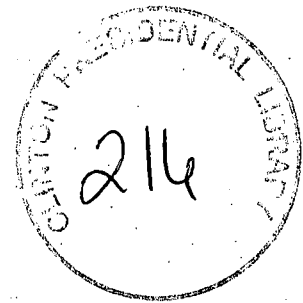
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THE WHITE HOUSE

WASHINGTON

May 29, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EL*
SUBJECT: JONES LITIGATION

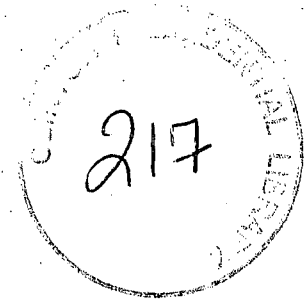
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cc: To JQ, Elena, Bruce
I think that the issue is
in a stable condition right now
and would save this if it should
flame up later -- oral argument, or
assurance of opinion, for example.
KW

THE WHITE HOUSE

WASHINGTON

May 29, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EL*
SUBJECT: JONES LITIGATION

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THE WHITE HOUSE

WASHINGTON

May 29, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

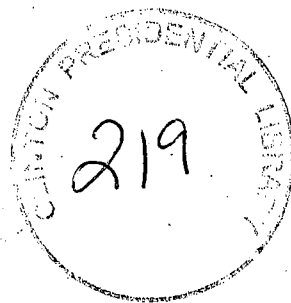
SUBJECT: JONES LITIGATION



I received a call today from Mark Levy, former law school classmate of the President, former head of the appellate section in DOJ's civil division, and current partner at Howrey & Simon. Levy told me that Ab had given him my name.

Levy offered to help in any way he could in the event the Court grants cert in Jones. He said that when he noticed Stone's and Strauss's names on the most recent brief, he realized there might be a role for "people outside Bennett's group" at the Supreme Court level. He also said that Drew Days would put in a good word for him.

No. 95-1853



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

REPLY BRIEF FOR THE PETITIONER

STET The President's submission is straightforward: No President has ever before been compelled to submit to ^{the distractions of a} civil ~~damages action,~~ directed personally against him, during his term in office. A decision with such serious ramifications for the Presidency and the nation should not be allowed to stand without this Court first considering the President's contention, founded on explicit language in the Court's decisions, as well as explicit statements by the Framers, that ^{the} ~~such a~~ lawsuit against a sitting President ^{should} ~~must in all but the most exceptional cases~~ be deferred until he leaves office.

Respondent does not -- ^{indeed,} ~~and~~ cannot -- identify a single instance in which a court has compelled an incumbent President to

219

defend a damages action directed at him personally. Nor does respondent explain why a fragmented panel of the court of appeals, rather than this Court, should decide the extraordinarily important constitutional question of whether a President may be compelled to do so. Instead, respondent's principal contentions are (i) that this is a "one-of-a-kind case" that can be litigated without interfering with the President's conduct of his office (Br. in Op. 8); (ii) that separation of powers principles permit a trial judge to ~~require~~^{require, review} and sometimes reject ~~specific~~^{specific} showings by the President that ~~matters~~^{the} of state is sufficiently significant to justify altering the litigation schedule, (Br. in Op. X); (iii) that Nixon v. Fitzgerald, by providing Presidents with absolute immunity from liability for conduct within the "outer perimeter" of official duties, somehow precludes deferral of this

litigation (Br. in Op. X); and (iv) that in our history, incumbent Presidents have been subjected to litigation comparable to this civil action. Br. in Op. X. Respondent is wrong at each turn.

1. This case is evidence, if any is needed, of the wisdom of the Court's observation in Nixon v. Fitzgerald that "the sheer prominence of the President's office" makes him "an easily identifiable target for suits for civil damages." 457 U.S. 731, 752-53 (1982). Respondent's brief in opposition characterizes this case as a "very simple dispute about what happened in a very short encounter between two people in a room," and one in which "[d]iscovery and trial . . . will not be burden-

Insert Jack's addition here and then start new paragraph.

219

The President's submission is straightforward: No incumbent President has ever before been compelled to submit to ~~litigation threatening him with personal liability for damages~~. The President, and the Nation, should not be subjected to this extraordinary burden ^{before} until this Court considers ~~of~~ the President's contention, founded on explicit language in this Court's decisions ^{as well as} and explicit statements by several of the Framers, that the litigation should be stayed until he leaves office.

The distraction of civil litigation, directed personally against him, during his term of office.

~~has~~ -- indeed, cannot --

Respondent does not identify a single instance in which a court has compelled a sitting President to defend a damages action directed at him ^{during his term of office}. Nor does respondent explain why a fractured panel of the court of appeals, rather than this Court, should decide ^{(The constitutionality of extraordinarily} whether a President may be compelled to do so. Instead, respondent's principal contentions are that the litigation of suits like this one will not interfere with the President's conduct of his office (Br. in Op. x); that the separation of powers ^{can} will be adequately protected even if trial judges ^{are permitted (indeed, encouraged)} require specific showings by the President that ~~particular~~ aspects of the litigation schedule ^{should be} altered (cite); and that the lesson of history is that Presidents may be subjected to litigation in the way respondent seeks (cite). Respondent is wrong at each turn.

significant constitutional question

and patently incorrect,

sufficiently significant affairs of state warrant alteration

1. Respondent's ~~lurid and~~ inaccurate recitation of the allegations in the complaint (Br. in Op. x-x) is evidence, if any is needed, of the wisdom of ^{correctly} ~~this Court's observation~~ that "the sheer prominence of the President's office" makes him "an easily identifiable target for suits for civil damages." (cite to NvF).¹ In her brief in opposition, respondent repeatedly

to permit the President to carry out his Article II duties;

¹The brief in opposition asserts matters not alleged in the complaint and makes misstatements about matters of public record. For example, . . . [Amy]

This is one such suit. And, it is one in which the inevitable consequences, and the intended effect of immediate prosecution of the suit is the

[why lead w/ the allegations?]

WERT

Complete distraction of the President from his constitutional duties. This Court should not allow litigants to use that leverage to extort from this or future WJC LIBRARY PHOTOCOPY

some." Br. in Op. at 10. The record, however, reveals that respondent's attorneys in fact intend to use this case as a vehicle for a far-reaching inquiry:

We'll be able to ask the President certain pertinent questions Was this a pattern of conduct that involved the use of police for private functions that would not be . . . part of their duty? Are there other women involved? Who are they? . . . [A]ll is on the table in the discovery deposition, including evidence that can lead to admissible evidence. So it's a pretty wide-ranging effort

C.A. App. 122-23 (Tr. of ABC's Nightline (Dec. 28, 1994)).

Respondent's counsel also stated that they will "exhaustively pursue" this line of inquiry with other witnesses and that they may seek to compel an unprecedented physical examination of the President. C.A. App. 117-18 (Tr. of CNN's Daybreak (Dec. 29, 1994)).

Respondent, in other words, envisions litigation that not only threatens the President with \$700,000 in damages, but that is specifically calculated to entangle him in the "discovery deposition" process. In addition, the district court found that discovery could not be conducted on even the claims against the President's co-defendant "without the heavy involvement of the President through his attorneys." Pet. App. 76. The inevitable consequence of such purportedly "uncomplicated" litigation (Br. in Op. __) will be to divert the President from his Article II duties.

It takes but a single lawsuit, ^{of this kind} especially if litigated during a critical period in national affairs, to "distract a President from his public duties, to the detriment of not only

the President . . . but also to the Nation that the Presidency was designed to serve." Fitzgerald, 457 U.S. at 753. But the dangers of abuse of litigation against an incumbent President are, of course, not limited to a single case. Respondent reiterates the panel majority's conception that "the universe of potential plaintiffs" who might sue an incumbent President -- for reasons of partisanship, extortion, or publicity-seeking -- is "small[]." Br. in Op. at 11, quoting Pet. App. 15. But no person becomes President without having been highly prominent for an extended period in the public or private sector. If the Court allows this case to proceed, it is difficult to believe that other potential litigants, encouraged by the spectacle, will not come forward in this or future Administrations, to use a lawsuit to distract, harass or obtain personal information about a President by "alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of pretrial motion." Pet. App. 27 (Ross, J. dissenting).

Respondent asserts that there is no extensive history of litigation against a sitting President being used for this purpose. Br. in Op. at _____. But there was no history of Presidents being sued for official acts before Nixon v. Fitzgerald. See 457 U.S. at 753 n.33.¹ The Court/nonetheless granted certiorari in

¹ The Court in Fitzgerald attributed this to the fact that Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), which permitted damages actions against federal officials for violations of the Constitution, was of relatively recent vintage. But of course common law tort actions have long been available against federal officials, as Justice Harlan noted in Bivens. See

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Fitzgerald nonetheless, and afforded President Nixon an absolute immunity -- a much broader protection than we seek here -- because it recognized the danger that opportunistic litigation presents to the office of the Presidency. 457 U.S. at ____ [That danger is especially great in the modern setting, where wide-ranging discovery is permitted and instantaneous, nationwide publicity is routinely used as a tool by litigants.] The risk of opportunistic litigation is no less in a case of this kind than it was in Fitzgerald, and this Court's review is no less warrant-

I think
this sentence
revised to make
it hit, really
goes on the
top of p. 4

NET [ed here]

2.a. Respondent embraces the panel majority's view that the risk such litigation poses to ~~the independence of~~ ^{the office of} the Presidency can be managed by allowing trial judges to exercise discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it will precipitate repeated confrontations between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation schedule be modified because of the demands of his office. As Judge Ross ^{asked} noted below (Pet. App. 29):

(above is
not a
violation
independent)

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

403 U.S. at 400 n.3, 409 (Harlan, J. concurring). The more likely explanation for the absence of suits against the President is that -- as we showed in the petition -- it has simply been universally understood that the President cannot be sued for damages while he is in office. See Fitzgerald, 457 U.S. at 758.

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? . . . [C]an 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?

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The brief in opposition seeks to create the impression that trial judges will be highly deferential to the demands of the Presidency. It repeatedly quotes Judge Beam's formulation, according to which a trial judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25, quoted in Br. in Op. 8; see also Br. in Op. x. But that is not the standard established by the prevailing opinion below, which stated that the President could seek relief from a trial judge only if he could show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16.

Moreover, under either standard,
~~In either case,~~ once trial judges are vested with discretion, they will inevitably exercise it in different ways; while some may be deferential to the President, others ~~will~~ will surely not be. And the affront to the separation of powers inheres in the very fact that a trial judge is empowered to review the President's official responsibilities to determine whether he can afford to devote more attention to a private civil action.

Again one need look no further than this case to see ~~the need for a simple rule that~~ ^{it} ~~private civil damages lawsuit~~
~~the danger of authorizing courts to review such matters.~~

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~~such as this is to be deferred until the President completes his service in office.~~ ^{Hev.} The district court made a specific case-management determination, based on the particular facts of this case, that the trial should be stayed until the President leaves office. Pet. App. 70-71. The panel majority, notwithstanding its purported reliance on the discretion of trial judges, promptly reversed the stay as an abuse of discretion, without even explaining why the district court's evaluation of the facts was mistaken. Pet. App. 13 n.9.

This clash between the district court and the court of appeals -- and the ~~disagreement between~~ ^{in the court of appeals even as to} the fact that even the two members of the panel ~~the appropriate legal standard --~~ majority could not agree on the formulation to govern trial judges' exercise of their discretion -- is symptomatic. It shows

that the separation of powers cannot reliably be protected by requiring the President to make ad hoc showings about how specific aspects of the litigation will affect his ability to carry out his official duties. ^{It also} and underscores the need for this Court to review this very important issue.

^{in order to support the argument that courts can oversee presidential involvement in litigation}
b. /Respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. Br. in Op. ____.

^{ulps to make this argument clearer}
The lesson of those cases, however, is the opposite of what respondent suggests: ^{how} they show that it is difficult ^{it is} for courts to reconcile the conflicting demands of the judicial process, ~~on the one hand~~ with the responsibilities of the executive branch, ~~on the other.~~

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A President who testifies as a witness is involved in a one-time encounter with the judiciary. By contrast, a defendant faced with personal liability will be involved in every phase of ~~the course of~~ the litigation. The opportunities for tension and conflict between the President and the courts thus increase exponentially. Moreover, a President who is a third-party witness ordinarily faces little risk to his reputation or his financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. The burdens and distractions that ensue inevitably will be far more intrusive than when the President is a witness.

Nonetheless, even in the far less burdensome context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking² and should be undertaken only in cases of compelling need.³ Even when the President

² See, e.g., United States v. Poindexter, 732 F. Supp. 142, 148-50, 155-59 (D.D.C. 1990) (court limited defendant to written interrogatories and videotaped deposition, and reviewed questions to be asked in advance); United States v. McDougal, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (permitting presidential testimony only by way of videotaped deposition conducted at the White House, supervised by the trial court via videoconferencing to avoid abuses, after which only directly relevant portions would be shown at trial).

³ See, e.g., Poindexter, 732 F. Supp. at 147 (President would be compelled to testify at criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (footnote omitted); United States v. North, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (compelled appearance of former President as a witness in a criminal trial must be justified by a "sufficient showing . . . that the "President's testimony is essential to assure the defendant a

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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 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).

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respondent's rights to pursue her claims; does not seek to evade accountability; and remains subject to the risk of damages. And while respondent, like the panel majority, engages in overblown rhetoric to the effect that the President is seeking to place himself "above the law" and that the relief he seeks is "unprecedented," even respondent finds herself forced to concede the validity of the underlying principle for which we contend. She acknowledges that the President is not like any other litigant, and that the courts must show "deference" and "solicitude" for the President's unique responsibilities. Br. in Op.X.

