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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Statement of the Case; RE: Paula Jones (24 pages)	05/06/1996	P5 233
002. draft	Clinton vs. Jones; RE: Petition for a Writ of Certiorari (34 pages)	05/10/1996	P5 234
003. draft	Clinton vs. Jones; RE: Petition for a Writ of Certiorari (29 pages)	05/13/1996	P5 235

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FOLDER TITLE:

Paula Jones Certiorari Petition [5]

Debbie Bush
2009-1006-F
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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]

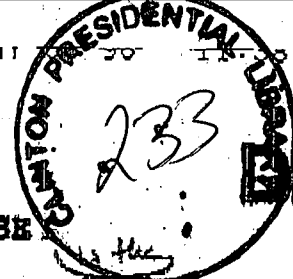
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Freedom of Information Act - [5 U.S.C. 552(b)]

- 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]



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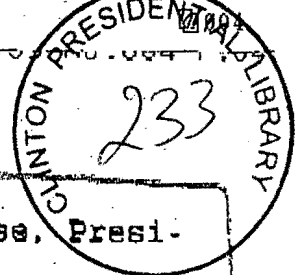
[001]

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 ^(this) a civil damages ^(action) 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, ~~outside the scope of the President's official duties~~, ^(took office). ~~The complaint included two claims arising under the federal civil rights statutes and two arising under common law, and sought \$175,000 in actual and punitive damages for each of the four counts. Jurisdiction was founded on 28 U.S.C. §§ 1331, 1332 and 1343. Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts.~~

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. ^(where she named as a co-defendant)

^(Respondent) 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.

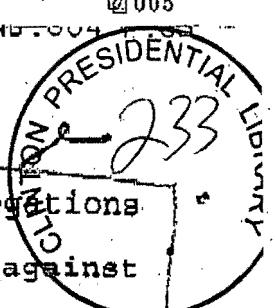


Before answering or filing any other response, President Clinton informed the district court that he intended to move to defer the litigation until he completed his service as Chief Executive, and asked the court to resolve this threshold issue before requiring the President to undertake any other burdens 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~~ ^{required} 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.

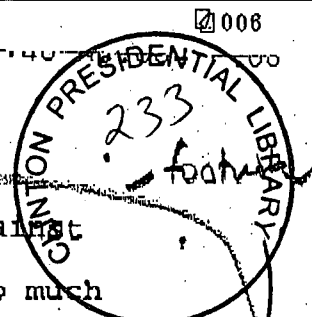


judicial discretion. Moreover, due to the particular allegations in this case, which as a practical matter made the claims against Trooper Ferguson inseparable from those against the President, it was asserted that the entire litigation should be held in abeyance. The Solicitor General filed a Statement 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} ~~the district court denied the President's motion to~~
~~dismiss, and held that all discovery could proceed immediately.~~
~~The court, however, stayed~~ ^{the} ~~trial until the President's term of~~
~~office expired.~~ ^{Pet App citation} ~~Jones v. Clinton, 869 F. Supp. 690, 699 (D.D.~~
~~Ark. 1994).~~ ^{INSERT A} ~~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."~~ ^(Pet App. 15) ~~and that these concerns "are not lessened~~
~~by the fact that the [conduct alleged] preceded his Presidency."~~
~~Id. at 696.~~ ^{the} ~~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 Proce-~~
~~dure 40 and the court's equitable power to manage its own docket.~~
~~Id. at 699.~~

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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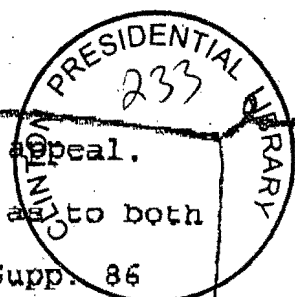


The stay of trial encompassed the claims against Trooper Ferguson as well, because the court found "too much interdependency of events and testimony to proceed piecemeal," and that "it would not be possible to try the Trooper adequately without testimony from the President." Id. The trial court

~~further concluded that the plaintiff would not be significantly inconvenienced by delay of trial. Id. Nevertheless, the court also concluded, however, that there was ^(P) ^(district) ~~no reason why the discovery and deposition process could not proceed as to all persons including the President himself.~~~~
Id. The court ^(stand) ~~suggested~~ that this would avoid potential problems that might be caused by the possible ^(loss) ~~evaporation~~ ^(over) 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.

Pl 2: The President and respondent both appealed.

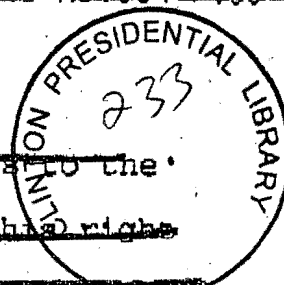


Trooper Ferguson did not participate in the appeal. Nonetheless, the district court stayed the litigation as to both defendants pending appeal. Jones v. Clinton, 879 F. Supp. 86 (E.D. Ark. 1995). The court again found that "Trooper Ferguson is a defendant, but the case revolves around the alleged actions 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, 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. ^{not} 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

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. W.G. Brady Photocopy



~~that "Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws," and that right overrode any interests asserted by the President. Id. at 1359-60 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 D.Ed. 80 (1805)).~~

~~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."~~

He concluded all proceedings

not

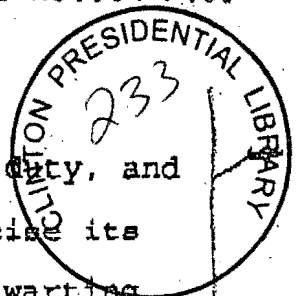
Judge Bowman asserted that the President

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.~~

on the ground that is separation of powers

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



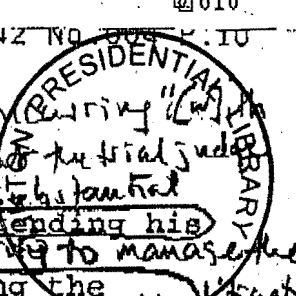
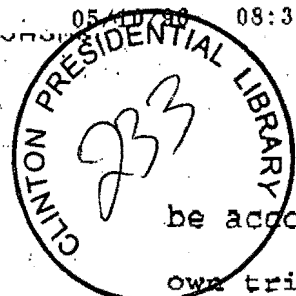
perform a specific and clearly articulated presidential duty, and expressed confidence that the district court would exercise its broad discretion to control litigation so as to avoid thwarting the performance of presidential duties. Id. at 1362.

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 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.

INVENT B
~~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~~

H

But he expressed his belief that this



he suggested,

stated that he was concerning "the understanding" that the trial judge would have substantial authority to manage the litigation in a way that accommodates the interest at stake.

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. 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.

INSERT C

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 dissent found that

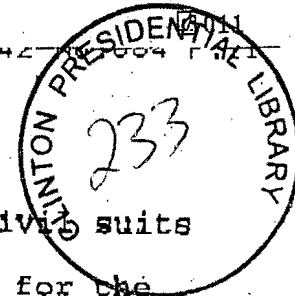
the unofficial nature of the alleged events would not make defending a private suit for civil damages any less of a burden on the President's time and attention and therefore on his constitutional responsibilities. . . .

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]



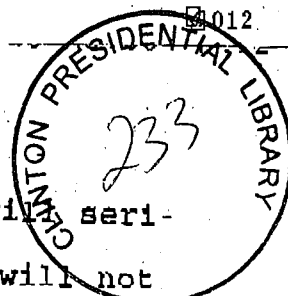
^(noted)
 Judge Ross also was ~~concerned~~ that private civil suits against sitting Presidents would "create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice 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. ^(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-~~

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



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

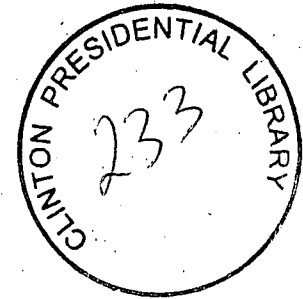
~~On January 23, 1996, President Clinton filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the Eighth Circuit, as did the Solicitor General as amicus. The petition was denied on March 28, 1996, with one judge dissenting.~~

~~"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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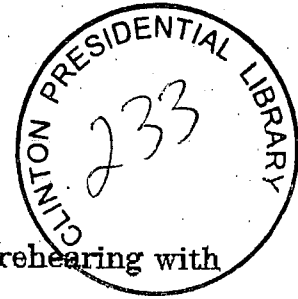
The district court reasoned (Pet. App. xxa) that "the case most applicable to this one is Nixon v. Fitzgerald, [457 U.S. 731 (1982)]," which held that a President is absolutely immune from any civil litigation challenging his official acts as President. See *id.* at 7xx. The district court noted that 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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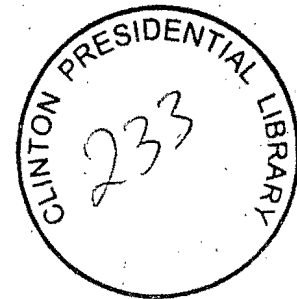
Judge Beam "concur[red] in the conclusions reached by Judge Bowman" (Pet. App. xx). He stated that the issues presented "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. He also

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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).

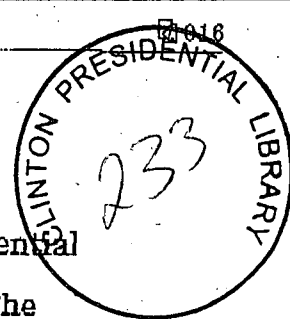


Reasons for Granting the Petition

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.

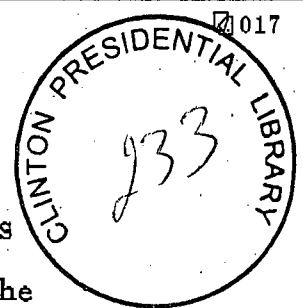
1. a. The Executive Branch of government is unique because it is entrusted by Article II to a single individual. The President is never off



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.

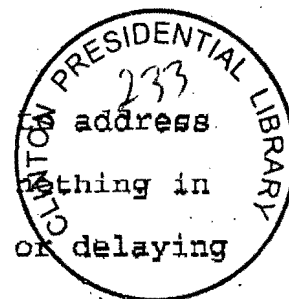
The panel majority concluded that because Fitzgerald provides the President with absolute immunity from a civil damages action challenging his official acts, the President should receive no form of "immunity"—which is how the panel majority characterized the postponement of litigation—from any other 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



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).

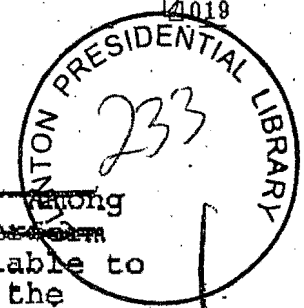
The debate below only serves to illustrate the magnitude of the issues raised by this case and the fact that they go to the heart of the proper relationship between the Judiciary and the Presidency. The differences between the majority and dissent, moreover, underscore the need for this Court to speak 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~~ ^{he} stated that "[t]he

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



no indented quotation

~~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 as 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.

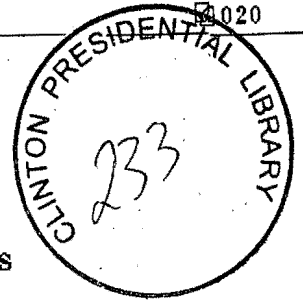
Journal of William Maclay 167 (E. Maclay ed. 1890) (quoted in Fitzgerald, 457 U.S. at 751 n.31.). President Jefferson also *was even more emphatic:* ~~made relevant observations about the proper relationship between the Judiciary and the President:~~

(...)

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). *(WJF)*

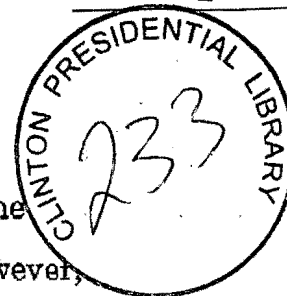
Moreover, the historical records shows that the Framers believed that a President could not be prosecuted criminally, until after he had been impeached or otherwise removed from of-



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.

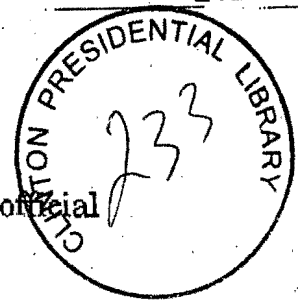
2. The panel majority ruled that these problems can never be addressed by postponing litigation against the President. See Pet. App. xxa (quote from slip op. 16). Instead, the panel majority's solution was "judicial



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

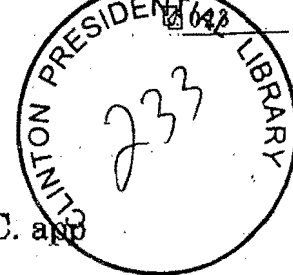


be obtained only in a manner that does not disrupt the President's official functions.

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.

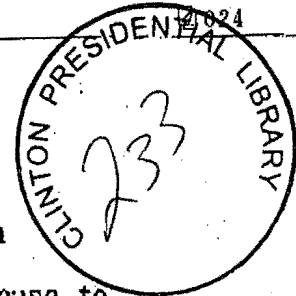
¹The panel majority, for example, declared that Article II "did not create a monarchy" and that the President is "cloaked with none of the attributes of sovereign immunity."



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.

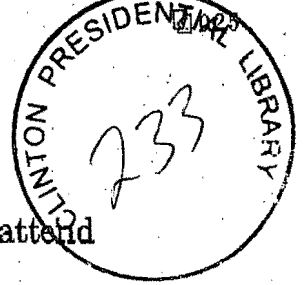
The abstention doctrine established by Pullman [full citation] requires district courts to stay, or to dismiss without prejudice, certain cases, while the plaintiff—who has a right to pursue his or her federal claims in federal court—is instead required to seek relief in state courts. It is far from 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.

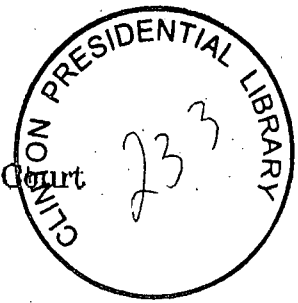
4. [My section on the cross-appeal.]

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

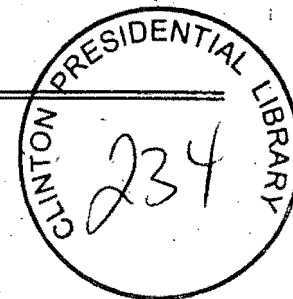
the separation of powers" (457 U.S. at 743). See also Franklin. The Court
should grant review in this case to protect those prerogatives.



[002]

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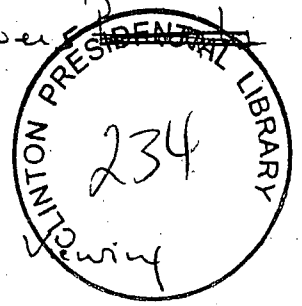
I thought there were two subsections where the scans showed. In these cases, I have asked you to go back to David's version. Of course, you should feel free to work with him to come up with a mutually acceptable alternative. I have also made some deletions, some edits, and so forth.

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Finally, there is the question of headings. The SG's Office doesn't use them for court petitions. I don't mind using them, but I think there

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I. The Decision Below is Inconsistent w/ ~~Wine v Fitzgerald~~
and Jeopardizes the
~~theoretical sources~~ and Separation of Powers



Court of Appeals

II. The ~~Decision Below~~ ~~was~~ ~~misunderstood~~ Erred in Viewing

The Relief Sought by The President as Extraordinary

^{Carried} III. The Court of Appeals Lacked Jurisdiction to Review and
Any Basis to Overturn

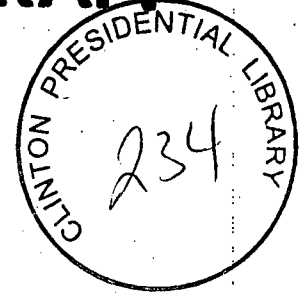
The District Court's Discretionary Decision to Stay The Lawsuit

IV. The Court ~~was~~ ^{should} Grant Review Now to Protect The
~~Presidential~~ Interests of The Presidency.

Within These sections, we should
just use numbers to denote
particular arguments.

Thanks very much. I can be reached throughout The
weekend either at 456-7594 or 332-1763.

Elena

DRAFT

No. _____

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

WILLIAM JEFFERSON CLINTON
Petitioner,

vs.