The fundamental disagreement is whether the President must submit to litigation and then seek this "solicitude" at each turn of the litigation. No court has ever, until now, required a sitting President to defend a civil damages action directed at him personally. In fact, no court has ever required a President to testify in a civil case as a witness. Yet respondent and the panel majority would have a sitting President participate in this entire course of litigation, and make repeated, piecemeal showings that multiply the opportunities for head-on confrontations between the court and the Executive.

b. Respondent and the panel majority suggest that Fitzgerald affirmatively rejected the President's position here. Pet. App. 8-9, 10-11; Br. in Op. at 16, 23. This suggestion is, to say the least, odd: in Fitzgerald, even the plaintiff, although seeking to hold then-former President Nixon liable in damages, conceded in his brief that litigation against a sitting

I'm not sure 3a hangs together. The second and third sentences of the 2nd ¶ seem to fit better in the conclusion. The last sentence of that ¶ hangs back to the argument in (2). Can't we make this clearer?

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President could be stayed⁴ -- reflecting the universal understanding, until this case, that a President cannot be subjected to personal damages litigation during his term of office. The issue in Fitzgerald was whether a President enjoys absolute immunity from liability, as opposed to qualified immunity, for all his official acts. The Court decided that the President, alone among all public officials, is entitled to this exceptional protection. That conclusion is fully consistent with our view that a President who is sued for acts outside the scope of his office is entitled to the much more limited relief of temporary insulation from litigation. Indeed, as we showed in the petition, a crucial aspect of the Court's reasoning in Fitzgerald was that ~~personal damages~~ litigation can divert a President from ^{performing} his duties while he is in office.

Respondent (Br. in Op. 16, X) makes much of Chief Justice Burger's statement in Fitzgerald that "[t]he doctrine of absolute immunity does not extend beyond [official] actions," -- a statement with which we of course agree. 457 U.S. at 761 n.4. (Burger, C.J., concurring); see also id. at 759. Respondent does not mention that Chief Justice Burger also said "[t]he need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties," and cautioned that "litigation processes . . . can be and are used as

⁴ Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1783 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28 (available in LEXIS, GenFed Library, Brief File).

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mechanisms of extortion." Id. at 763.

4. Respondent asserts (Br. in Op. 19-20) that President Jefferson "lost" his argument that subjecting Presidents to a Court's jurisdiction undermines the separation of powers. In fact, our history -- beginning at least with President Jefferson and extending through the Burr cases, the Fitzgerald case, and United States v. Nixon and its progeny -- teaches that subjecting a sitting President personally to the process of the courts is something that should be done only in cases of imperative need, and then only to the most limited extent possible. See Fitzgerald, 457 U.S. at 753-54.⁵ What respondent seeks -- allowing a sitting President to be sued for damages in his personal capacity

⁵ In the face of this Court's demonstration in Fitzgerald that the Framers contemplated that Presidents would not be subject to suit while in office (see Pet. 10-11, quoting 457 U.S. at 751 n.31), respondent cites four cases. Three involve the entirely different question of whether a President can be required to be a witness in a criminal proceeding. See supra, p. _____. The fourth, National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1973) (en banc), is inapposite and of questionable vitality, and in any event supports our position. In NTEU, the President was sued for injunctive relief in his official capacity, and was not required to defend the litigation personally. The court of appeals stated that it had the authority to mandamus President Nixon to perform a ministerial duty, but refrained from exercising that authority "in order to show the utmost respect to the office. . . and to avoid, if at all possible. . . any clash between the judicial and executive branches." The court proceeded by way of declaratory judgment instead. 492 F.2d at 616. Contrary to respondent's suggestion, NTEU demonstrates that courts go to great lengths to avoid entangling the President in their jurisdiction. Moreover, even the viability of the opinion expressed in NTEU -- that a President could be enjoined -- is in doubt, in view of the more recent discussion of that issue in Franklin v. Massachusetts, 505 U.S. 788 (1992). See id., 505 U.S. at 802-803 (plurality opinion of O'Connor, J.) (citing Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498-99 (1867)); id. at 826 (Scalia, J., concurring).

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-- would be an intrusion far beyond anything that has ever before been allowed, or even contemplated. To permit such an intrusion, without even so much as this Court's review, is utterly unwarranted.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Counsel of Record
Carl S. Rauh
Alan Kriegel
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MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner
President William Jefferson Clinton

FAX to
Eleva

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.

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

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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 ^(private) 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).



EXECUTIVE OFFICE OF THE PRESIDENT

22-May-1996 06:17pm

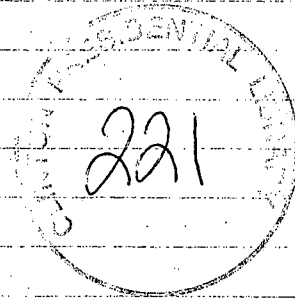
TO: Jack M. Quinn
FROM: Elena Kagan
Office of the Counsel
CC: Cheryl L Sweitzer
SUBJECT: jones brief et al

I just wanted to let you know about a conversation I just had with Jane. She called to ask me to talk to Ab before he appeared on crossfire. (Ab is appearing against Hank Brown; Bill Press hadn't known this when I talked with him.) I mentioned to her that you and I had just finished talking with Press. After a long silence, she said we had a "right-hand-left-hand problem." I asked her what she meant. She said that at the same time we were talking to Press, she had been trying (and almost succeeding) in convincing the producer not to do this subject. That was about it for the conversation.

I realize now that I may have really fucked up in not mentioning to you that she spoke to me this morning to find out what the situation was. She said that press calls were coming in, which they usually referred to Bennett, but that Bennett was on a plane and they didn't know what the situation was. I gave her the gist of the situation; at her request, I also gave her a copy of the petition. (Now I realize that that may be where the leg affs guy got it from; is that what you were concerned about?) I figured when Bennett reappeared and issued his statement that that would naturally finish whatever involvement she and her folks had. I am really really sorry about not telling you about this. Frankly, it just didn't occur to me as at all important until this recent right-hand-left-hand conversation. God, do I feel like an idiot.

Public: in filing
sometime next
week.

Check what has been done previously.



Tues or
Wednesday.

Draft under review - in text.

In Section -

d. The CJA decision is sharply at odds w/ the surrounding legal landscape. EG - the avail ev. indicates that The Framers did not contemplate the poss. that crim process could be brought aft a sitting President. - The Ct's decision thus gives greater priority to priv. civil actions than crim law, enforcement process would receive. Yet as this Ct noted in *Fitz*, there is a lesser pub. int. in actions for civil damages than in crim process. ✓

The panel's holding is similarly inconsistent w/ the pub. policies reflected in the S+S CRA. The SSCRA reg. fed + st cts to grant a stay in any suit involving "a person in mil serv," if the ct determines that "the abil. of the pt to prosecute the action or the Δ to conduct his defense [would be] materially affected by reason of his mil serv." ✓ If the ct makes the wrong finding re the impact of mil serv on the litigation, the Act mandates a stay of process regardless of the effect on other litigants. ✓ The policy consid. that underlie the SSCRA apply w/ far greater force to a civil action that threatens to impair the attn to duty of the Pres [who is the C-in-C.] Art II, sec 2.

Do Memo for Kathy -
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e. exacerbates risks of 701. Inspired litig aft the Pres.

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 (1 page)	05/21/1996	P5 222
002. notes	re: Handwritten Notes - President (1 page)	n.d.	P5 223
003a. memo	David to Amy et al; re: Reply Br. (1 page)	05/21/1996	P5 224
003b. draft	re: William Jefferson Clinton v. Paula Jones (6 pages)	05/21/1996	P5 225
004. draft	re: William Jefferson Clinton v. Paula Jones (16 pages)	05/23/1996	P5 226
005. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (2 pages)	05/22/1996	P5 227
006. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (2 pages)	05/22/1996	P5 228
~~007. memo~~	~~Amy Sabrin to Bob Bennett et al; re: Draft Petition (partial) (1 page)~~	~~05/10/1996~~	~~P6/b(6)~~

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [3]

2009-1006-F

ek2026

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

May 21, 1996



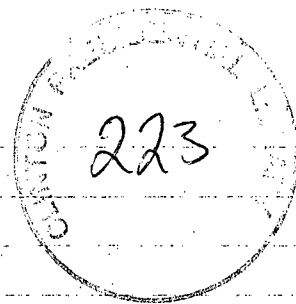
MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

Attached is a draft of David's reply brief. (I believe David suggested that he do the initial draft and Amy acceded.) I think it's quite good.

The brief is due on Tuesday. Because of Memorial Day weekend, everyone wants to get it to the printers on Friday. I am going to try to get my comments to David later today or tomorrow. If you have any thoughts or suggestions on the brief, let me know.



I think you can tell the Pres
that it is highly unlikely that
the Sct would grant the Pres.

relief on the statutory basis,
but not on the constitutional
basis.

So - he's not giving up much

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
MEMORANDUM



Tuesday, May 21, 1996

To: Amy
Elena
Geof

From: David

Re: Reply br.

Here's a draft. My general view about reply briefs is that they should be short (this one is probably too long already) and thematic, rather than slogging through their arguments point by point. Not that I carried out that mission particularly well. Let me know what you think.

David et al
is
thematic
arguments are
briefly
not
long
is
very
well
done
by
David
et al

characterizes this case as a "very simple" one in which "[d]iscovery and trial . . . will not be burdensome" (cite). The record in this case, however, reveals that respondent's attorneys in fact have a different approach in mind:

What we're pretty excited about is . . . [that] [w]e'll be able to ask the President certain pertinent questions . . . Was this a pattern of conduct that involved the use of police for private functions that would not be . . . part of their duty? Are there other women involved? Who are they? . . . [A]ll is on the table in the discovery deposition, including evidence that can be used to present a good case for our client.

Sic?

C.A. App. 122-23 (quoting xxx).

Respondent, in other words, envisions litigation that not only threatens the President with \$700,000 in damages, but that is specifically calculated both to attack his reputation and to entangle him personally in the "discovery deposition" process. It is difficult to think of a better illustration of how a case that purports to be "uncomplicated" litigation that "would not work any hardship" can in fact be extraordinarily distracting and burdensome to a President.

The dangers of abuse of litigation against an incumbent President are, of course, not limited to this case. Respondent reiterates the panel majority's conception that because a President is immune from liability for his official actions, the "universe of potential plaintiffs" who might sue him while he is in office—for reasons of partisanship, extortion, or publicity-seeking—is "small[.]" But of course this is not true. No person becomes President without having been highly prominent, usually for an extended period, in some other capacity in the public or private sector. If the Court allows this case to proceed, it is difficult to believe that other potential

Moreover, it doesn't take more than a single case to single out a person for public scrutiny.

litigants, encouraged by the spectacle, will not come forward, in this or future Administrations, to use litigation as a means of trying to distract, embarrass, or obtain information about a President.

Respondent asserts (Br. in Op. x) that there is no extensive history of litigation being used for this purpose. But there was no history of Presidents being sued for official acts before *Nixon v. Fitzgerald*. See *NvF* cite.² The Court granted certiorari in *Fitzgerald*, and afforded President Nixon an absolute immunity—a vastly stronger protection than we seek here—because it recognized the danger that opportunistic litigation presents to the office of the Presidency. The danger is especially great in the modern setting, where wide-ranging discovery is permitted and the availability of instantaneous, nationwide publicity is routinely used as a tool by litigants—as this case again demonstrates. The risk of opportunistic litigation is no less in a case of this kind than it was in *Fitzgerald*, and this Court's review is no less warranted here.

2. a. Respondent embraces the panel majority's view that risks to the Presidency can be managed by allowing trial judges to exercise their discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it will precipitate continual strains between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation

²The Court in *Fitzgerald* attributed this to the fact that *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (check), which permitted damages actions against federal officials for violations of the Constitution, was of relatively recent vintage. But of course common law tort actions have long been available against federal officials, as Justice Harlan noted in *Bivens*. See cite [DAS]. The more likely explanation for the absence of suits against the President is that—as we showed in the petition—it has simply been universally understood that the President cannot be sued for damages while he is in office.

schedule be modified because of the demands of his office. As Judge Ross asked (Pet. App. 29):

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? [C]an 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?

Respondent repeatedly quotes Judge Beam's soothing formulation of the standard that a trial judge is to apply: a judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired." Pet. App. 25, quoted with emphasis in Br. in Op. 8; see also Br. in Op. x. But the prevailing opinion, written by Judge Bowman, established a much more strict standard: the President may seek relief from a trial judge only if he can show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. ^{significantly,} And when ~~they~~ ^{she} reviewed a specific case-management determination made by the trial judge in this case—her decision to stay the trial, which, as we showed in the petition (cite), rested on her specific judgment about the appropriateness of delay on the facts this case—~~both Judge Beam and Judge Bowman~~ ^{they} reversed the determination as an abuse of discretion, without any explanation about why her evaluation of the particular facts was mistaken. See Pet. App. xx. Certainly the panel majority, in reversing the district court, did not make the finding that, in Judge Beam's words, a trial would not "even slightly impair[]" the President's ability to carry out his office—a finding that would have been implausible on its face.

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don't want to seem to be bargaining for easier standard -- even the Beam std puts the decision in the ct's hands -- emphasize the "she finds" language and insist this is unacceptable

The disarray in the court of appeals even on the abstract question of what the appropriate standard should be—and the panel majority's refusal to defer to the actual exercise of discretion by the district court in this case—are in fact symptomatic. They show that the separation of powers cannot reliably be protected by requiring the President to make ad hoc showings about how specific aspects of the litigation schedule will affect his ability to carry out the duties of his office.

b. In seeking to support her argument that trial judges can manage litigation in a way that protects the President's constitutional role, respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. But the true lesson of those cases is the opposite of what respondent suggests: those cases show how extremely difficult it is for courts to reconcile the conflicting demands of the judicial process, on the one hand, with the responsibilities of the executive branch, on the other.

A President who testifies as a witness is involved in only a one-time encounter with the judicial branch. By contrast, a defendant faced with personal liability will be involved throughout the course of the litigation, in every phase. The sources of tension and conflict between the President and the courts thus increase exponentially. Moreover, a President who is a third-party witness ordinarily faces little risk to his reputation or his financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. Nonetheless, even in the far less problematic context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking and fraught with difficulty, and should be undertaken only in cases of imperative need.

David-I'd put this after the next sentence + start a new ¶ at "nonetheless"

and, as such, the distractions that ensue are apt to be far less intrusive than when the President is defendant.

These are the President's duties as defendant.