PAULA JONES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Robert S. Bennett
Counsel of Record

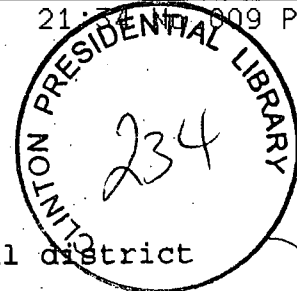
Carl S. Rauh
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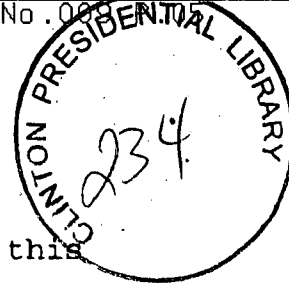
Attorneys for the Petitioner
President William Jefferson Clinton



QUESTIONS PRESENTED

The respondent has brought suit in federal district court to recover civil damages against an incumbent President, based in substantial part on alleged conduct outside the scope of the President's official duties. The questions presented are:

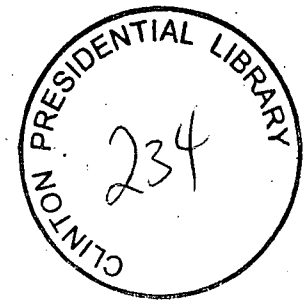
1. Whether the litigation of private civil damages claims against an incumbent President must, in ^{the absence of} ~~all but the most~~ exceptional ^{circumstances,} ~~cases~~ be deferred until he leaves office.
2. Alternatively, whether a district court, as a proper exercise of judicial discretion, ^{may} ~~can and should~~ stay such litigation in whole or part, until the President leaves office.



LIST OF PARTIES TO THE PROCEEDING

1. President William Jefferson Clinton is a Defendant in this case, and the Petitioner in this Court.
2. Paula Jones is the Plaintiff in this case, and the Respondent in this Court.
3. Danny Ferguson is a Defendant in this case, but is not a party to the proceedings in this Court.

Please check for
proper form with
David Shavers.

**TABLE OF CONTENTS**

[To Be Added]

TABLE OF AUTHORITIES

[To Be Added]

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form with David

OPINIONS BELOW

The opinion for which the President seeks review is Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996). The principal opinion of the District Court in this case is Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994). Both of these opinions, as well as all other opinions and orders issued by the courts below, are included in the Appendix to this petition.

BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Eighth Circuit was issued on January 9, 1996. President Clinton timely filed a petition for rehearing and a suggestion for rehearing en banc, which was 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

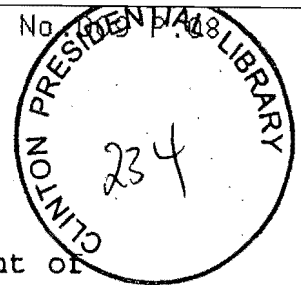
50 U.S.C. app. § 510

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Fed. R. Civ. P. 40

These provisions appear verbatim at pages ____-____ of the Petitioner's Appendix.

STATEMENT OF THE CASE *>bold*

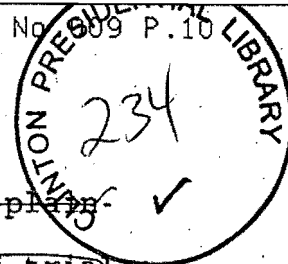
Petitioner William Jefferson Clinton is President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed this civil damages action against the President in the United States District Court for the Eastern District of Arkansas. The complaint was premised in substantial part on conduct 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 founded on 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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234



The ^{diswhich} trial court ^{also} further ~~also~~ concluded, that the plaintiff would not be significantly inconvenienced by delay of trial. ^{that there was} ~~Id.~~ However, it found "no reason why the discovery and deposition process could not proceed," ^{The court stated} and ~~said~~ that this would avoid the possible loss of evidence ^{that might occur} with the passage of time. Id.

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. Three opinions resulted.

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

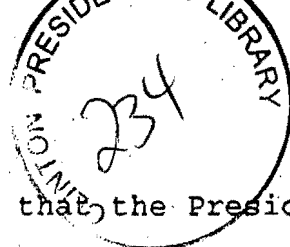
He wrote that

/"The Court's struggle in Fitzgerald to establish presidential immunity for acts within the outer perimeter of official authority believed ^S ~~ver~~ the notion that beyond this perimeter there is still more immunity waiting to be discovered," he wrote. Pet. App. _____. He further found that it would be an abuse of discretion to stay all proceedings against an incumbent President, asserting

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." Id.

³ 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. ____.



that the President "is entitled to immunity, if at all, only as an exercise of discretion because the Constitution ordains it." Id. at ____.

Presidential immunity This cannot be granted or denied by the courts

Judge Bowman also put aside concerns that separation of powers could be breached by a trial court ^{is} exercising control over the President's time and priorities, through the supervision of discovery and trial. ^{He reasoned} ~~on the ground~~ 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." Id. at ____.

~~The judge 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 ____.

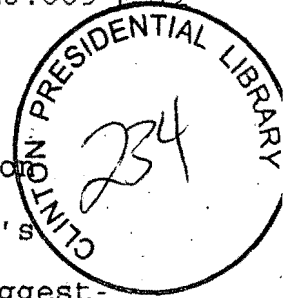
redundant
no sarcasm

This discretion, however, was not deemed so broad as to sanction the stay of trial ordered here. Judge Bowman found that the court of appeals had "pendent appellate jurisdiction" to entertain respondents' challenge to that stay, id. at ____ 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. Id. at ____ n.9.

redundant

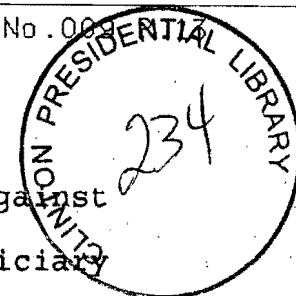
Judge Beam "concur[red] in the conclusions reached by Judge Bowman." (Pet. App. ____). He stated that the issues presented "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. Id. at ____.

He also acknowledged that potential "judicial branch interference with the functioning of the presidency should this suit be allowed to go forward" is a matter of "major concern." Id. at ____.



____. He expressed his belief, however, that this litigation could be managed with a "minimum of impact on the President's schedule." Id. at _____. This could be accomplished, he suggested, by the President's choosing to forego attending his own trial or ^{becoming} ~~being~~ involved in discovery, or by limiting the number of pre-trial encounters between the President and respondent's counsel. Id. at _____. Finally, Judge Beam stated that he was concurring "[w]ith the understanding" that the trial judge would have substantial latitude to manage the litigation in a way that would accommodate the interests of the Presidency. Id. at _____.

Judge Ross dissented, contending that the demands of the President's constitutional duties and principles of separation of powers justified staying the litigation altogether until he leaves office. Pet. App. _____. In his view, 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." Observing that "no other branch of government is entrusted to a single person," he found 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." Id. at _____.



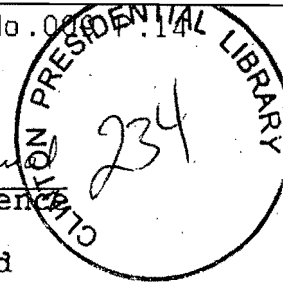
Judge Ross also found that private civil suits against sitting Presidents would "create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes." Id. at _____. At the same time, Judge Ross reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Id. Accordingly, Judge Ross said he 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 abilities to attend to the duties of his office." Id. at _____.

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. _____. ^{Stating that the majority holding} ~~"My colleagues would put all the prob-~~
~~lems of our nation on a pilot control and treat as more urgent~~^{would} ~~a~~
~~private lawsuit that even the [respondent] delayed filing for at~~
~~least three years,"~~ ^{wrote that this holding would} ~~he wrote (id. at _____), and would~~ "allow
judicial interference with, and control of, the President's
time." Id. at _____.

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REASONS FOR GRANTING THE PETITION

as "more urgent" than "the problems of our nation,"



extraordinary national
This case presents a question of ~~profound consequence~~
importance that
~~to both the Presidency and the Judiciary, 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, 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, *the wearing of*
erroneous in several respects. It is inconsistent with Nixon v. Fitzgerald and ~~out of step~~ with established separation of powers principles. In particular, 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. ____) -- *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.

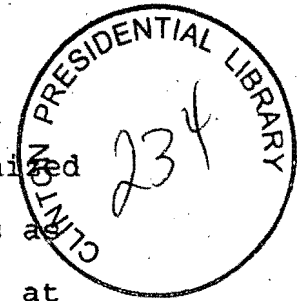
The panel majority also grossly overstated the supposedly extraordinary character of the relief that the President seeks. The deferral of litigation for a specified, limited *judicial* period is far from unknown in our system, and it is routinely afforded in order to protect interests that are not comparable in importance to the interests the President advances here. ~~Final~~

~~ly, the majority's holding that the court had no equitable power to stay litigation involving a President is an undue constriction of the district court's otherwise broad discretion, and is at odds with this Court's pronouncements about the level of deference that is to be accorded the Presidency.~~

Now, ^{This/} ~~moreover,~~ is the appropriate ^{time/} ~~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 ^{very interests that} ~~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, which increasingly would enmesh Presidents in the judicial process, and the courts in the political arena, to the detriment of both. It is therefore ^{important} ~~important~~ that the ^{vaind in this case} ~~issues~~ be confronted now.