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David - are there any other ways to show this, other than just by asserting it? This seems a bit off - are

difficult questions that have arisen? 5

Even when the President is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests—insisting that district courts manage the President's schedule as a defendant in personal damages litigation—pushes the separation of powers well past the breaking point.

3. The brief in opposition ~~evidently~~ 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.³ ~~Of course~~ the President seeks no such thing, and never has. The President has never suggested that he is absolutely immune from liability for unofficial acts, and respondent's elaborate arguments against that proposition (Br. in Op. xx, xx, xx) are simply beside the point, a determined effort to confuse the issue.

Rather,
Throughout this case, the President has asserted only that the responsibilities of the Presidency warrant deferring this litigation until he leaves office. And while respondent, like the panel majority, engages in overblown rhetoric to the effect that the President is seeking to place himself "above the law" and that the relief we seek is "unprecedented," the fact is that even respondent finds herself forced to concede the validity of the underlying principle for which we contend. She acknowledges that the President is not like any other litigant, and that the courts must show "solicitude" for the President's special responsibilities.

No court has ever, until now, required that a President submit, as a defendant, to a civil damages action directed at him personally. No court has ever required a President even to testify in a civil case as a witness. It is

³For example, the brief in opposition uses the word "immunity" or its cognates at least 40 times.

even doubtful that a court may enjoin the President in the performance of his official duties—a proceeding that presents much less of a danger of disruption than the kind of litigation respondent pursues. See *Franklin v. Massachusetts*, 505 U.S. 788, 802-30 (1992), citing *Mississippi v. Johnson*, 4 Wall. 475, 498-99 (1867); see also *Franklin*, 505 U.S. at xxx (Scalia, J., concurring).

Respondent asserts (Br. in Op. 19-20) that President Jefferson “lost” the principle for which we contend.⁴ In fact, our history, beginning at least with President Jefferson, has been that in this area—subjecting a sitting President personally to the process of the courts—judicial inroads on the executive branch have been allowed infrequently, only in cases of imperative need, and then only to the most limited extent possible. What respondent seeks—allowing a sitting President to be sued for damages in his personal capacity—would be a massive intrusion, far beyond anything that has ever before been allowed, or even contemplated. To allow such an intrusion, without even so much as this Court’s review, would be utterly unwarranted.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

⁴In the face of this Court’s demonstration, in *Nixon v. Fitzgerald*, that the Framers contemplated that Presidents would not be subject to suit while in office (see Pet. 10-11, quoting 457 U.S. at 751 n. 31), respondent cites four cases. Three involve Presidential testimony in criminal proceedings. One—NTEU—which respondent artfully describes as “holding President amenable to judicial process in a civil case” (Br. in Op. 20 (emphasis in original)) in fact held Even that limited holding is drawn into serious question by *Franklin v. MA*. [Amy?]

SASM&F

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13:23 No.015 P.04

No. 95-1853

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

BRIEF FOR ^{THE} PETITIONER IN REPLY

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Attorneys for the Petitioner
President William Jefferson Clinton

No. 95-1853

IN THE
Supreme Court of the United States
October Term, 1995

CLINTON PRE
224

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

THE
BRIEF FOR PETITIONER IN REPLY

The President

The President's submission is straightforward: No

incumbent President has ever before been compelled to submit to
(a civil damages action, ~~for~~ directed at him personally) during his term of
litigation threatening him with personal liability for damages. U.S.C.

This momentous holding by the panel majority below should not be
enforced ^{before} without this Court's consideration of the President's

contention, founded on explicit language in the Court's decisions,
(as well as and) ^{and by} and explicit statements by several of the Framers, that the such
litigation should be deferred until he leaves office.

Respondent ~~does not~~ ^{-and cannot-} identify a single instance in which
a court has compelled a sitting President to defend a damages
action directed at him personally. ^{during his term of office} Nor does respondent explain
why a fragmented panel of the court of appeals, rather than this

The President, and
the Nation, should
not be subjected to this
extraordinary
burden

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Court, should decide whether a President may be compelled to do so. Instead, respondent's principal contentions are that this is a "one-of-a-kind case" that can be litigated without interfering with the President's conduct of his office (Br. in Op. 8); ⁽ⁱ⁾ that the separation of powers ^{can} will be protected adequately even if a trial judge retains the authority to overrule the President's judgment as to the importance of his official priorities (Br. in Op. X); ⁽ⁱⁱ⁾ that Nixon v. Fitzgerald, ⁽ⁱⁱⁱ⁾ by providing a President with absolute immunity at the "outer perimeter" of official conduct, ^(iv) and therefore the President is not entitled to protection here (Br. in Op. X); and that history teaches that Presidents may be subjected to litigation in the manner respondent seeks. Respondent is wrong at each turn.

1. This case is neither uncomplicated, nor likely to be isolated. Respondent's lurid recitation of the allegations in the complaint (Br. in Op. 1-3) is evidence, if any is needed, of the wisdom of this Court's observation that "the sheer prominence of the President's office" makes him "an easily identifiable target for suits for civil damages." Nixon v. Fitzgerald, 457 U.S. ___, ___, (19 __). []!!!

In her brief in opposition, respondent characterizes this case as a "very simple dispute about what happened in a very short encounter between two people in a room," and one in which "[d]iscovery and trial . . . will not be burdensome." Br. in Op. at 10. The record, however, reveals that respondent's attorneys in fact intend to use the lenient standards of civil discovery to

are permitted (indeed, encouraged) to request the President to show, in specific detail, that particular affairs of state warrant alteration of the litigation schedule

some be precluded a deferral of this litigation

1. looks like we're blaming the discovery rules
2. we should let them speak for themselves as much as possible

This case as a vehicle for a "wide-ranging"

conduct a far-reaching inquiry into many aspects of the

President's conduct, including matters that go far beyond the

President's alleged limited contacts with the respondents

What we're pretty excited about is . . . [that] [w]e'll be able to ask the President certain pertinent questions . . . Was this a pattern of conduct that involved the use of police for private functions that would not be . . . part of their duty? Are there other women involved? Who are they? . . . [A]ll is on the table in the discovery deposition, including evidence that can lead to admissible evidence. So it's a pretty wide-ranging effort that can be used to present a good case for our client.

C.A. App. 122-23 ¹⁾ ~~(quoting xxx)~~ Respondent's counsel also have stated that they will "exhaustively pursue" this line of inquiry with other witnesses, and ^{that they} may seek to compel ~~an unprecedented~~ physical examination of the President. ^{C.A. App. 117-18} 2)

Respondent, in other words, envisions litigation that not only threatens the President with \$700,000 in damages, but that is specifically calculated both to attack his reputation and to entangle him in the "discovery deposition" process. It is not surprising, therefore, that the district court found that

discovery could not be conducted here "without the heavy involvement of the President through his attorneys," (Pet. App.

76), and it is difficult to think of a better illustration of how a case that purports to be "uncomplicated" litigation (Br. in Op.

can in fact be extraordinarily distracting and burdensome to a President.

This Court should not permit litigants to use this kind of leverage against a President (and indeed against the nation) to extract from this or future Presidents whatever satisfaction they may seek.

G.A. App. 117-118 transcribed comments of Joseph Cammarata, Daybreak CNN television broadcast (Dec. 29, 1994) at

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Memorandum

The dangers of abuse of litigation against an incumbent President are, of course, not limited to this case. Respondent reiterates the panel majority's conception that the "universe of potential plaintiffs" who might sue an incumbent President -- for reasons of partisanship, extortion, or publicity-seeking -- is "small[]." Br. in Op. at _____. But no person becomes President without having been highly prominent, usually for an extended period, in some other capacity in the public or private sector. If the Court allows this case to proceed, it is difficult to believe that other potential litigants, encouraged by the spectacle, will not come forward in this or future Administrations, to use litigation to distract, harass or obtain information about a President by "alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of pretrial motion." (Pet. App. at 27) (Ross, J. dissenting). *[DAS get Kimball's note]*

Respondent asserts that there is no extensive history of litigation *against a sitting President* being used for this purpose. Br. in Op. at _____. But there was no history of Presidents being sued for official acts before Nixon v. Fitzgerald. See 457 U.S. at 753 n.33.² The

select

² The Court in Fitzgerald attributed this to the fact that Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), which permitted damages actions against federal officials for violations of the Constitution, was of relatively recent vintage. But of course common law tort actions have long been available against federal officials, as Justice Harlan noted in Bivens. See id. [DAS]. The more likely explanation for the absence of suits against the President is that -- as we showed in the petition -- it has simply been universally understood that the President cannot be sued for damages while he is in office. See Fitzgerald, 457 U.S. at 758.

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Court granted certiorari in Fitzgerald nonetheless, and afforded President Nixon an absolute immunity -- a ^{much} ~~vastly~~ broader protection than we seek here -- because it recognized the danger that opportunistic litigation presents to the office of the Presidency. 457 U.S. at _____. ^(at) The danger is especially great in the modern setting, where wide-ranging discovery is permitted and the availability of instantaneous, nationwide publicity is routinely used as a tool by litigants. ^(-- as this case amply demonstrates.) The risk of opportunistic litigation is no less in a case of this kind than it was in Fitzgerald, and this Court's review is no less warranted here.

Why not?

The threat to such litigation poses to the independence of the judiciary

2. a. Respondent embraces the panel majority's view that risks to the Presidency can be managed by allowing trial judges to exercise discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it ^(will) ~~could~~ precipitate repeated confrontations between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation schedule be modified because of the demands of his office. As Judge Ross ~~noted below~~, ^(noted below) ~~this approach raises more questions than it answers~~ (Pet. App. 29):

could seem weak

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? [C]an 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?

(INSERT A)

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~~Respondent repeatedly quotes Judge Beam's soothing formulation that a trial judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired." Pet. App. 25, quoted with emphasis in Br. in Op. 8; see also Br. in Op. x. But the prevailing opinion, written by Judge Bowman, established a significantly more stringent standard: the President may seek relief from a trial judge only if he can show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16.~~

~~And when Judge Beam and Judge Bowman reviewed a specific case-management determination made by the trial judge in this case -- the district court's decision to stay the trial, which, as we showed in the petition (cite), rested on its specific judgment about the appropriateness of delay based on the trial court's findings of fact in this case -- they both reversed the determination as an abuse of discretion, without any explanation about why the trial court's evaluation of the particular facts was mistaken. See Pet. App. xx. Certainly the panel majority, in reversing the district court, did not make the finding that, in Judge Beam's words, a trial would not "even slightly impair[]" the President's ability to carry out his office -- a finding that would have been implausible on its face. The disarray in the court of appeals on even the abstract question of what the appropriate standard should be~~

underscores the need for this Court's guidance here. Moreover, this divergency of views, as well as and the panel majority's refusal to defer to the actual exercise of discretion by the ~~district court~~ ^{demonstrates} ~~in this case~~ ^{IT shows}, are in fact symptomatic. They show that the separation of powers cannot reliably be protected by requiring the President to make ad hoc showings about how specific aspects of the litigation schedule will affect his ability to carry out the duties of his office.

b. ~~In seeking to support her argument that trial judges can manage litigation in a way that protects the President's constitutional role,~~ respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. Br. in Op. _____. But the true lesson of those cases is the opposite of what respondent suggests: those cases show how difficult it is for courts to reconcile the conflicting demands of the judicial process, on the one hand, with the responsibilities of the executive branch, on the other.

Moreover, a President who testifies as a witness is involved in a one-time encounter with the judicial branch, and even then, the principle of separation of powers is strained to the limit. Because the process of accommodation is fraught with difficulty, this Court has said it should be undertaken only in cases of imperative need, such as to preserve the broad based public interest and the defendant's rights in criminal prosecutions. [Cites.] By contrast, a President who is a civil

~~defendant faced with personal liability will be involved with a court in every phase of the litigation. The opportunity for tension and conflict between the President and the court thus increase exponentially. The course respondent suggests -- insisting that district courts be given the authority manage the President's schedule as a defendant in personal damages litigation -- pushes the separation of powers well past the breaking point.~~

~~It also should be noted that no court has ever compelled a President even so much as to testify in a civil case, and that insofar as the Presidency is concerned, this Court has on more than one occasion drawn a line between civil and criminal proceedings. See Nixon v. Fitzgerald, 457 U.S. at 754 & n. (public interest in criminal law enforcement is greater than its interest in civil matters, and thus warrants potential intrusions on the Presidency in criminal cases); United States v. Nixon, 418 U.S. __, __ n. __ (1974) (reserving the question of whether a President can be compelled to provide evidence in civil proceedings). Thus, there is no basis to rely on instances where Presidents have appeared as witnesses in criminal proceedings, to conclude that a President is required to participate as a defendant in a civil damages action. To the extent that the panel majority's decision does so, it calls for review by this Court.~~

~~3.a. By miscasting both the decision in Fitzgerald and the nature of the relief the President seeks, the respondent hopes to persuade the Court that the President's contentions are~~

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also 224

40 (3A.)

not worthy of consideration. First, the brief in opposition 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. ~~of course~~ the President seeks no such thing, and never has. The President has never suggested that he is absolutely immune from liability for unofficial acts, and respondent's elaborate arguments against that proposition (Br. in Op. xx, xx, xx) are simply beside the point -- a determined effort to confuse the issue.

what's the
purpose
of this
argument?