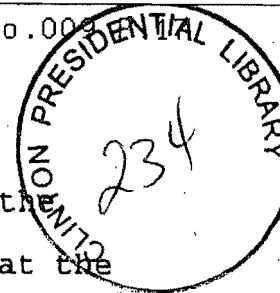
I. The Decision Below Is Inconsistent With ^{the meaning of} Nixon v. Fitzgerald.

Historically, the Court has recognized that the President "occupies a unique position in the constitutional scheme." Fitzgerald, 457 U.S. at 749. Unlike the power of the other branches of government, the entire "executive Power" is vested in a single individual, "a President," who is indispensable to the execution of that power. Article II, § 1. The President is ^{never} ~~on~~ duty, ^{24 hours a day/} ~~24 hours a day/~~ 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." Id. 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.

~~Fitzgerald held 5-4 that Presidents enjoy absolute immunity from damages liability for acts within the "outer perimeter" of their official duties. Id. at 756.~~ The panel majority concluded that because the Fitzgerald ^{provides the President} ~~holding was~~ ^{with absolute} ~~immunity from~~ ^{limited to} civil damages claims challenging his 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 carrying out his ^{Official} ~~duties fearlessly and particularly~~ (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.

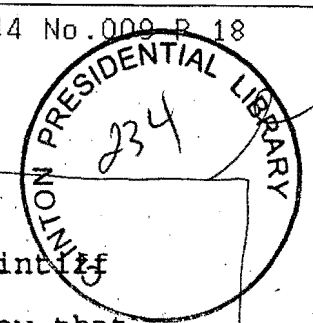


The panel majority ignored this second basis for the holding of Fitzgerald. The first basis of Fitzgerald -- that the threat of liability might ~~chill~~^{affect} official Presidential decision making -- is, of course, not present here.⁴ But in this case the President does not seek immunity from liability. ^{He} He seeks protection only from the second risk emphasized by Fitzgerald -- the burden^{is} inevitably attendant upon being a defendant in a lawsuit. The court of appeals simply disregarded this "unique risk to the effective functioning of government."

The majority 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.

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.

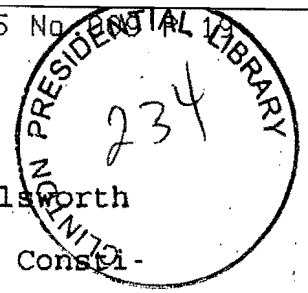


457 U.S. at 753-54 (citations and footnotes omitted).

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 interest beyond those that are present in private civil damages claims. The majority below, however, found this passage to be inapposite, and further found that respondent had a constitutional right to litigate her claims expeditiously, which overrode any interest asserted by the President. Id. See also id. at 1363 (Beam, J., concurring). This 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 majority's resistance to applying these important principles to the present case should be reviewed by this Court.

II. The Court Of Appeals Overlooked Significant Historical Sources.

As the Fitzgerald Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuit¹⁵ has deep roots in our tradition¹⁵. 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, agreed 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 was even more emphatic:

ce?

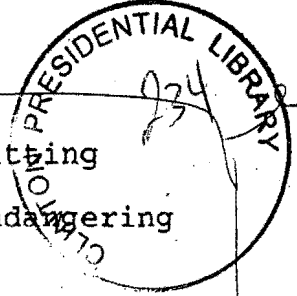
The leading principle of our Constitution is the independent of the Legislature, executive and judiciary of each other, . . . But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy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

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's] 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.

Moreover, the Framers believed that a President could not be prosecuted criminally, until after he had been impeached or otherwise removed from office.⁵ As later eloquently argued by

⁵ See The Federalist No. 69, at 446 (Alexander Hamilton) (Modern Library ed., 1937; id. No. 77, at 502 (Alexander Hamilton); id. No. 65, at 426 (Alexander Hamilton); 2 Max Farrand, The Records of the Federal Convention of 1787, at 500 (rev. ed. 1937) (noting the comment of Governor Morris); id. at 626 (comment of James Wilson). See also Nixon v. Sirica, 487 F.2d 700, 757-58 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part); Stephen L. Carter, The Political Aspects of Judi-

(continued...)



then-Solicitor General Robert Bork, this is because a sitting President could not be subject to prosecution without endangering his ability to perform the duties of his office.⁶

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. 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.

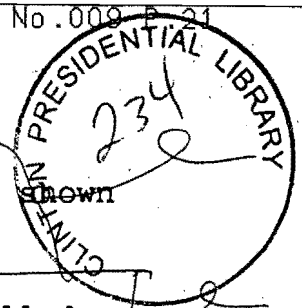
III. The Decision Below Also Was Inconsistent With The Constitutional Tradition of Separation of Powers.

The panel majority attempted to minimize the 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} ~~In fact, the rigid holding below, requiring trial courts in all cases to proceed with litigation against a defendant Chief Executive, represents a significant departure from the tradition of accommodating the President's special constitutional responsibilities.~~

⁵(...continued)

cial Power: Some Notes on the Presidential Immunity Decision, 131 U. Pa. L. Rev. 1341, 1370 (1983).

⁶Memorandum for the United States concerning the Vice President's Claim of Constitutional Immunity at 17-18, In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. filed Oct. 5, 1973).

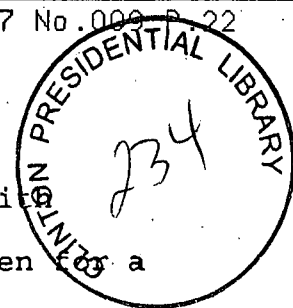


significant break from the tradition of judicial deference shown to the Presidency.

For example, Presidents on occasion have been called upon as witnesses in criminal cases. Such intrusions are deemed warranted because of the public's substantial interest in criminal law enforcement (Fitzgerald, 457 U.S. at 754), and the defendant's Constitutional right to compel evidence and testimony on his behalf (U.S. Const. Amend. 6; United States v. Burr, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)), factors not present here. 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. 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.⁷

Where the President is the pivotal, named defendant, there are few such devices available to minimize his involvement in the litigation. There is an enormous difference between being

⁷ See, e.g., United States v. McDougal, No. _____ (E.D. Ark. ___, 1996) (refusing to compel President to testify in person, and permitting only videotaped deposition of President to be taken at White House); United States v. Poindexter, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (videotaped deposition); United States v. North, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (refusing to enforce a subpoena *ad testificandum* against former President until after defendant put on his case at trial, and then quashing the subpoena because defendant failed to show testimony would support his defense), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 550 U.S. 941 (1991); United States v. Fromme, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

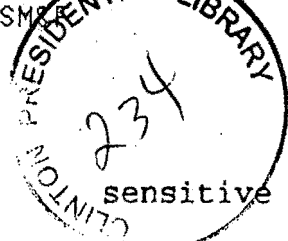


in a car
a third-party witness and being a defendant threatened with financially ruinous personal liability. This is true even for a person with only the normal business and personal responsibilities of everyday life -- which are, of course, incalculably less than those of the President. A President as a practical matter could never wholly ignore a suit such as the present one, which seeks to impugn the President's character and conduct over a lengthy period, and which seeks \$750,000 dollars in 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."⁸ In this regard the President is no different than any other litigant, except that a President's litigation, like a President's ~~sickness~~ ^{illness}, becomes the nation's problem.

separate? — The panel majority ruled that these problems can never be addressed by postponing litigation against the President: "[P]residential immunity . . . cannot be granted or denied by the courts as an exercise of discretion." Pet. App. _____. Instead, the panel majority's solution was "judicial case management

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



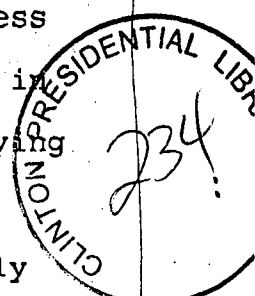
sensitive to the burdens of the presidency and the demands of the President's schedule." Id. at ____ The panel majority envisioned that, throughout the course of litigation against him, a President could "pursue motions for rescheduling, additional time, or continuances" if he could show that the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties."

Any -
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I'd like
to go
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his
version
throughout
the
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This means that a court frequently would find it necessary to pass judgment on the validity of a President's grounds for a continuance or relief from a specified requirement of litigation, based on the executive judgment that a matter of national interest commanded the President's attention at that time. 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 could 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 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.

Additionally, under the panel majority's 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.

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." Pet. App. _____. Conversely, however, as, Judge McMillian pointed out in his dissent, "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." Pet. App. _____.

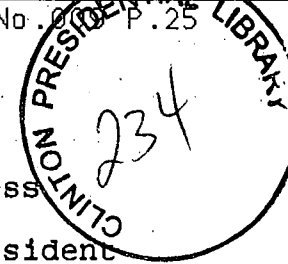


This approach is an obvious affront to the complex and delicate relationship between the Judiciary and the Presidency. Neither branch should be in a position where it must approach the other for approval to carry on its day-to-day activities. Even if the trial courts discharge their responsibilities 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.

IV. The Decision Below Was Tainted By The Erroneous Conviction That The President Was Seeking Extraordinary Relief.

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. In fact, far from seeking a "degree of protection from suit for his

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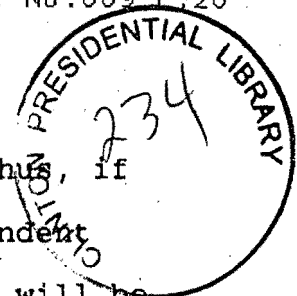
private wrongs enjoyed by no other public official (much less ordinary citizens)," Pet. App. __, the relief that the President seeks -- the temporary deferral of litigation -- is far from unknown in our system, and the burdens it imposes on plaintiffs are not at all extraordinary.

There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected. 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.⁹ 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.

sounds snobbish
~~As a result, service members who are sued while on active duty can, in appropriate circumstances, obtain precisely the relief which would be available to the lowliest private in the armed forces that he commands.~~
 The Pres seeks here, for precisely the reasons he invokes.

The so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as ^{Petitioner files a} bankruptcy petition ~~is filed~~. That stay affects all litigation that "was or could have been commenced" prior to filing, and ordinarily will remain in effect until the

Diff from DS's which is right?
⁹ Specifically, lawsuits against an active-duty service member are to be stayed unless it can be shown that his or her interests in the litigation would not be materially affected by reason of military service. 50 U.S.C. § 521.



bankruptcy proceeding is completed. 11 U.S.C. § 362.¹⁰ 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.

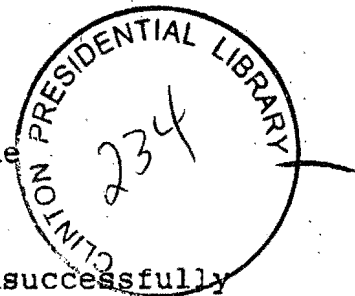
Other stays are accorded as a matter of judicial discretion, as when civil litigation is put off indefinitely until the conclusion of a related criminal prosecution against the same defendant,¹¹ or under the judicially-created abstention doctrine.¹²

The abstention doctrine established by Pullman 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

¹⁰ Indeed, a bankruptcy judge's discretion has been held sufficient to authorize stay of third-party litigation in other courts 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 (Matthew Bender 15th Ed. 1994), and cases cited therein.

¹¹ 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).

¹² See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943); Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).



only plaintiffs who sue at or before the outset of the president's term will face a delay of that length.

In addition, 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 while he or she pursues an interlocutory appeal. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). That will routinely delay litigation for a substantial period, possibly for several years. *Add rest of Strauss H here.*

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 is prepared to do when significant institutional or public interests are at stake, as they manifestly are here. *Add sentence from Strauss.*

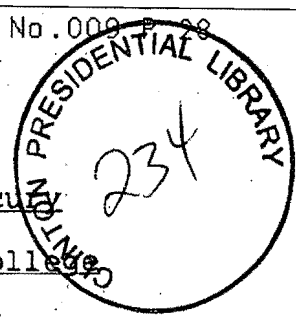
V. The Panel Majority Also Erred In Reversing The District Court's Decision To Stay The Trial Until After President Clinton Leaves Office.

A. This Court Should Determine If The Court Of Appeals Had Jurisdiction To Review This Aspect Of The District Court's Ruling.

Aside from general question about headers, this one does not clearly distinguish this argument from all that has come before it.

Respondent cross-appealed to challenge the district court's order to stay trial. Ordinarily, though, a decision by a district court to stay of proceedings is not a final decision for

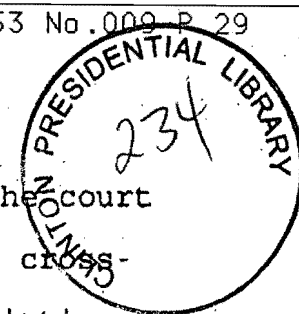
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purposes of appeal. Moses M. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S.1, 10 n.11 (1983); Cheyney State College v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1993). Such orders may be appealed on an interlocutory basis only by writ of mandamus pursuant to 28 U.S.C. § 651.¹³ 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. XXa n.4.

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." 115 S. Ct. 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, which was properly before the court under the collateral order doctrine. Pet. App. XXa n.4. (citing Kincade v. City of

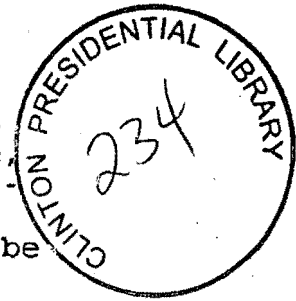
¹³ Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively end[s] the litigation." See, e.g., Boushel v. Toro Co., 985 F.2d 406, 408 (8th Cir. 1993); Cheyney State, 703 F.2d at 735. Even assuming that this exception should be allowed, 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.



Blue Springs, Mo., 64 F.3d 389, 394 (8th Cir. 1995)). The court reasoned that "[a]ll issues raised in the appeal and the cross-appeal... are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency, from civil suit for his unofficial acts?" Id.

Contrary to the panel's unsupported assertion, the issues are not inextricably intertwined, and cannot be resolved by answering that single question. The issue 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 part of the litigation. The former question raises an issue of law, to be decided on the basis of separation of powers principles such as those we have discussed; the latter is a discretionary determination that is to be made on the basis of the particular facts of this case. The former question, being purely an issue of law, is one on which the district court's determination is entitled to no special deference; the latter determination can be overturned only for abuse of discretion, as even the panel subsequently recognized. Pet. App. XXa n. 9.

The district court, in deciding to postpone the trial in this case, explicitly invoked its discretionary powers over scheduling (Pet. App. XXa (citing Fed. R. Civ. P. 40 and "the equity powers of the Court")), and based its decision not only on the defendant's unique official status -- which was certainly a relevant and valid factor to consider -- 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 through the alleged negligence of the President and desperately needs to recover such damages as may be awarded by a jury. It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court. . . . 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.

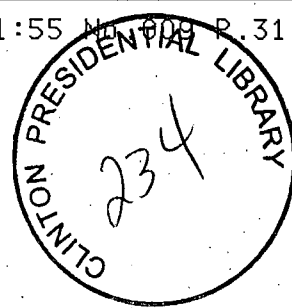
Id. at ____.

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 raises 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.

7 [B. The Panel's Decision To Reverse The District Court On This Point Also Was Incorrect On The Merits.

As Justice Cardozo explained for this Court, 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 con-

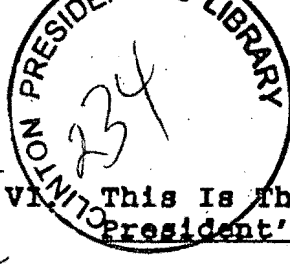


trol the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance....

We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in conditions of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences of the public welfare or convenience will thereby be promoted.

Landis v. North American Co., 299 U.S. 248, 254-55, 256 (1936).

in what regard?
The panel here did not address the district court's findings in this regard (see supra), and 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. XXa 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 careful weighing of the particular facts that might warrant a conclusion that the trial court here abused its discretion. Such over-reaching by a court of appeals to assert jurisdiction over the stay of trial, and to substitute its judgment for an appropriate exercise of discretion by a district court, warrants review by the Supreme Court.



VI. This Is The Only Opportunity For The Court To Review The President's Claim And Grant Adequate Relief.

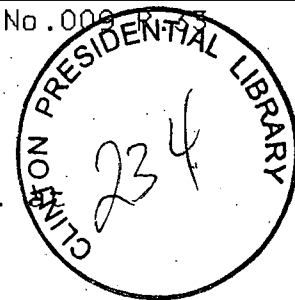
Again, I think like the Shales version - better if there are some specific objections to that. Please work with him.