~~Rather,~~ throughout this case, the President has asserted only that the responsibilities of the Presidency warrant deferring this litigation until he leaves office. ~~The President seeks a stay, with an immunity from liability.~~ And while respondent, like the panel majority, engages in overblown rhetoric to the effect that the President is seeking to place himself "above the law" and that the relief we seek is "unprecedented," the fact is that even respondent finds herself forced to concede the validity of the underlying principle for which we contend. She acknowledges that the President is not like any other litigant, and that the courts must show "deference" and "solicitude" for the President's special responsibilities. (Br. in Op.X.)

unique

exceptional cases
require a President's
testimony,
and civil
cases where
non factors
are not
present.
see (cases)

~~Thus there is no dispute about whether courts are required to accommodate the Presidency, but only about how the Presidency is to be accommodated. In this regard, no court has ever, until now, required that a President to submit, as a defendant, to a civil damages action directed at him personally or to testify in a civil case as a witness. It is even doubtful~~

② In fact, no court has ever required a President even

Assure

explain in the petition, this Court has drawn a sharp line between criminal cases, where both the public interest and the defendant's constitutional rights might be

submit to litigation, then

9 The fundamental disagreement is whether the President must seek this "solicitude," ~~not in half~~ at each turn of the litigation, or whether the separation of powers requires courts

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that a court may enjoin the President in the performance of his official duties -- a proceeding that presents much less of a danger of distraction to the President personally than the kind of litigation respondent pursues. See Franklin v. Massachusetts,

505 U.S. 788, 802-03 (1992) (plaintiff's opinion of O'Connor, J., citing Mississippi v. Johnson, 4 Wall. 475, 498-99 (1867)); see also Franklin, 505 U.S. at xxx (Scalia, J., concurring). Yet the

respondent and the panel majority would have a sitting President participate in this entire course of litigation, and make repeated, piecemeal showings that multiply the opportunities for head-on confrontations between the court and the Executive. We

submit that the approach most consistent with the President's constitutional role and separation of powers is to defer the litigation entirely until the defendant leaves office, and thereby avoid separation of powers problems altogether.

b. The respondent and the panel majority discuss Fitzgerald as if it affirmatively rejected the President's position here. Pet. App. 8-9, 10-11; Br. in Op. at 16, 23. This simply is not the case. The issue confronting the Court in Fitzgerald was whether a former President enjoys qualified immunity or absolute immunity for official acts -- not whether a sitting President is entitled to a temporary buffer from civil damages claims that are based on conduct outside the scope of his official duties. While the rationale of Fitzgerald speaks to the issue presented here -- and strongly supports the President's position -- Fitzgerald did not resolve it, which is why review by

Somehow
add

highlight
suggest that

insert

insert D

this Court is warranted.

(Br. in Op. 16, 17)
(Respondent makes much of)

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Chief Justice Burger's comment about immunity for unofficial acts, quoted by the respondent (Br. in Op. 16, 17), also must be understood in this context. The only view Chief Justice Burger expressed was that ^(the doctrine of) absolute immunity ^(does) beyond official acts -- a statement from liability did not extend to personal misconduct, a position with which we concur. 457 U.S. at 753, 761 n.4 (Burger, C.J., concurring). ^{See id. at 759.} ^{Respondent does not mention that} He was speaking, moreover, in a case involv-

ing a former President. There is nothing in Chief Justice Burger's concurring opinion, or in the setting in which it was written, to support the conclusion that he would permit an incumbent Presidents to be subjected to a court's jurisdiction at the whim of private plaintiffs. Indeed, Fitzgerald's counsel asserted that a district court could stay such proceedings against a sitting President. See Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1788 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 20 (available on LEXIS). ^(legitimate) ^{Chief Justice Burger left no doubt,} ^{about his view that a sitting President} ^{should not be subject to} ^{damages suits.}

4. Respondent asserts (Br. in Op. 19-20) that President Jefferson "lost" the principle for which we contend. In fact, our history, beginning at least with President Jefferson, ^{teaches that any efforts} ~~has been that in this area~~ subjecting a sitting President personally to the process of the courts ^(should be upheld) ~~judicial inroads on~~ the executive branch have been permitted infrequently, only in cases of imperative need, and then only to the most limited

Chief Justice Burger also said:
[quote from just before 763 n.6]
This is our position exactly.

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extent possible. See Fitzgerald, 457 U.S. at 753-54.³ What respondent seeks -- allowing a sitting President to be sued for damages in his personal capacity -- would be an ^{unjustified} intrusion, far beyond anything that has ever before been allowed, or even contemplated. To allow such an intrusion, without even so much as this Court's review, would be utterly unwarranted.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

the entirely different question whether a President may be required to answer in a criminal case.

in which a President was merely a witness.

³ In the face of this Court's demonstration in Fitzgerald that the Framers contemplated that Presidents would not be subject to suit while in office (see Pet. 10-11, quoting 457 U.S. at 751 n. 31), respondent cites four cases. Three involve criminal proceedings, a situation which, as we have demonstrated, is clearly distinguishable from a President's participation as a defendant in a civil action. See Petition at Fitzgerald, 457 U.S. at 754. The fourth, National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1973) (en banc) is both inapposite and of questionable vitality. In NTEU, the President was sued for injunctive relief in his official capacity, as head of the executive branch, and was not required to defend personally the litigation. Moreover, although the court of appeals opined that it had the authority to mandamus President Nixon to perform a ministerial duty, in the end, it refrained from exercising that authority "in order to show the utmost respect to the office," and to avoid, if at all possible, any clash between the judicial and executive branches, and proceeded by way of declaratory judgment instead. 492 F.2d at 616. If anything, NTEU teaches that courts bend over backwards to avoid entangling the President in their jurisdiction. Moreover, the viability of even the opinion expressed in NTEU -- that a President could be enjoined -- is in doubt, in view of the more recent discussion of that issue in Franklin v. Massachusetts, 505 U.S. 788 (1992). See id., 505 U.S. at 802-803 (plurality opinion of O'Connor, J.); id. at 826 (Scalia, J., concurring).

--and in any event supports our position.

go to the appeals court.

Contrary to respondent's suggestion.

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INSERT A

The brief in opposition seeks to create the impression that trial judges will be highly deferential in reviewing Presidents' requests for changes in the litigation schedule.¹ ~~This is, of course, just ersatz reassurance.~~ ^(B.1) Once trial judges are vested with discretion, they will inevitably exercise it in different ways ^(C) and while some may be deferential to the President others will surely not be. ~~But~~ ⁱⁿ any event, respondent's assertion is simply beside the point. The affront to the separation of powers inheres in the very fact that trial judges are empowered to review the President's schedule and decide—literally—whether he is spending his time in the right way or whether he can afford to devote more attention to a private civil action.

Again one need look no further than this case to see the need for a simple rule that litigation is to be deferred until the President completes his service in office. The district court below did make a specific case-management determination, based on the particular facts of this case: she ruled that while discovery could go forward, the trial of the case should be stayed until the President left office. Pet. App. xx. The panel majority,

¹For example, the brief in opposition repeatedly quotes Judge Beam's formulation, according to which a trial judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired." Pet. App. 25, quoted with emphasis in Br. in Op. 8; see also Br. in Op. x. But that is not the standard established by the prevailing opinion below, and essentially ignored by respondent in the brief in opposition. The prevailing opinion stated that the President could seek relief from a trial judge only if he could show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16. Nor, of course, is Judge Beam's formulation the one that he and Judge Bowman applied. It is palpably implausible to say that the trial of this case would not "even slightly impair[]" the President's ability to carry out his duties, yet the panel majority reversed, as an abuse of discretion, the district court's decision to stay the trial until the President left office.

inserts - p.1

notwithstanding its purported reliance on the discretion of trial judges, promptly reversed the stay of the trial as an abuse of discretion, without even an explanation of why the district court's evaluation of the particular facts was mistaken. Pet. App. xx. This clash between the district court and the court of appeals—like the fact that even the two members of the panel majority could not even agree with each other on as formulation to govern trial judges' exercise of their discretion (see n. x, supra)—is symptomatic

comes out of now here delete

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of the DC
is...

INSERT B

By contrast, a defendant faced with personal liability will be involved throughout the course of the litigation, in every phase. The sources of tension and conflict between the President and the courts thus increase exponentially. Moreover, a President who is a third-party witness ordinarily faces little risk of any kind to his reputation or his financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. The burdens and distractions that ensue will inevitably be far more intrusive than when the President is a witness.

Nonetheless, even in the far less problematic context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking and fraught with difficulty, and should be undertaken only in cases of imperative need. [see Elena's comment about the need to provide evidence not just assert. Can we insert quotations from the witness cases about how difficult the process of accommodation is? Maybe in footnote if long.] Even when the President is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests—insisting that district courts manage the President's

junior-02

schedule as a defendant in personal damages litigation—pushes the separation of powers well past the breaking point.

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INSERT C

This suggestion is, to say the least, odd: in Fitzgerald, ^{every} the plaintiff, although seeking to hold then-former President Nixon liable in damages, conceded in his brief that in litigation against a sitting President could be stayed (79-1738 Resp. Br. 28)—reflecting the universal understanding, until this case, that a President cannot be subject to personal damages litigation during his term of office.

INSERT D

The Court decided that the President, alone among all public officials, is entitled to this exceptional protection. That conclusion is obviously fully consistent with our view that a President who is sued for acts outside the scope of his office is entitled to the much more limited relief of a temporary stay of the litigation. Indeed, as we showed in the petition, a crucial aspect of the Court's reasoning in Fitzgerald was that personal damages litigation can distract a President from his duties while he is in office.

insert-07

THE WHITE HOUSE

WASHINGTON

May 22, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: JONES LITIGATION

As the Washington Times reported today, Reps. Dornan and Stump are attacking the President for claiming an entitlement to a deferral of litigation under the terms of the Soldiers' and Sailors' Relief Act. I am attaching the materials they are circulating, as well as the relevant pages of the cert petition.

I believe the problematic sentence on the top of page 15 was the result of the SG's office suggesting to Bennett, after reviewing a draft of the brief, that the President could ask for relief directly under the Soldiers' and Sailors' Act. Bennett liked the idea and inserted the sentence.

In the Washington Times, Bennett notes that the reference to the Act is fleeting, says "we're not pushing that argument," but acknowledges that the petition argues that the Act is applicable to the President. I do not think we should say even this much. I think we should say that the cert petition is not requesting relief on this basis and that the petition used the Act (along with several other legal rules) as a simple analogy to show that courts often grant deferrals of litigation.

I would therefore recommend a response to the Dornan/Stump charges that goes something as follows:

These charges are a deliberate ~~and desperate~~ *and unfair* misreading of the President's legal papers in hopes of gaining political mileage.

~~In a 21 page petition, discussion of the Soldiers' and Sailors' Civil Relief Act, is limited to three sentences.~~

~~That Act~~ is mentioned in a section of the petition arguing *Simply* that it is not unusual for courts to do what the President seeks -- to defer litigation in order to serve important public interests. The Soldiers' and Sailors' Act is simply an example -- the petition also offers five others -- of a rule of law that commands such a deferral. All of these are analogies; they are not the basis for the petition for a stay of litigation.

The President asked for a stay under established principles

of constitutional law, in order to protect the ability of a President to perform his constitutional duties free from the distraction of harassing litigation. He did not claim -- even though as a technical point of law he might have been able to do so -- ~~for~~ ^(any) relief under the Soldiers' and Sailors' Act.

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THE WHITE HOUSE

WASHINGTON

May 22, 1996

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MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: JONES LITIGATION

As the Washington Times reported today, Reps. Dornan and Stump are attacking the President for claiming an entitlement to a deferral of litigation under the terms of the Soldiers' and Sailors' Relief Act. I am attaching the materials they are circulating, as well as the relevant pages of the cert petition.

I believe the problematic sentence on the top of page 15 was the result of the SG's office suggesting to Bennett, after reviewing a draft of the brief, that the President could ask for relief directly under the Soldiers' and Sailors' Act. Bennett liked the idea and inserted the sentence.

In the Washington Times, Bennett notes that the reference to the Act is fleeting, says "we're not pushing that argument," but acknowledges that the petition argues that the Act is applicable to the President. I do not think we should say even this much. I think we should say that the cert petition is not requesting relief on this basis and that the petition used the Act (along with several other legal rules) as a simple analogy to show that courts often grant deferrals of litigation.

I would therefore recommend a response to the Dornan/Stump charges that goes something as follows:

These charges are a deliberate -- and desperate -- misreading of the President's legal papers in hopes of gaining political mileage.

In a 21-page petition, discussion of the Soldiers' and Sailors' Civil Relief Act is limited to three sentences.

That Act is mentioned in a section of the petition arguing that it is not unusual for courts to do what the President seeks -- to defer litigation in order to serve important public interests. The Soldiers' and Sailors' Act is simply an example -- the petition also offers five others -- of a rule of law that commands such a deferral. All of these are analogies; they are not the basis for the petition for a stay of litigation.

The President asked for a stay under established principles

of constitutional law, in order to protect the ability of a President to perform his constitutional duties free from the distraction of harassing litigation. He did not claim -- even though as a technical point of law he might have been able to do so -- ~~for~~ ^(any) relief under the Soldiers' and Sailors' Act.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. fax cover sheet	David Strauss to John Quinn; re: Certiorari Petition (1 page)	04/26/1996	P5	229
001b. memo	Geof Stone & David Strauss to Bob Bennett & Amy Sabrin; re: The Petition (pages)	04/26/1996	P5	230
002. draft	Amy Sabrin to Jack Quinn et al; re: Draft petition for Certiorari in Jones v. Clinton (33 pages)	05/06/1996	P5	231
003. draft	re: Petition for Writ of Certiorari - William Jefferson Clinton vs. Paula Jones (pages)	05/11/1996	P5	232

COLLECTION:

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

FOLDER TITLE:

Paula Jones Certiorari Petition [4]

2009-1006-F

ex-2 027

RESTRICTION CODES

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

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

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

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

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

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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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,

to: Kathy, Bruce, Elena

Sincerely,

David

This is good stuff,
esp. for a first impression.
We should discuss how
to help ensure their
smooth integration into
Bob's team —

Jack

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
MEMORANDUM



Friday, April 26, 1996

To: Bob Bennett
Amy Sabrin

From: Geof Stone
David Strauss

Copy: Jack Quinn

Re: The petition

Here are some thoughts on the certiorari petition. DAS has already talked with Amy Sabrin about several of these and we all seem to be on the same page.

First, a general thought. Perhaps the biggest single hurdle for us to overcome is the sense that our approach would place the President "above the law" and would give him a special privilege that no one else has. To deal with this, it might be worth emphasizing, to a greater degree than we have so far, this point: in seeking a deferral of the litigation, the President is simply asking for something that the legal system already provides to other parties in a variety of situations. There are numerous well-established legal doctrines that already, in various contexts, require plaintiffs to defer the prosecution of their claims, sometimes for several years. These include abstention doctrines, exhaustion doctrines, doctrines allowing interlocutory appeals, automatic stay doctrines in bankruptcy, as well as the examples mentioned in the court of appeals briefs (the Soldiers' and Sailors' Civil Relief Act and the deferral of civil proceedings in favor of a parallel criminal prosecution). There are probably other examples that we can dig up.

These other doctrines aren't exactly like what we're seeking for the President; the other side will be able to distinguish them in various ways. But the differences are matters of degree, not kind. It is very far from unheard of, in our system, for civil plaintiffs to find that, because of the need to accommodate other interests, they have to wait a substantial period before pursuing their claims in court.

Our papers in the court of appeals do a terrific job of making the argument—which will obviously be central to our position before the Supreme Court—that the President has extraordinary responsibilities and is therefore entitled to protection from civil litigation while in office. But the emphasis on the extraordinary nature of the President's job, while completely justified, may tend to create the impression that we're asking for an extraordinary form of relief. This in turn feeds the other side's "above the law" sloganeering. In fact, the relief we're seeking is quite comparable to what the courts already afford in many other contexts—and our reasons for asking for a deferral of the case are much more compelling than the reasons present in those other contexts.

Here are some specific thoughts on how the petition might unfold:

Questions Presented. Tentatively at least, it seems to us that the questions presented should be along these lines: (1) Whether, in the absence of exceptional circumstances, a district court is required to defer the trial of a civil suit against the President. (2) Whether a district court has discretion to defer the trial of a civil suit against the President.

Three comments:

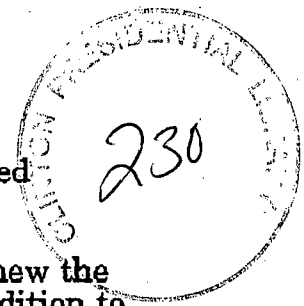
i. At least in the petition, we should follow the lead of *Nixon v. Fitzgerald*, where the plurality did not explicitly say that Presidential immunity was required by the Constitution. (The *Fitzgerald* formulation was that immunity is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers." 457 U.S. at 749.) We should use the same formulation, or one like it. It might look like overreaching to go further than *Fitzgerald* did.

ii. It would be a good idea, we think, to avoid calling the protection we're seeking an "immunity," given the way the court below tried to capitalize on that term. (As it happens, what we're asking for isn't technically an immunity at all—it's just a continuance, or the equivalent.)

iii. We will obviously have to work out how to characterize the presumption in favor of deferral; since we don't argue for an absolute bar, under what circumstances may the courts entertain a claim against the President? We are potentially vulnerable to an endless parade of hypotheticals here. If we are too restrictive, we look as if we're overreaching; but if we would allow relatively minor suits against the President, we risk trivializing our position. For the most part, though, this problem can wait until the merits brief.

Jurisdiction. There is of course a question whether the court of appeals had jurisdiction over Jones's appeal. A district judge's decision to postpone a trial is not an appealable final order; relief if any is by mandamus. The court of appeals decided it had "pendent" jurisdiction over the claim, but that is questionable in light of the Supreme Court's recent decision in *Swint v. Chambers County Commission*. (The Eighth Circuit said that the two

issues were inextricably intertwined; but our two questions presented disentangle them. Analytically they're entirely distinct.)



Although we shouldn't spend a lot of space on it, we should renew the jurisdictional objection in the Supreme Court for two reasons (in addition to the fact that it's jurisdictional): the Court will have a harder time denying certiorari if there is a serious jurisdictional issue in the case; and we might save the district court's order deferring the trial even if we lose the discovery part of the case.

Statement. This should be pretty straightforward. It should make the panel majority opinion look extreme (not a difficult task) and highlight the dissent and division below. We can use the dissenting opinions to make several of our points.

Reasons for granting the petition. We should start off with a paragraph or so summarizing our principal arguments. As we see it, there are four:

1. The court of appeals' decision is inconsistent with *Nixon v. Fitzgerald* and with "the constitutional tradition of the separation of powers."

a. Here we should emphasize the language of *Fitzgerald* and the historical sources cited by the *Fitzgerald* opinion (Story, Jefferson, and the Framers). The main pitch should be that the court of appeals simply ignored one entire aspect of *Fitzgerald*—that immunity is needed not just to ensure fearless decision-making but to protect the President against distraction and harassment while he is in office. We should rely on Justice Powell's language to make our arguments to the maximum extent possible.

b. This might be a good place to quote the famous Learned Hand aphorism to the effect that, illness aside, being involved in litigation is the worst thing that can happen to anyone. It's no different for a President, except that his litigation, like his illnesses, becomes the nation's problem.

c. Our argument on the second question is that even if the President didn't have a right to have the litigation deferred, the district judge certainly had the discretion to defer the trial. We should make this argument not as an explicit fallback, but along the lines of: the court of appeals' ruling on this point was an even more egregious error. This discussion should be short; we want to heighten the impression that the court of appeals was off the rails, but we don't want to make a compromise decision by the Supreme Court (essentially reinstating the district court's decision) seem too attractive to the Justices.

2. The cure prescribed by the court of appeals—"judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule" (slip op. 13)—is worse than the disease. District judges—or state trial judges—will literally be passing judgment on

whether the President is spending his time in the right way. We should be as concrete as possible in giving examples. We should consider, if not here then in the merits brief, describing the President's actual schedule for some period of time to make the point as concrete and vivid as we can.

3. The relief we seek—deferral of the litigation—is, contrary to the panel majority, far from extraordinary and unknown. In fact deferral is required in many other contexts, for reasons that do not approach in importance the reasons we assert here. This is the point we described at the beginning of this memorandum.

4. This is an issue of obvious national importance. It would be utterly incongruous for this issue to be decided by a fragmented panel of the Eighth Circuit. For the Court not to decide it now would mean that the President would have to undergo discovery and a trial—even though he might have a constitutionally based right not to. If he prevailed at the trial the Court would never even have an opportunity to vindicate his claim. These are, of course, precisely the reasons that the Court has recognized a right to an interlocutory appeal in cases of this kind, and they call for a grant of certiorari here.

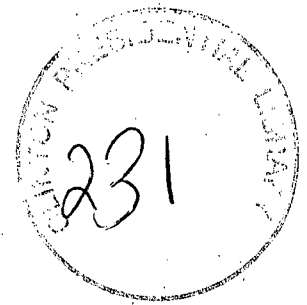
Finally, there are two points that we will want to make in some form—perhaps briefly in the petition, subsidiary to point 1 above, then at greater length in the merits brief—but that have to be handled with delicacy.

a. We want to make the point that unless we prevail here, suing the President—in the hope of forcing him to give a deposition, interrogating his associates, requiring him to hand over his family's financial records, and so on—will become a popular sport. People will do it to pursue partisan objectives, to extract a settlement, or just to gain publicity for themselves.

The problem with making this point is that there of course haven't been a lot of suits like this. There seem to be several ways of dealing with this problem. First, there is language in *Fitzgerald* that will help us (about "the sheer prominence of the President's office" and how he is "an easily identifiable target for suits for civil damages" (457 U.S. at 752-53; footnote omitted)). Second, *Fitzgerald* itself recognized that "there is no historical record of numerous suits against the President" (457 U.S. at 753 n.33). *Fitzgerald* thought that was because the *Bivens* remedy was of recent vintage, but public officials were sued in tort before *Bivens*. Third, there may be material we can cite about the abuses of civil litigation generally—how it's used to harass CEOs and celebrities, for example. Finally, the reason Presidents have not been sued often may be that it's simply been assumed—as the Framers assumed—that you can't do it. If it now becomes clear that you can, why wouldn't we expect to see such suits with some frequency.

b. We have to deal with the argument that standard devices, already in place, will protect the President against harassing litigation—Rule 11, summary judgment, and (if the suit relates to prior official conduct)

qualified immunity. One possible answer, which we say in one of our court of appeals briefs, is that it's easy to draft a complaint that raises factual issues that can't be resolved without a trial. I believe there has been litigation about this issue in the qualified immunity context, and it may be possible to show that this problem—complaints that raise credibility questions and thus can't be resolved without a trial, but that appear in some instances to be insubstantial and designed for harassment—is in fact a vexing and so far unresolved issue. Thus the other side simply cannot say that the devices in place will already protect the President against harassing litigation.



PRIVILEGED AND CONFIDENTIAL
SUBJECT TO THE ATTORNEY WORK PRODUCT
AND ATTORNEY-CLIENT PRIVILEGES

M E M O R A N D U M

May 6, 1996

TO: Jack Quinn
Elena Kagan
Geoff Stone
David Strauss

FROM: Amy Sabrin

Re: Draft Petition for Certiorari in
Jones v. Clinton

Attached please find a working draft of the body of the above-referenced petition. David Strauss is writing a short section to go at the end regarding the issues surrounding the discretionary stay/stay of trial.

In order to expedite review, I am sending you this draft, even though we need to plug in a number of citations. This draft incorporates the points from David and Geoff's outline, although not necessarily in the order proposed.

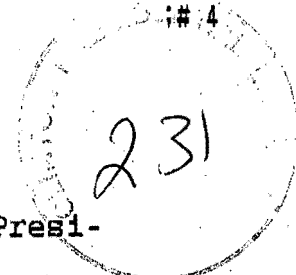
We are advised by our printer that in order to meet the 30-page limit, the typed draft (with margins set as shown here) should be no more than 35 pages. Accordingly, we will likely have to cut this draft by several pages, especially once the citations are added.

STATEMENT OF THE CASE

On January 20, 1993, petitioner William Jefferson Clinton became President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed a civil damages complaint against the President in federal district court for the Eastern District of Arkansas. The complaint was premised in substantial part on conduct alleged to have occurred three years earlier, and therefore, outside the scope of the President's official duties. 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. Jurisdiction was founded on 28 U.S. §§ 1331, 1332 and 1343. Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts.¹

¹ Specifically, the first two claims allege that in 1991, when the President was Governor of Arkansas and Mrs. Jones a state employee, he subjected the respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (1988). A third claim alleges that the President thereby inflicted emotional distress upon Mrs. Jones. Finally, the complaint alleges that in 1994, the President defamed Mrs. Jones through statements attributed to the White House Press Secretary and his lawyer, denying her much-publicized allegations against the President.

Mrs. Jones further alleges that State Trooper Danny 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.



Before answering or filing any other response, President Clinton informed the district court that he intended to move to defer the litigation until he completed his service as Chief Executive, and asked the court to resolve this threshold issue before requiring the President to undertake any other burdens of litigation. The court agreed to do so. Jones v. Clinton, 858 F. Supp. 902 (E.D. Ark. 1994).²

The President thereafter promptly moved the court to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office, asserting that such a course was implicit in, and mandated by, the unique and singular nature of the President's Article II duties and principles of separation of powers. In so arguing, the President relied in part on the rationale of Nixon v. Fitzgerald, 457 U.S. 731 (1982), which held that Presidents enjoy absolute immunity from civil damages based on conduct within the outer perimeter of their official duties. Recognizing that the present case differs from Fitzgerald in that it is premised in large part on conduct outside the scope of official duties, the President did not seek immunity from liability, but asserted that some limited protection nonetheless was required because the defendant here was a sitting President.

Alternatively, the President asserted that the litigation should be stayed in the public interest, as an exercise of

² Trooper Ferguson answered the complaint, and supported the President's position that the litigation should be stayed pending resolution of the presidential immunity issue.

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judicial discretion. Moreover, due to the particular allegations in this case, which as a practical matter made the claims against Trooper Ferguson inseparable from those against the President, it was asserted that the entire litigation should be held in abeyance. The Solicitor General filed a Statement of Interest on behalf of the United States, also asserting that an incumbent Chief Executive should not be required to litigate private civil damages suits of this kind, and that the entire litigation should be stayed.

The district court denied the President's motion to dismiss, and held that all discovery could proceed immediately. The court, however, stayed trial until the President's term of office expired. Jones v. Clinton, 869 F. Supp. 690, 699 (E.D. Ark. 1994). The court found Fitzgerald to be "sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention under the circumstances would be to interfere with the conduct of the duties of the office," and that these concerns "are not lessened by the fact that the [conduct alleged] preceded his Presidency." Id. at 698. Accordingly, the court stayed trial "[t]o protect the Office of President ... from unfettered civil litigation, and to give effect to the separation of powers." Id. at _____. The court also found that staying trial was an appropriate exercise of judicial discretion pursuant to Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket. Id. at 699.

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The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found "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." Id. The trial court further concluded that the plaintiff would not be significantly inconvenienced by delay of trial. Id. Nevertheless, the court found "no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Id. The court suggested that this would avoid potential problems that might be caused by the possible evaporation of evidence with the passage of time. Id.

President Clinton timely appealed those parts of the district court's order denying his motion to dismiss and permitting discovery to go forward. The Solicitor General, representing the United States, submitted an amicus brief in support of the President's position, as did a group of 18 scholars. Mrs. Jones cross-appealed the order staying trial, supported by 11 academicians and the American Civil Liberties Union as amici. In opposition, President Clinton questioned whether the Court of Appeals had jurisdiction to entertain Mrs. Jones' cross-appeal from the stay of trial. Citing Swint v. Chambers County Commission, 115 S.Ct. 1203, 1209-12 (1995), the President argued that Mrs. Jones could not use the President's appeal from a denial of immunity as a vehicle to challenge an otherwise unreviewable decision to stay proceedings.

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Trooper Ferguson did not participate in the appeal. Nonetheless, the district court stayed the litigation as to both defendants pending appeal. Jones v. Clinton, 879 F. Supp. 86 (E.D. Ark. 1995). The court again found that "Trooper Ferguson is a defendant, but the case revolves around the alleged actions of then-Governor Clinton, the central figure in this action." Id. at 88. Accordingly, the court could not "imagine how proceedings can go forward against Ferguson without the heavy involvement of the President through his attorneys." Id.

On January 9, 1996, a divided panel of the Eighth Circuit affirmed the district court's decision denying the motion to dismiss and allowing discovery to proceed, and reversed the district court's order staying trial. Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996). Three opinions resulted; a majority, a concurrence and a dissent.