If the Court declines to review the case at this point, the President would be required to submit to discovery and trial. If that occurs, the rights the President seeks to vindicate will be irretrievably lost. Regardless of whether he prevails at trial, subsequent review would be ineffective and the Court likely will be deprived of the opportunity to provide guidance for future cases.

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 also call for a grant of certiorari here.

If the Eighth Circuit decision is permitted to stand, moreover, Presidents will be confronted with many more such lawsuits. Fitzgerald specifically anticipated this threat. 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



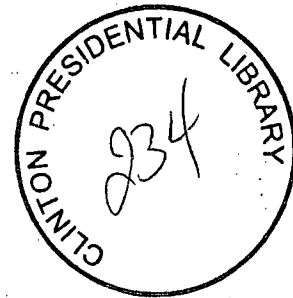
vindication on the merits does not repair the damage." *Id.* 763 (concurring opinion; footnote omitted).

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. Moreover, 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, as Judge Ross noted below, "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." *Pet. App.* _____. 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.¹⁴

¹⁴ Heretofore, there have been no 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, and two of were effectively complete by the time the defendant became President. In New York ex rel. Hurley v. Roosevelt, 179 N.Y. 544 (1904), an intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, nine months before Mr. Roosevelt became President. The New York Court of Appeals affirmed the dismissal without opinion in 1904, while he was President. *Id.* In DeVault v. Truman, 194 S.W.2d 29 (1946), the action was initiated in November 1944 (*id.* at 31), the month that Mr. Truman was elected Vice President. The trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945, and one year later, the Supreme Court of Missouri affirmed the dismissal. *Id.* at 32.

(continued...)

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, now is the appropriate juncture to review the issues of national importance raised by this case.

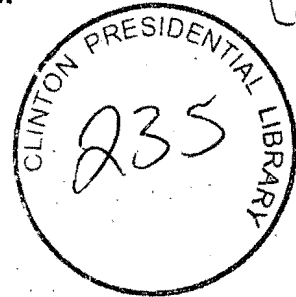


¹⁴(...continued)

John F. Kennedy was sued over an auto accident involving a campaign car in 1960, while he was a candidate for the Presidency. Complaint, Bailey v. Kennedy, No. 757200, and Hills v. Kennedy, No., 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960 and subsequently consolidated) (hereinafter "Bailey"). After he was inaugurated, a Los Angeles Superior Court judge denied the plaintiffs request to take the President's deposition, requiring only that he submit to written interrogatories. Bailey, Order denying motion for deposition (Aug. 27, 1962). The case was settled before the President was required to respond.

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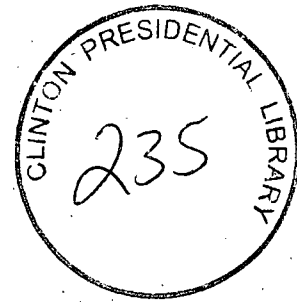
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No. _____

IN THE
Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

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

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 1st letter of
 each word.

PETITION FOR A WRIT OF CERTIORARI

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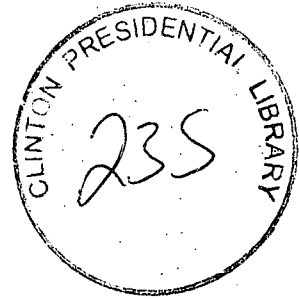
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QUESTIONS PRESENTED

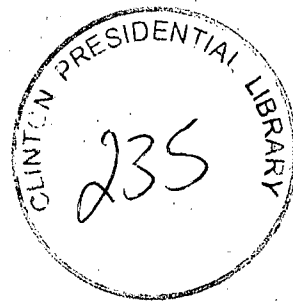
1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until he leaves office.
2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.

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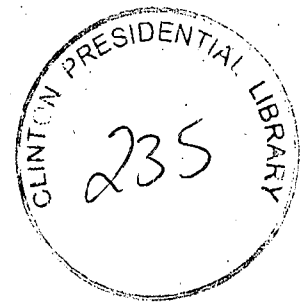
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LIST OF PARTIES TO THE PROCEEDING

Petitioner, President William Jefferson Clinton, was a defendant in the district court and appellant in the court of appeals. Respondent Paula Corbin Jones was the plaintiff in the district court and the cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.



iii

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
JURISDICTION	1
LEGAL PROVISIONS INVOLVED IN THIS CASE.....	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION.....	7
I. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Separation Of Powers	8
II. The Court of Appeals Erred In Viewing The Relief Sought By The President As Extraordinary	13
III. The Panel Majority Erred In Asserting Jurisdiction Over, And Reversing, The District Court's Discretionary Decision To Stay The Trial Until After President Clinton Leaves Office.....	16
IV. The Court Should Grant Review Now To Protect The Interests Of The Presidency	19
CONCLUSION	21

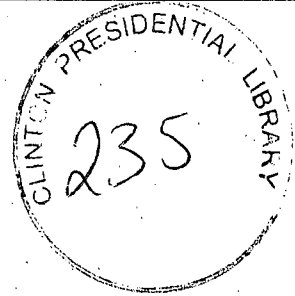


TABLE OF AUTHORITIES

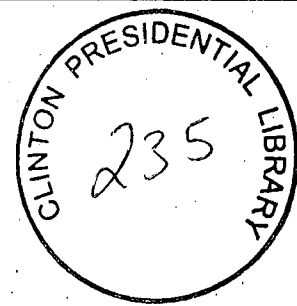
Cases	Page(s)
<i>Boushel v. Toro Co.</i> , 985 F.2d 406 (8th Cir. 1993).....	16
Faculty <i>Cheyney State College v. Hufstedler</i> , 703 F.2d 732 (3d Cir. 1983).....	16
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949).....	17
<i>DeVault v. Truman</i> , 194 S.W.2d 29 (1946).....	20
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	16
<i>Kincade v. City of Blue Springs, Mo.</i> , 64 F.3d 389 (8th Cir. 1995).....	5
<i>Koester v. American Republic Investments</i> , 11 F.3d 818 (8th Cir. 1993).....	15
<i>Landis v. North American Co.</i> , 299 U.S. 248 (1936).....	18
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985).....	5
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	16
<i>New York ex rel. Hurley v. Roosevelt</i> , 179 N.Y. 544 (1904).....	20
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982).....	passim
<i>Railroad Commission of Texas v. Pullman Co.</i> , 312 U.S. 496 (1941).....	15
<i>Ricci v. Chicago Mercantile Exchange</i> , 409 U.S. 289 (1973).....	15
<i>Spector Motor Services, Inc. v. O'Connor</i> , 340 U.S. 602 (1951).....	15
<i>Swint v. Chambers County Comm'n</i> , 115 S. Ct. 1203 (1995).....	17
<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).....	12
<i>United States v. Burr</i> , 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).....	12

cert. denied, 1996 WL 26287 (Apr. 29, 1996)

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Cases	Page(s)
<i>United States v. Fromme</i> , 405 F. Supp. 578 (E.D. Cal. 1975).....	13
<i>United States v. Mellon Bank, N.A.</i> , 545 F.2d 869 (3d Cir. 1976).....	15
<i>United States v. North</i> , 713 F. Supp. 1448 (D.D.C. 1989), <i>aff'd</i> , 910 F.2d 843 (D.C. Cir. 1990), <i>cert. denied</i> , 500 U.S. 941 (1991).....	13
<i>United States v. Poindexter</i> , 732 F. Supp. 142 (D.D.C. 1990).....	13
<i>Wehling v. Columbia Broadcasting Sys.</i> , 608 F.2d 1084 (5th Cir. 1979).....	15

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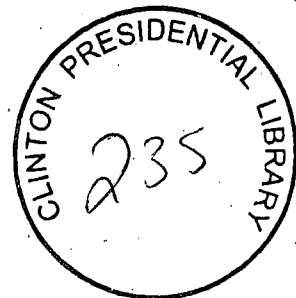
Constitutional Provisions, Rules and Statutes

11 U.S.C. § 105	15
11 U.S.C. § 362	14
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1291	17
28 U.S.C. § 651	16
28 U.S.C. §§ 1331, 1332 and 1343.....	3
42 U.S.C. § 1983	2, 3
42 U.S.C. § 1985	2, 3
50 U.S.C. app. § 510.....	2
50 U.S.C. app. § 521.....	2, 14
50 U.S.C. app. § 525.....	2
Fed. R. Civ. P. 40.....	2, 17
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. 1994).....	14
U.S. CONST. amend. VI	12
U.S. CONST. amend. XXV	2

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U.S. CONST. art. II, § 1, cl. 12, 9

U.S. CONST. art. II, §§ 2-42

Pleadings From Other Cases

Bailey v. Kennedy, No. 757200 (Los Angeles County
Superior Court filed Oct. 27, 1960)20

Hills v. Kennedy, No. 757201 (Los Angeles County
Superior Court filed Oct. 27, 1960)20

United States v. McDougal, No. LR-CR-95-173 (E.D.
Ark. Mar. 20, 1996)12

Other Authorities

(Lawrence P. King ed.)

2 COLLIER ON BANKRUPTCY ¶ 105.02 (MB) 15th ed.
1994)15

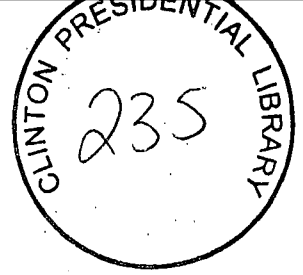
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Ford ed., 1905)10

JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed.,
1890)10

JOSEPH

3 A STORY, COMMENTARIES ON THE CONSTITUTION OF
THE UNITED STATES § 1563, pp. 418-19 (1st ed.
1833)10

3 Lectures on Legal Topics, Assn. of the Bar of the City
of New York 105 (1926)13



No. _____

IN THE
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October Term, 1995

WILLIAM JEFFERSON CLINTON,

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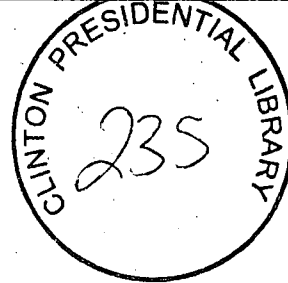
Petitioner William Jefferson Clinton respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 9, 1996.

OPINIONS BELOW

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

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996. A petition



for rehearing was filed on January 23, 1996, and denied on March 28, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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

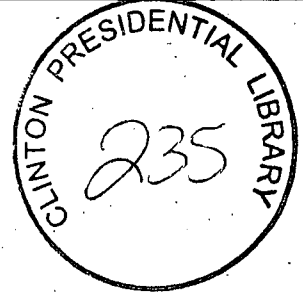
50 U.S.C. app. § 510

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Fed. R. Civ. P. 40

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



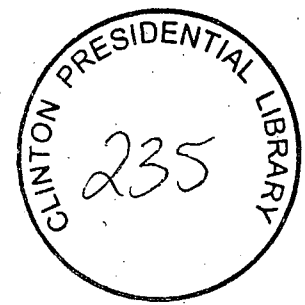
STATEMENT OF THE CASE

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

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

¹ The first two counts allege that in 1991, when the President was Governor of Arkansas and respondent a state employee, he subjected respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (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.

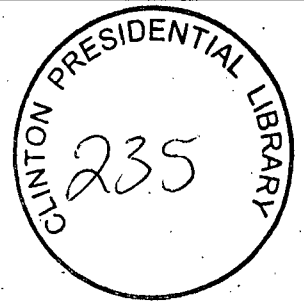


could proceed immediately "as to all persons including the President himself." Pet. App. 71.

The district court reasoned that "the case most applicable to this one is *Nixon v. Fitzgerald*, [457 U.S. 731 (1982)]," (Pet. App. 67) which held that a President is absolutely immune from any civil litigation challenging his official acts as President. While the holding of *Fitzgerald* did not apply to this case because President Clinton was sued primarily for actions taken before he became President, the court stated that "[t]he language of the majority opinion" in *Fitzgerald* "is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office." Pet. App. 68-69. The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge stayed the trial "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.²

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

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



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.

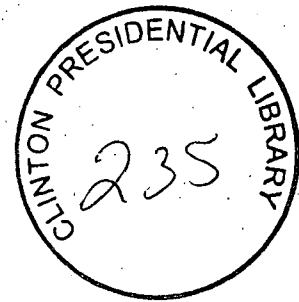
Judge Bowman found the reasoning in *Fitzgerald* "inapposite where only personal, private conduct by a President is at issue," (Pet. App. 11), and determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. "The Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered," he wrote. Pet. App. 9.

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

, cert. denied, 1996 WL 26287 (Apr. 29, 1996)),

In reaching these conclusions, Judge Bowman put aside concerns that the separation of powers could be jeopardized

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. 20-24. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

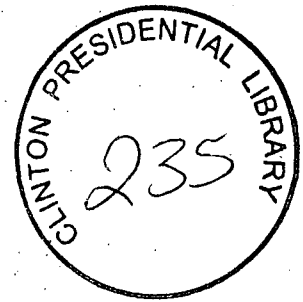


by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial. He stated that any separation of powers problems could be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's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

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

"[w]ith

Judge Ross dissented, ~~concluding~~ ^{stating} that the "language, logic and intent" of *Fitzgerald* "directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term." Pet. App. 25. Judge Ross observed that "[n]o other branch of government is entrusted to a single person," and determined that "[t]he burdens and demands of civil litigation can be expected . . . to divert [the President's] energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result . . . would impair the integrity



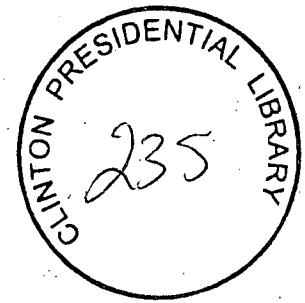
of the role assigned to the President by Article II of the Constitution." Pet. App. 26.

Judge Ross also stated that private civil suits against sitting Presidents "create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes." Pet. App. 28. At the same time, he reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. 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 request for a rehearing en banc, with three judges not participating and Judge McMillian dissenting. Judge McMillian said the majority's holding had "demean[ed] the Office of the President of the United States." Pet. App. 32. He wrote that the panel majority "would put all the problems of our nation on pilot control and treat as more urgent a private lawsuit that even the [respondent] delayed filing for at least *three* years," and would "allow judicial interference with, and control of, the President's time." Pet. App. 33.

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary national importance, which was resolved erroneously by the court of appeals. For the first time in our history, a court has ordered a sitting President to submit, as a defendant, to a civil damages action directed at him personally. We believe that absent exceptional circumstances, an incumbent President should never be placed in this position. 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.

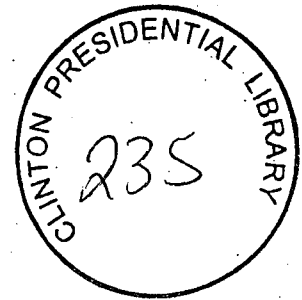
The decision of the court below is erroneous in several respects. It is inconsistent with the reasoning of *Nixon v. Fitzgerald* and with established separation of powers principles. The panel majority's suggested cure for the separation of powers problems its own ruling creates -- "judicial case management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

Now

~~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 more 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.

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

1. The President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Unlike the power of the other two branches, the entire "executive Power" is vested in a single individual, "a President," who is indispensable to the execution of that



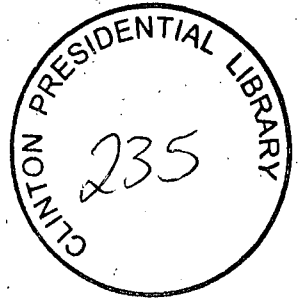
authority. U.S. CONST. art. II, § 1. The President is never off duty, and any significant demand on his time necessarily imposes on his capacity to carry out his constitutional responsibilities.

Accordingly, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. 753. Indeed, "[t]his tradition can be traced far back into our constitutional history." *Id.* at 753 n.34. The form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit against him until he leaves office -- is modest. It is far more 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, largely not present here.⁶ But in this case the President does not seek immunity from liability.⁷ He

⁶ 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.



seeks protection only from the second danger to the Presidency 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."

2. As the *Fitzgerald* Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. See 457 U.S. at 751 n.31. Justice Story stated that "[t]he president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability.*" 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added) (*quoted in Fitzgerald*, 457 U.S. at 749). Senator Ellsworth and then-Vice President John Adams, both delegates to the Constitutional Convention, also agreed that "the President, personally, was not . . . subject to any process whatever. . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed., 1890) (*quoted in Fitzgerald*, 457 U.S. at 751 n.31).

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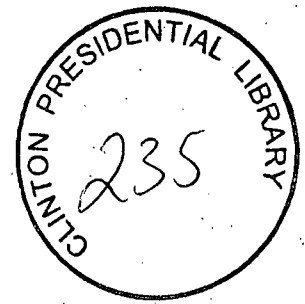
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President Jefferson was even more emphatic:

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

10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905). As the Court said in *Fitzgerald*, "nothing in [the

quoted in Fitzgerald, 457 U.S. at 751 n.31.