The majority, finding the reasoning in Fitzgerald "inapposite where only personal, private conduct by a President is at issue," id. at 1360, determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Id. at 1363. At the outset, the opinion stated that President Clinton was seeking "immunity from civil liability for his unofficial acts," id. at 1356, and analyzed the case on that basis. It subsequently acknowledged that President Clinton here sought only to defer litigation, rather than immunity from liability. This distinction was deemed unavailing, however, because the majority found

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that "Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws," and this right overrode any interests asserted by the President. Id. at 1359-60 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)).

The court further held that it would be an abuse of discretion to stay litigation altogether against an incumbent President where the Constitution, as construed by the majority, did not require it. "[P]residential immunity is not a prudential doctrine fashioned by the courts," the majority found. "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." Id. at 1362.

The majority also rejected the President's argument that separation of powers could be breached by a trial court exercising control over the President's time and priorities, through the supervision of discovery and trial, and the issuance of orders. 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." Id. at 1361. If the President believed that any order of the trial court impeded his ability to function as Chief Executive, the majority continued, his remedy was to seek a writ of mandamus. Id. at 1363. It put the burden on the President to make a particularized showing that court order intruded upon his ability to

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perform a specific and clearly articulated presidential duty, and expressed confidence that the district court would exercise its broad discretion to control litigation so as to avoid thwarting the performance of presidential duties. Id. at 1362.

This discretion, however, was not deemed so broad as to sanction the stay of trial ordered here. The Court of Appeals found it had "pendent appellate jurisdiction" to entertain Mrs. Jones' challenge to that stay, id. at 1357 n. 4 (citing Kincade v. City of Blue Springs, Mo., 64 F.3d 389, 394 (8th Cir. 1995)), and then reversed the stay as an abuse of discretion. "Such relief would be the functional equivalent to a grant of temporary immunity to which. . . Mr. Clinton is not constitutionally entitled," the majority found. Id. at 1361 n.9.

The concurrence was offered to expand on several points. Id. at 1363 (Beam, J., concurring). First, Judge Beam stated his view that civil plaintiffs have "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," and that the protection sought by the President would contravene these rights. Id. at 1363-1365. Judge Beam next acknowledged that potential "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" was a matter of "major concern," but believed the present litigation was "relatively uncomplicated" and could be managed with a "minimum of impact on the President's schedule." Id. at 1365-66. This could

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be accomplished by the President choosing to forego attending his own trial or being involved in discovery, or by limiting the number of pre-trial encounters between the President and Mrs. Jones' counsel, Judge Beam suggested. Id. at 1366. Finally, Judge Beam felt it necessary to underscore that the majority opinion did not prevent a trial judge from delaying or rescheduling any proposed action by any party if it would imperil the duties of the President even slightly. Id. at 1367.

The dissent would have found that the demands of the President's constitutional duties and principles of separation of powers justified staying the litigation altogether until he leaves office. Id. at 1367-70 (Ross, J., dissenting). It disputed the majority's interpretation of Fitzgerald, asserting that the "language, logic and intent" of that case strongly supported deferring civil litigation against an incumbent President, even if the claims were based on private conduct. Observing that "no other branch of government is entrusted to a single person," the dissent found that

[t]he 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. . . .

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 deserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution.

Id. at 1367.

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Judge Ross also was concerned that private civil suits against sitting Presidents would "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." Id. at 1367-68. In this vein, he listed a number of questions left unanswered by the majority about how a district court could manage litigation where the President is a party, without intruding on a President's authority:

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?

Id. at 1369. "Where there is no urgency to pursue a suit for civil damages," the dissent concluded, "the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office." Id.

Judge Ross further observed that postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Id. He would permit exceptions in exceptional cases: litigation would be allowed to proceed if a plain-

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tiff could "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that it will not significantly impair the President's abilities to attend to the duties of his office." Id. at 1370.

On January 23, 1996, President Clinton filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the Eighth Circuit, as did the Solicitor General as amicus. The petition was denied on March 28, 1996, with one judge dissenting.

"My colleagues," the dissent wrote, "would put all the problems of our nation on a pilot control and treat as more urgent a private lawsuit that even the appellant delayed filing for at least three years." Jones v. Clinton, Order Denying Suggestion For Rehearing En Banc (March 28, 1996) at 2 (McMillian, J., dissenting). Judge McMillian also expressed "every confidence that the issues of national concern in this case relating to the judiciary's relationship to the presidency will command the attention to the United States Supreme Court." Id. at 5.

REASONS FOR GRANTING THE PETITION

I. Introduction.

This case presents issues of profound consequence to both the Presidency and the Judiciary. The question here is how best, consistent with the Constitution and separation of powers, to prioritize the public and private interests that are implicat-

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ed when a court is asked to exercise jurisdiction over a sitting President as a defendant in private civil damages litigation.

The President asserted that private civil damages claims, even though premised on conduct outside the scope of official duties, ought to be deferred until the President's term

~~in office is completed in order to command a Chief Executive's~~
ability to execute his official duties effectively and independently. This circumscribed protection is founded upon public policy, history and the structure of our government, and is implicit in the nature of the President's constitutional role. It is calibrated to preserve the plaintiff's potential remedies while protecting the public's right to have the individual they elected President available to perform the unique and demanding responsibilities assigned by the Constitution exclusively to that officer. It also would minimize the potential for breaches of separation of powers that exists any time a court asserts jurisdiction over an incumbent President and thereby gains authority to command the Executive's time and attention.

Relieving a President temporarily of the requirement to defend litigation under these circumstances does not place a President "above the law"; it means only that a particular remedy, money damages, may not be immediately available to a plaintiff. The President would remain amenable to suit for damages upon leaving office, and would be subject as well to many other forces that regulate a President's private conduct, such as constant scrutiny by the press. See Fitzgerald, 457 U.S. at 757.

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Deferring litigation in these circumstance is similar to protections provided to other litigants by statute or by courts in a myriad of situations where public interests override the need to adjudicate promptly individual civil claims. Providing a temporary buffer from litigation, the President asserted, is the appropriate method to protect the public and private interests here as well.

The Eighth Circuit rejected this position, holding not only that private civil damages claims based on unofficial conduct may go forward against an incumbent President, but that they must without exception go forward. The majority held that the Constitution does not explicitly or implicitly confer any form of immunity on the President for private conduct, and that short of the Constitution, there is no basis for a district court to defer such litigation. Moreover, the court found that the plaintiff had a constitutional interest in the expeditious adjudication of her claims that overrode any interests asserted by the President, and that it would be an abuse of discretion to stay proceedings here, absent a constitutional mandate requiring the district court to do so.

This momentous holding by a fragmented Court of Appeals raises compelling questions of law that have not been, but ought to be, settled by this Court. In the view of the dissenters as well as ourselves, the decision is inconsistent with Nixon v. Fitzgerald and out of step with historical sources addressing the relationship between the courts and the Presidency. The inflexi-

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ble manner in which the majority resolved the issue also exacerbates the separation of powers concerns that are presented by any litigation involving an incumbent President. Accordingly, review by the Supreme Court is warranted.

Now, moreover, is the appropriate juncture 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 constitutionally-based public interests he seeks to vindicate and could foreclose subsequent review by the Court. Moreover, if the decision below is allowed to stand, federal and state courts could be confronted with a multiplicity of private civil damage complaints against incumbent Presidents. Without guidance from this Court as to whether such litigation should proceed or how it would be managed, more and more plaintiffs will be willing to use the civil justice system as a vehicle to advance private or political agendas at the expense of the public's interest in an unimpeded Presidency. Having to defend against such claims increasingly would enmesh Presidents in the judicial process, and the courts in the political arena, to the detriment of both the nation and the Judiciary. It is therefore critical that the Supreme Court review these issues now.

Review is further warranted because the Eighth Circuit's reasoning rests on the fallacious premise that the President here is seeking extraordinary relief available to no other defendant. The President here does not seek immunity from

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liability for private conduct, but asks only to hold litigation in abeyance. Similar relief is provided to a variety of litigants in other situations where the public interest requires, even without a constitutional mandate requiring such protection, and it is not thought in those situations to impair the plaintiff's right to access the courts to seek redress. Such protection should be available to the President as well.

Finally, the Court of Appeals effectively held that a defendant's status as President was not a factor to be considered by a trial court when deciding whether to stay proceedings. This undue constriction of a district court's otherwise broad discretion to stay litigation is so far a departure from the accepted and usual course of judicial proceedings, and is so at odds with this Court's pronouncements about the level of deference that is to be accorded the Presidency, as to warrant the exercise of the Supreme Court's supervisory powers in this case.

II. The Issue Of Whether A Court Is Required To Defer Private Civil Damages Litigation Against An Incumbent President Is An Important Question Of Federal Law That Should Be Settled By The Supreme Court.

Historically, the Court has shown "special solicitude" to a President's "claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers," Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982), and has reached out to review lower court decisions that touch upon the relationship between the courts and the Executive. See, e.g., Franklin v. Massachusetts, 505 U.S. 731, ____ (1992); Fitzgerald, 457 U.S.

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at 743; United States v. Nixon, 418 U.S. 683, __ (1974). In part this is because of the Court's recognition that the President "occupies a unique position in the constitutional scheme." Fitzgerald, 457 U.S. at 749.

Under Article II, § 1, the entire "executive Power" is vested in a single individual, "a President," who is indispensable to the execution of that power. The President is so vital to the performance of the duties lodged in the Executive that this is the only office of government for which the Constitution provides a substitute in the event of temporary or permanent disability. U.S. Const. amend. XXV, §§ 3-4. The range of powers and duties assigned to the President -- significant among these the power to command the armed forces and to direct the executive departments -- further serve to distinguish that officer from all other officers of the federal government, and from governors of states as well. See U.S. Const. art. II, §§ 2-3; Nixon v. Fitzgerald 457 U.S. 731, 749 (1982). The Executive thus differs significantly from the other two branches of government, in that no single member of Congress or single Justice or judge is as essential to the continued functioning of their respective branches, as is the President to the functioning of the executive branch.

"Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." Fitzgerald, 457 U.S. at 752. While Presidents under very controlled circumstances have been

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required to furnish evidence in criminal prosecutions,³ and while some Presidents have voluntarily testified before Congress⁴ [or have voluntarily been deposed in civil cases],⁵ no President until now has been required by a court to testify at a private civil trial, let alone to participate as a defendant in private civil damages litigation.

The adoption of a rule requiring a President to be called away from his official duties at the behest of a private plaintiff is of considerable import to the public as well as to the courts and the President. Before such a rule is to be rigidly enforced -- and we believe that it should not be -- we respectfully submit that it is incumbent upon this Court to examine the reasoning of the appellate ruling to ensure that it is appropriate as a matter of law and public policy.

A. The Decision Below Is Inconsistent With Nixon v. Fitzgerald.

While there is no case that directly addresses the issue confronting the courts in this matter, it is agreed by all who have examined it that Nixon v. Fitzgerald, 457 U.S. 731 (1982), provides the most relevant guideposts. Fitzgerald held 5-4 that Presidents enjoy absolute immunity from damages liability for acts within the "outer perimeter" of their official

³See, e.g., United States v. Nixon, CITE; United States v. Poindexter, CITE; United States v. Fromme, CITE.

⁴CITES?

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duties. 457 U.S. at 756. This holding relied on several significant grounds. First, the Court was concerned that subjecting Presidents to liability for official acts would inhibit them from carrying out those duties fearlessly and impartially. To prevent this undesirable outcome, the Court extended absolute immunity, even to former Presidents, for official conduct. Id. at 752 & n.32. Because most of the claims in this case do not involve official duties, President Clinton did not assert immunity from liability with respect to those claims.⁶

However, "[b]ecause of the singular importance of the President's duties," the Fitzgerald Court also was extremely concerned that "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Id. at 751. Justice Powell, writing for the majority, further recognized that the "sheer prominence of the President's office" makes the President

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.

Id. at 752-53 (footnote omitted). See also id. at 763 (Burger, C.J., concurring) (need to defend damages suits would have the

⁶The 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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serious effect of diverting the attention of a President from his executive duties).

President Clinton asserted that the same factors -- the President's acute vulnerability to civil claims, and the diversion of a President's time and attention from his official duties -- are present equally whether a suit for civil damages against a sitting President is based on private conduct or official conduct. The practical reality is that personally defending any private civil suit could require a President to spend considerable amounts of time preparing for and participating in depositions, consulting with lawyers about discovery and pre-trial motions, and attending trial, possibly for weeks, while the urgent business of the nation -- foreign and domestic, civilian and military -- awaited the Chief Executive's attention.

A President's days start with an early national security briefing and last late into the night with state dinners and domestic policy briefings. His grueling schedule is frequently interrupted by unforeseeable matters that require immediate attention. While he has numerous advisors, a President's duties are, for the most part, non-delegable. Ultimately only he can decide whether American troops will go to Bosnia, whether the United States should attempt to negotiate a Mideast ceasefire, or whether to sign or veto a budget bill. It is a simple fact, moreover, that the President cannot be in two places at once. If he is with his lawyers preparing for a deposition, he is not with his national security advisors deciding how the United States

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should respond to a burgeoning international dilemma. If he is in trial in Arkansas, he is not in Washington to meet with congressional leaders to push through an important piece of legislation. On the other hand, if he foregoes actively participating in his own defense to conduct to the public's business, he puts his personal interests at peril.

While Presidents would most likely attend to their public obligations to their personal detriment, 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 conduct over a lengthy period, and which seeks \$750,000 dollars in damages from the President personally. This case in particular would be especially burdensome, personally intrusive and time-consuming. Here, for example, plaintiff's counsel have announced their intention to "exhaustively pursue" allegations far beyond the President's alleged limited contact with Mrs. Jones, including purported relationships with other women, and possibly to seek to compel an unprecedented physical examination of the President.⁷ As the district court found, such litigation would necessarily require the extensive involvement of the President, in consultation with his counsel. Jones v. Clinton, ___ F. Supp. ___, ___ (E.D. Ark. 1994).

Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness

⁷ CITE

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and death."⁸ In this regard the President is no different than any other litigant, except that a President's litigation, like a President's sickness, becomes the nation's problem. The President therefore asked to defer the litigation to protect the constitutional and public interests identified in Fitzgerald.

The majority below, however, read Fitzgerald's rationale to be motivated solely by the Court's concern that Executive decision-making not be chilled by the threat of lawsuit, and hence found it wholly inapposite to this case. Jones v. Clinton, 72 F.3d at 1360. This cramped reading was criticized by the dissent, as ignoring a significant part of Fitzgerald's rationale:

[T]he language, logic and intent of Nixon v. Fitzgerald, 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 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.

⁸ Lectures on Legal Topics, Assn. of the Bar of the City of New York 105 (1926).

Id. at 1367 (Ross, J., dissenting); see also Jones v. Clinton, Order Denying Suggesting for Rehearing En Banc (March 28, 1996) at 2 (McMillian, J., dissenting) ("The panel opinion. . . unfortunately misinterprets the principles enumerated in Nixon v. Fitzgerald").

The Eighth Circuit further contravened Fitzgerald by determining that the plaintiff's claim for civil damages presented a sufficiently significant interest to warrant the unusual step of exercising jurisdiction over the President. In Fitzgerald, the Court cautioned lower courts to refrain from doing so in all but the most compelling cases:

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. When judicial action is needed to serve broad public interests -- as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf., Youngstown Sheet & Tube Co. v. Sawyer, supra, or to vindicate the public interest in an ongoing criminal prosecution, see United States v. Nixon, supra -- the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.

457 U.S. at 753-54 (citations and footnotes omitted). Fitzgerald also expressly noted that "there is a lesser public interest in actions for civil damages than . . . in criminal proceedings." Id. at 754 n.37.

The clear import of this passage is that a plaintiff who wishes to bring a sitting President to court must show that the litigation would serve a broad constitutional or public

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interest beyond those that are present in private civil damages claims. The majority below, however, found this passage to be inapposite, and declined to undertake the balancing it would seem to mandate in all cases involving the President. Jones v. Clinton, 72 F.3d at 1360. It further found that Mrs. Jones had a constitutional right to litigate her section 1983 and state common law claims, which trumped any interest asserted by the President. Id. See also id. at 1363 (Beam, J., concurring).

This last point misperceives the nature of the relief the President seeks, in that a plaintiff's right to seek redress in the courts is not extinguished by deferring litigation. Most significantly, it contradicts Fitzgerald's findings that a "merely private suit for civil damages" -- even one alleging a violation of the plaintiff's constitutional rights -- did not justify subjecting a President to a federal court's jurisdiction.

The dissent, by comparison, weighed the competing interests, and concluded that the "cause of action should be stayed unless the plaintiff can show that he or she will suffer irreparable injury without immediate relief and that adjudication of the suit will not significantly impair the President's ability to attend to the duties of he's office." Id. at 1369 (Ross, J., dissenting). We believe the dissent's approach is more consistent with Fitzgerald, and that the majority's resistance to applying these important principles to the present case should be reviewed by this Court.

B. The Decision Below Also Was Inconsistent With The Constitutional Tradition of Separation of Powers.

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The Court also should review the appellate decision to ascertain if it was sufficiently protective of separation of powers. The holding below, requiring trial courts in all cases to proceed with litigation against a defendant Chief Executive, represents a significant break from the established judicial approach to the Presidency.

Although courts have not hesitated to interpret the limits and prerogatives of presidential power (and President Clinton here does not challenge a court's authority to do so), courts historically have avoided asserting jurisdiction over the President and have found mechanisms to avoid constitutional confrontations with the Executive.⁹ For example, Presidents have on occasion been called upon as witnesses in criminal cases. Such involvement was deemed warranted because of the public's substantial interest in criminal law enforcement, Fitzgerald, 457 U.S. at ___, and the defendant's Sixth Amendment rights to compel evidence and testimony on his behalf. United States v. Burr, CITE. Even in those compelling cases, as Chief Justice Marshall recognized, courts are "not required to proceed against a President as against other witnesses." Id. at ___. Instead, they have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that does not disrupt his official functions, such as by videotaped deposition.¹⁰

⁹CITES.

¹⁰CITES.

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Where an incumbent President is the pivotal, named defendant, there are few if any devices available to minimize Presidential involvement in the litigation. Such suits therefore inherently open the door to confrontation between the Executive and the courts. Jones v. Clinton, 72 F.3d at ___ (Ross, J., dissenting). A court frequently would find it necessary to pass judgment on the validity of a President's asserted grounds for requesting a continuance or relief from a specified requirement of litigation, based on the executive judgment that matter of national interest commanded the President's attention at that time. Id. at ___.

The majority and concurring opinions below would solve such problems simply by relying on the good judgment and discretion of the trial court. Id. at 1361, 1363; id. at ___ (Beam, J., concurring). The majority significantly cabined the court's discretion, however, by raising to an unsurmountable, constitutional level the plaintiff's interest in proceeding with litigation, and by foreclosing the possibility of staying any part of the proceedings. Id. at ___, __ n.9.

The court put on the President, moreover, the burden of demonstrating on a case-by-case basis that a scheduling decision or court order would interfere with "specific, particularized, clearly articulated presidential duties," thereby adding to his litigation load. Id. at 1362. To obtain review of any interlocutory order the President felt unduly intruded upon his official responsibilities, the majority suggested that he could further shoulder the burden of seeking a writ of mandamus. Id. at ___. Unspoken was the fact that a litigant has to make an extremely

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high showing to warrant such extraordinary relief, CITE, or that such appeals, which might be needed repeatedly, would be at the President's personal expense.

The court also was insensate to the possibility that under its rationale, Presidents could be sued on state causes of action in state courts, often presided over by elected judges. It failed to consider the implications of this for federalism, or what avenue a President would have to challenge decisions by a state trial court that he believed unnecessarily interfered with his ability to perform his national, constitutional duties.

In this regard, the majority's solution raises more questions than it answers. For example, if the President seeks a continuation to attend to a national security matter, under the Eighth Circuit's approach, would he be required to disclose national security details to the court and the plaintiff in order to justify his request? Similarly, if a President wants a continuance so he could personally "strong arm" members of Congress to pass a piece of legislation he deemed crucial, would that be sufficiently important? By denying such a motion, would a court not be substituting its judgment for the President's as to national priorities and interfering with the political process? Are a President's "political" activities to be given less weight in these circumstances than those deemed by a court to be "official"? Cf. Fitzgerald, 457 U.S. at ___ (refusing to distinguish between core executive functions and other official duties); Ex rel Canon, ___ F.2d. ___, ___ (D.C. Cir. 19___) (courts lack expertise to distinguish between political and official functions).

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Judge Beam concurred separately to attempt to address the gaps in the majority reasoning, emphasizing that nothing in the decision "prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find the duties of the presidency are even slightly imperiled." 72 F.3d at ___ (Beam, J., concurring). Conversely, however, "nothing in the majority opinion would prohibit a federal judge" -- or even a state judge, for that matter -- "from ordering the President to appear, testify, provide discovery, answer numerous interrogatories and requests for admission at the trial judge's almost unrestricted discretion." CITE (McMillian, J., dissenting from Denial of Suggestion for Rehearing En Banc).

The debate below only serves to illustrate the magnitude of the issues raised by this case and the fact that they go to the heart of the proper relationship between the Judiciary and the Presidency. The differences between the majority and dissent, moreover, underscore the need for this Court to speak to these separation of powers issues.

C. The Court Of Appeals Overlooked Relevant Historical Sources.

The Eighth Circuit wholly failed to address important, germane historical sources that were quoted with approval in Fitzgerald. See 457 U.S. 751 n.31. If anything, these sources present a stronger case for the protection sought by an incumbent President here than they did for the damages immunity extended to former President Nixon in that case. Chief among these is Justice Story's comment that:

[t]here are . . . incidental powers, belonging to the executive department, which are necessarily implied from the

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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 § 1563, pp. 418-19 (1st Ed. 1833) (quoted in Fitzgerald, 457 U.S. at 749) (emphasis added).

Similarly, Senator Ellsworth and then Vice President John Adams, both delegates to the Constitutional Convention, are reported to have stated that

the President, personally, was not subject to any process whatever. . . . For [that] would . . . put 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.). President Jefferson also made relevant observations about the proper relationship between the Judiciary and the President:

The leading principle of our Constitution is the independent 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 withdrawn him entirely from his constitutional duties?

10 The Works of Thomas Jefferson 404 n. (P. Ford. ed. 1905) (quoting a letter from the President to the prosecutor in the trial of Aaron Burr).

Moreover, the historical records shows that the Framers believed that a President could not be prosecuted criminally, until after he had been impeached or otherwise removed from of-

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fice.¹¹ As later eloquently argued by then Solicitor General Robert Bork, a sitting President could not be subject to prosecution without endangering his ability to perform the duties of his office.¹² The panel here failed to heed this historical evidence and held that private civil damages suits can proceed against an incumbent President, thereby according civil actions higher status than criminal prosecutions, in contradiction to Fitzgerald. See 457 U.S. at 754 n.37.

Neither the majority nor the concurring opinions below even referenced any of the historical sources discussed above. Such inattention to the intent of the Framers in answering a constitutional question of first impression contradicts the approach taken by the Fitzgerald court, and further manifests the need for review by this Court.

II. Review At This Juncture Is Necessary If The Interests Of The Presidency Are To Be Preserved.

Now is the appropriate juncture to review the issues of national importance raised by this case. If the Court declines to take the case at this point, the President would be required to submit to discovery and trial, even though there may be a constitutionally-based public interest in deferring the litigation. If that occurs, the damage he seeks to avoid to the interests of the Presidency and the nation will have been done. Regardless of whether he prevails at trial, subsequent review would be ineffective and the case will likely become moot.

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For the same reasons, the Court previously has recognized a right of immediate interlocutory appeal to preserve a petitioner's asserted claims to be spared the burdens of litigation. See, e.g., Behrens v. Pelletier, 116 S. Ct. 834 (1996); Digital Equipment Corp. v. Desktop Direct, Inc., 114 S.Ct. 1992, 1997 (1994); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Where the petitioner is a President seeking to preserve important prerogatives of that office, the case for review has been found to be especially compelling. Fitzgerald, 457 U.S. at 743. These reasons thus also call for a grant of certiorari here.

If the Eighth Circuit decision is permitted to stand, moreover, it is not just this President who will suffer, but his successors as well, who would be confronted with many more such lawsuits. Heretofore, no private civil damages claims have been initiated or actively litigated against a sitting Chief Executive.¹³ This, we believe, is because it was assumed, as the Framers assumed, that a President was not amenable to such suits. We are now as a society confronting a litigation explosion where prominent people from all walks of life are subjected to harassing or extortionate lawsuits. If such suits are permitted to go forward without limitation against the President, "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 pretrial motion." Jones v. Clinton, 72 F.3d ___, 1368 (8th Cir. 1995) (Ross, J., dissenting).

¹³Discuss Kennedy, Roosevelt and Truman cases.

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By virtue of the "sheer prominence of the President's office," Presidents would be extremely attractive targets for plaintiffs seeking notoriety, or who hope to extract settlements or achieve political disruption. See Fitzgerald, 457 U.S. at 752. Suing a President -- in the hope of confronting him in a sworn deposition, interrogating his associates and family members, or obtaining personal financial records -- would become popular political sport. These cases, moreover, will only spawn additional unsettled issues about litigation involving the President, including questions about media access to discovery materials.

It would be incongruous indeed if the last word on the critical issue of whether such litigation should go forward at all, or how such litigation can be controlled to protect the Presidency, is a splintered opinion by a panel of the Eighth Circuit Court of Appeals. Accordingly, it is important that these issues be reviewed now.

III. The Panel Mischaracterized The Relief The President Seeks, Which In Any Event Is Not Extraordinary Or Unique.

In a case of this magnitude, it is important that whatever result is reached be premised on accurate and careful legal analysis. Here, the majority's reasoning was infected by an incorrect characterization of the President's position and by the erroneous conviction that the President was seeking a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)." Jones v. Clinton, 72 F.3d 1354, 1361 (1995).

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The very first sentence of the majority opinion incorrectly states that the President seeks "immunity from civil liability for his unofficial acts." Id. at 1356. President Clinton, however, wants only to defer litigation until he leaves office. He never sought to evade accountability or, potentially, damages. "[T]he issue here is not whether the President may be required to answer claims based on unofficial conduct, but when." Id. at 1369 (Ross, J., concurring).

Although the majority subsequently acknowledged that the protection the President sought was in fact more limited, id. at 1359-60, its reasoning was tainted throughout by this initial misperception. Thus, it found that the President's proposed course of action would impair Mrs. Jones' constitutional "entitlement to access to the courts," even though such rights are unaffected by merely deferring litigation. Id.

Most significantly, the majority operated on the premise that the President sought an extraordinary remedy, when in fact, many litigants are able to obtain stays of civil litigation where holding the claims in abeyance would serve some overriding public interest. Such stays are in some instances conferred by statute, as in the case of the automatic stay in the Bankruptcy Code¹⁴ or the stay available to active-service military personnel provided in the Soldiers' and Sailors' Civil Relief Act.¹⁵ Others are accorded as a matter of judicial discretion, as in the case where civil litigation is put off indefinitely until

¹⁴CITES

¹⁵CITES.

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the conclusion of related criminal prosecutions against the same defendant,¹⁶ or under the judicially-created abstention doctrine.¹⁷ Indeed, under Bankruptcy Rule 105, bankruptcy judges have been found to have discretion to enjoin third-party litigation in other courts that threaten to imperil the debtor's ability to reorganize, even if the debtor is not a party to the litigation.¹⁸

[The choler with which the court below attacked the President's request for similar relief calls into question the care and objectivity with which it analyzed this case.] Moreover, if a plaintiff's constitutional entitlement to access to the courts can be overcome only by a constitutional mandate of immunity, as the Eighth Circuit asserts, all the above-cited stays are jeopardized. For these reasons too, review is warranted.

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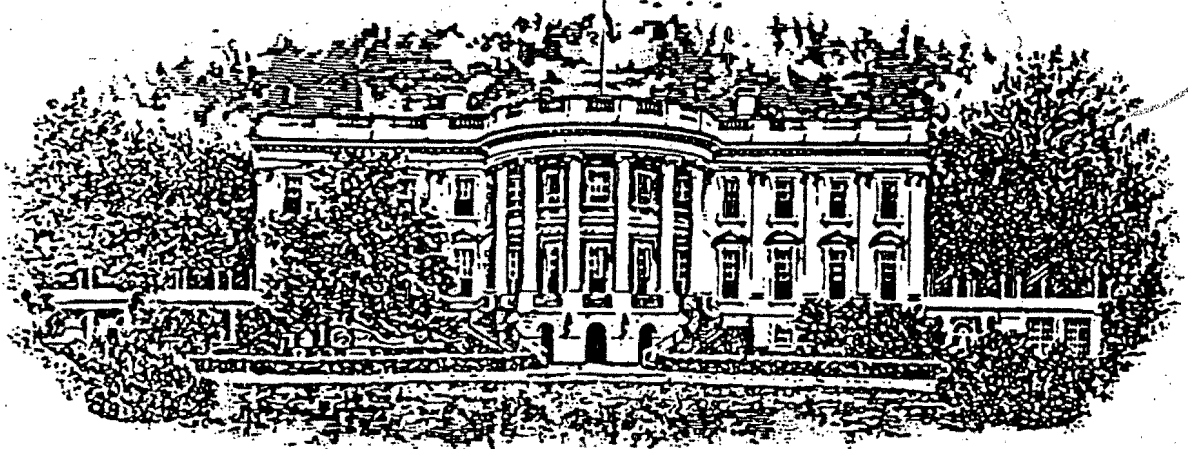
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¹⁷CITES.

¹⁸CITES.

The White House

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No. _____

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

WILLIAM JEFFERSON CLINTON,
Petitioner,

vs.

PAULA JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Eighth Circuit

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QUESTIONS PRESENTED

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1. Whether the litigation of private civil damages claims against an incumbent President must in all but the most exceptional cases be deferred until he 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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LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eighth Circuit Court of Appeals were petitioner President William Jefferson Clinton, defendant/appellant below; and respondent Paula Corbin Jones, plaintiff/cross-appellant below. Danny Ferguson, a defendant in the district court, did not participate in the proceedings in the court of appeals.

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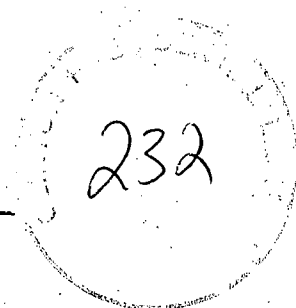
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TABLE OF AUTHORITIES

[To Be Added]

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No. _____



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

WILLIAM JEFFERSON CLINTON,
Petitioner,

vs.

PAULA JONES,
Respondent.

Petition For 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. ____) is reported at 72 F.3d 1354. The Court of Appeals' order denying the petition for rehearing (Pet. App. ____) is to be published at _____. The principal opinion of the district court (Pet. App. ____) is reported at 869 F. Supp. 690. Other published opinions of the district court (Pet. App. at ____ - ____) appear at

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_____. Other unpublished opinions of the district court are included in the Appendix to this petition at App. ____.

BASIS FOR JURISDICTION IN THIS COURT

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

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

42 U.S.C. § 1985

50 U.S.C. app. § 510

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Fed. R. Civ. P. 40

These provisions appear verbatim 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 count.¹ Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343.

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left

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 (1988). 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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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 term of office expired, but held that discovery could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is Nixon v. Fitzgerald, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil litigation challenging his official acts as President. See id. While the holding of Fitzgerald did not apply to this case because President Clinton was sued for actions taken before he became President, the court reasoned 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." The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." Pet. App. 68-69. Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the court stayed 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

² The stay of trial encompassed the claims against Trooper
(continued...)

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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.

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. "The Court's struggle in Fitzgerald to establish presiden-

² (...continued)

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

³ Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 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. _____. Trooper Ferguson did not participate in the appeal, but the district court, at President Clinton's request, stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

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tial 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," he wrote. Pet. App. 9. He 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.

In so holding

Judge Bowman also put aside concerns that the separation of powers could be jeopardized by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial. 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 Holding

move up Bowman further concluded that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to the *for the trial* stay, Pet. App. 5 n.4 (citing *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995)), *Judge Bowman accordingly* and then reversed *that* the stay of trial as an abuse of discretion. Pet. App. 13 n.9.]

Judge Beam concurred 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

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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 forego 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. Finally, Judge Beam stated that he was concurring with 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. 24.

Judge Ross dissented, concluding 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 noted that "no other branch of government is entrusted to a single person," and determined that "[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.

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Judge Ross also stated that private civil suits against sitting Presidents would "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. Accordingly, Judge Ross would allow litigation to proceed against a sitting President only if a plaintiff could "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 petition for rehearing 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 opinion} ~~"My colleagues . . ."~~ "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" ~~he wrote (Pet. App. 33)~~ and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

REASONS FOR GRANTING THE PETITION

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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 civil litigation directed at him personally. We believe that absent exceptional circumstances, an incumbent President should never be placed in this position. But 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, in addition, erroneous in several respects. It is inconsistent with the reasoning of Nixon v. Fitzgerald and with established separation of powers principles. In particular, the panel majority's suggested solution for the separation of powers dilemma created by its own ruling -- "judicial case management sensitive to . . . the demands of the President's schedule" (Pet. App. 13) -- only exacerbates the problem, by giving a trial court a general power to pass judgment on how the President spends his 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

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comparable in importance to the interests the President advances here.

This 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 a multiplicity of private civil damage complaints against incumbent Presidents, which increasingly would enmesh Presidents in the judicial process, and the courts in the political arena, to the detriment of both.

Conflicts

I. The Decision Below Is Inconsistent With The Court's Decisions And Jeopardizes 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 power. U.S. CONST. art. II, § 1. The President is always on 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

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form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit against him until he leaves office -- is much more modest, 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.

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, not present here.⁴ But in this case the President does not seek immunity from liability. He seeks protection only from the second danger to the Presidency emphasized by

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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Fitzgerald -- the burden^{15/} inevitably attendant upon being a defendant in a lawsuit. 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. 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 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-19 (1st Ed. 1833) (quoted in Fitzgerald, 457 U.S. at 749) (emphasis added). Senator Ellsworth and then Vice President John Adams, both delegates to the Constitutional Convention, also agreed 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) (quoted in Fitzgerald, 457 U.S. at 751 n.31).

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 withdrawn him entirely from his constitutional duties?

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10 The Works of Thomas Jefferson 404 n. (P. Ford. ed. 1905) (quoting a letter from the President to the prosecutor in the trial of Aaron Burr). 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. ^{Holding} ~~It is ruled that~~ ^{relying on the courts to ameliorate these concerns} ~~these problems can never be addressed by postponing litigation against the President. "Presidential immunity . . . cannot be granted or denied by the courts as an exercise of discretion." 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. This proposed solution, however, exacerbates rather than solves the separation of powers problems raised by~~ ^{of Powers problems raised by} ~~allowing a suit to go forward against a sitting President. this proposed course of action only perpetuates them.~~ ^{to go forward.}

Specifically, 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. ____.

In other words, under the panel's approach, a trial court could

The constant struggle between the Chief Executive and a trial court is precisely what Jefferson so feared.

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insist, before considering 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.

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 ^{SET} trial court³ discharged this mission with the greatest judiciousness, it is difficult to think of anything more inconsistent with the separation of powers than to put ² court⁷ in the position of continually passing judgment on whether the President is spending his time in a way ^{it} they find ^{is} acceptable. ✓

4. The panel majority similarly attempted to minimize the demands that defending private civil litigation would impose on the President's time and energies, by likening the defense of a lawsuit to the few instances when Presidents have testified in judicial proceedings. ~~But this analogy is inapt for two reasons. This has occurred, however, only in cases~~

~~First, Second, even where the President is called a witness courts have of exigent need, and only under carefully controlled circumstances. 304km places on him.~~

only
testifying as
a third-party
witness,

live to end of action
A sitting President has never been compelled to testify at a civil trial. A President has occasionally been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (Fitzgerald, 457

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U.S. at 754), and the defendant's Constitutional right to compel evidence on his behalf (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, they have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that does not disrupt his official functions, such as by videotaped deposition.⁵

~~First, and most important~~
More significantly, 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

⁵ See, e.g., United States v. McDougal, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition); 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 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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character and to obtain \$750,000 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).

→ 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 no different than any other litigant, except that a President's litigation, like a President's illness, becomes the nation's problem.

More material above done here

II. 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

⁶ Lectures on Legal Topics, Assn. of the Bar of the City of New York 105 (1926).

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. ____.

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seeks -- the temporary deferral of litigation -- is far from unknown in our system, and the burdens it imposes on plaintiffs are not at all 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. 1996), provides that civil suits 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 needs of the Nation." 50 U.S.C. App. § 510. President Clinton here thus seeks relief no different than that which would be available to members of the armed forces 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 filing, and ordinarily will remain in effect until the bankruptcy proceeding is completed. 11 U.S.C. § 362.⁹

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 military service." 50 U.S.C. § 521.

⁹ Indeed, a bankruptcy judge's discretion has been held sufficient to authorize stay of third-party litigation in other courts (continued...)

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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 of office.

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~~Other stays are accorded as a matter of judicial discretion, as when civil litigation is put off indefinitely until the conclusion of a related criminal prosecution against the same defendant.~~¹⁰ Judicially created doctrines, such as the abstention doctrine, also can result in lengthy stays. The abstention doctrine established by Pullman, for example, requires district courts to stay, or to dismiss without prejudice, certain cases, while the plaintiff -- who has a right to pursue his or her federal claims in federal court -- is instead required to seek relief in state courts.¹¹ It is far from unheard of for Pullman abstention to precipitate delays of six or eight years in federal litigation. See, e.g., Spector Motor Services, Inc. v. O'Connor,

⁹ (...continued)

that could conceivably 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; 2 Collier on Bankruptcy ¶ 105.02 (MB 15th ed. 1994), and cases cited therein.

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¹⁰ See, e.g., Koester v. American Republic Investments, 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).

¹¹ See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).

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340 U.S. 602, 603-04 (1951) (nine-year delay). Many Presidents ^{if a President does,} do not serve as many as eight years in office, and even then only plaintiffs who sue at or before the outset of the President's term will face a delay of that length.

Similarly, the doctrine of primary jurisdiction, where it applies, forces plaintiffs to postpone the litigation of their civil claims while they institute administrative proceedings and potentially, judicial review thereof, even though the administrative proceedings may not be able to provide relief -- a process that can of course take several years. [CITE.] In addition, government employees 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). That will 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 constitutional entitlement to access to the courts. More specifically, these examples demonstrate that what the President is seeking -- the temporary deferral of litigation -- is something that our judicial system routinely ^{provides} ~~does~~ when significant institu-

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over the
objection of
the plaintiff,

) And district courts often exercise their discretion to stay civil proceedings while a related criminal prosecution goes forward.

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tional or public interests are at stake, as they manifestly are here.

Lacked Jurisdiction to Review and Lacked ^{Any} Basis to Overturn

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

1. Respondent cross-appealed to challenge the discretionary district court's order to stay trial. Ordinarily, though, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. Moses M. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 n.11 (1983); Cheyney State College v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. 28 U.S.C. § 651.¹² In asserting that jurisdiction existed for her cross-appeal, the respondent did not contend that the order was appealable under 28 U.S.C. § 1291 as a final order, or as a "collateral" order under Cohen v. Beneficial Industrial 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.

¹² 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); Cheyney State, 703 F.2d at 735. 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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In Swint v. Chambers County Comm'n, 115 S. Ct. 1203 (1995), however, 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 majority sought to avoid the clear implication of Swint by declaring that respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4.¹³ *This conclusion, however, is incorrect.*

~~This is incorrect.~~ The question of whether the President is entitled, as a matter of law, to defer the 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 on the basis of fundamental principles such as those we have discussed; the latter is a discretionary determination to be made on the basis of the particular facts of the case. 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; whereas a court's exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion.

The district court, in deciding to postpone the trial in this case, explicitly invoked its discretionary powers over

¹³ See supra, n. ____.

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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 at 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 decision to postpone the trial -- unlike review of its decision to reject the President's position that the entire case should be deferred -- 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 majority's expansion of the court of appeals' jurisdiction over this interlocutory appeal was in error.

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2. Also in error was its decision to reverse the district court on the merits of this point. As Justice Cardozo explained for this Court Landis v. North American Co., 299 U.S. 248 (1936), a trial judge's decision to stay proceedings should not be lightly overturned. "The 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 labelling the district court's order the "functional equivalent" of "temporary immunity", inasmuch as the district court denied the President a significant part of the relief he sought. But it is entirely clear that the panel majority, in its sweeping and conclusory ruling, did not begin to conduct the kind of

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careful weighing of the particular facts that might warrant a conclusion that the trial court here abused its discretion.

IV. 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 ~~this Court~~ ^{is declined} ~~denies review~~ 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.

④ The decision below ~~The Court majority~~ subjected a President to suit. Now, moreover, a court for the first time has held that ~~for the first time in our nation's history, breaching the historical~~ ~~a sitting President is required to litigate private civil damages~~ ~~understandings as appropriate today as ever before.~~¹⁴ ~~claims, just at a time when our society is confronting a litigation explosion, where people from all walks of life are subjected to harassing or extortionate lawsuits.~~¹⁴ The court in Fitzgerald specifically anticipated the threat posed by suits of this kind.

¹⁴ Heretofore, there have been no ^{private} private civil suits initiated or actively litigated while the defendant was serving as President. While there are recorded civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all were underway before the defendant assumed office. Two were effectively complete by the time the defendant became President and the third was settled before discovery proceeded against the defendant. See New York ex rel. Hurley v. Roosevelt, 179 N.Y. 544 (1904); DeVault v. Truman, 194 S.W.2d 29 (1946); Complaint, 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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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). ^{recent} The widely perceived increase in harassing ~~unsubstantiated~~ lawsuits only increases this danger. In these circumstances, the fact that there is "no historical record of numerous 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. | 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." Fitzgerald 457 U.S. at 743. The Court should grant review in this case to protect those prerogatives.