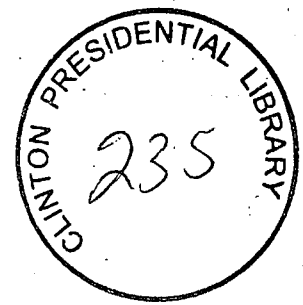


Framers'] debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens." 457 U.S. 751 n.31.

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

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

This approach is an obvious affront to the complex and delicate relationship between the Judiciary and the Presidency. Neither branch should be in a position where it must approach the other for approval to carry out its day-to-day responsibilities. Even if a trial court discharged this mission with the greatest judiciousness, it is difficult to think of any-

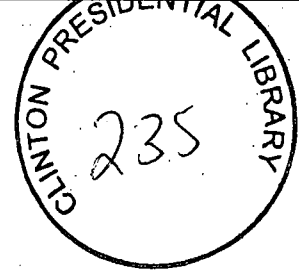


thing more inconsistent with the separation of powers than to put a court in the position of continually passing judgment on whether the President is spending his time in a way the court finds acceptable.

4. The panel majority similarly attempted to downplay the demands that defending private civil litigation would impose on the President's time and energies. Pet. App. ~~12-14~~ 13-15. The concurring opinion in particular likened the defense of a personal damages suit to the few instances when Presidents have testified as witnesses in judicial or legislative proceedings. Pet. App. 22-23. This notion is implausible on its face; there is no comparison between being a defendant in a civil damages action and merely being a witness. Even so, Presidents have been called as witnesses only in cases of exigent need, and only under carefully controlled circumstances designed to minimize intrusions on the President's ability to carry out his duties.

A sitting President has never been compelled to testify in civil proceedings. Presidents occasionally have been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (*Fitzgerald*, 457 U.S. at 754) and the defendant's Constitutional right to compulsory process (U.S. CONST. amend. VI; *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)) -- factors that are, of course, not present here. But even in those compelling cases, as Chief Justice Marshall recognized, courts are not "required to proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). Instead, courts have required a heightened showing of need for the President's testimony, and have permitted it to be obtained only in a manner that does not disrupt his official functions, such as by videotaped deposition.⁵

⁵ See, e.g., *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (videotaped deposition at the White House); *United States*



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

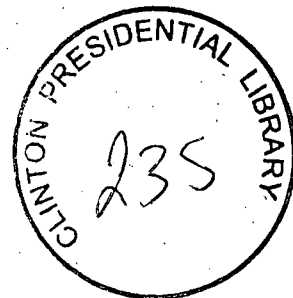
Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness and death."⁶ In this regard the President is like any other litigant, except that a President's litigation, like a President's illness, becomes the nation's problem.

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

v. Poindexter, 732 F. Supp. 142, 146-47 (D.D.C. 1990) (videotaped deposition); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena because defendant failed to show that President's testimony would support his defense), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

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



sought and in the burden that it imposed on respondent.⁷ In fact, far from seeking a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)" (Pet. App. 13), the relief that the President seeks -- the temporary deferral of litigation -- is far from unknown in our system, and the burdens it 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 claims by or against military personnel are to be tolled and stayed while they are on active duty.⁸ Such relief is deemed necessary to enable members of the armed forces "to devote their entire energy to the defense 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.~~

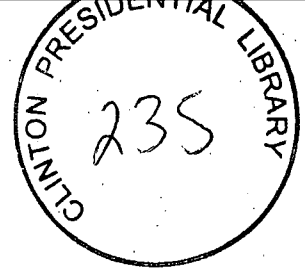
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The so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. That stay affects all litigation that "was or could have been commenced"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

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

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

⁹ Indeed, a bankruptcy judge's discretion has been held sufficient to authorize a stay of third-party litigation in other courts that conceivably could have an effect on the bankruptcy estate, even if the debtor is not a



party 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.

It is well-established that courts, in appropriate circumstances, may put off civil litigation until the conclusion of a related criminal prosecution against the same defendant.¹⁰ That process may, of course, take several years, and affords the civil plaintiff no relief.

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Under the abstention doctrine established by *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), district courts must stay certain litigation and must require plaintiffs -- who have a right to pursue their federal claims in federal court -- to institute separate proceedings in state court. *Pullman* abstention can precipitate delays of six or eight years or longer in federal litigation. See, e.g., *Spector Motor Services, Inc. v. O'Connor*, 340 U.S. 602, 603-04 (1951) (nine-year delay).

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The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may not provide the relief they seek. This process too can take several years. See, e.g., *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 306-07 (1973). And public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in

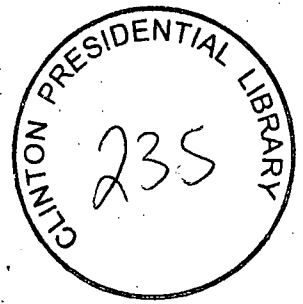
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party to the litigation and the automatic stay is not triggered. See 11 U.S.C. § 105; 2 COLLIER ON BANKRUPTCY ¶ 105.02 (MB 15th ed. 1994), and cases cited therein.

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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).

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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 entitlement to access to the courts. More specifically, these examples demonstrate that what the President is seeking -- the temporary deferral of litigation -- is relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

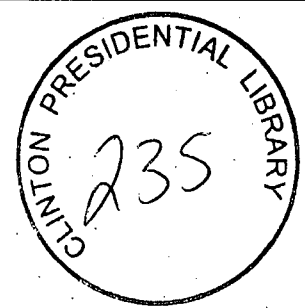
III. The Panel Majority Erred In Asserting Jurisdiction Over, And Reversing, The District Court's Discretionary Decision To Stay The Trial Until After President Clinton Leaves Office.

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1. ~~Respondent cross-appealed to challenge the district court's order to stay trial.~~ Ordinarily, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. See 28 U.S.C. § 651.¹¹ In asserting that jurisdiction existed for her cross-appeal, the respondent did not seek such a

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¹¹ Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." See, e.g., *Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993); *Cheyney State College v. Hufstедler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, it is not applicable here, where the district court's order clearly contemplated further proceedings in federal court. See *Boushel*, 985 F.2d at 408-09.



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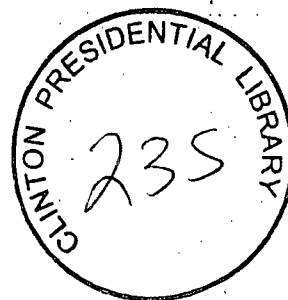
writ or contend that the stay was appealable under 28 U.S.C. § 1291 as a final order, or as a "collateral" order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, respondent asserted, and the panel majority found, that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. 5 n.4.

In *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995), this Court ruled that the notion of "pendent appellate jurisdiction," if viable at all, is extremely narrow in scope (see *id.* at 1212), and is not to be used "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 1211. The panel majority sought to avoid *Swint* by declaring that respondent's cross-appeal was "inextricably intertwined" with the President's appeal.¹² Pet. App. 5 n.4. This conclusion, however, is incorrect.

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

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

¹² See *supra* n.2.



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.

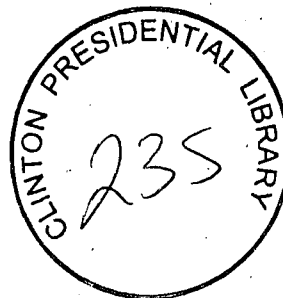
The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to 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. *g*

2. In any event, The decision to reverse the district court was also incorrect on the merits. As Justice Cardozo explained for this Court in *Landis v. North American Co.*, 299 U.S. 248 (1936), a trial judge's decision to stay proceedings

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should not be lightly overturned: "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55. Indeed, the Court in *Landis* specifically stated that "[e]specially in cases of extraordinary public moment, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.* at 256.

The panel majority justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally entitled." Pet. App. 13 n.9. It is unclear what the panel meant by 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 careful weighing of the particular facts that might warrant a conclusion that the trial court here abused its discretion.

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

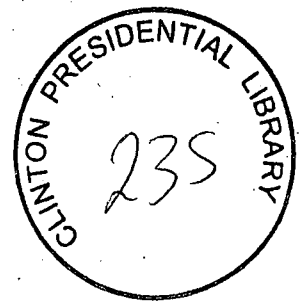
This is the only opportunity for the Court to review the President's claim and grant adequate relief. If review is declined at this point, the case will proceed in the trial court, and the interests the President seeks to preserve by having the litigation deferred -- interests "rooted in the constitutional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

held that the litigation could go forward through all steps short of trial.

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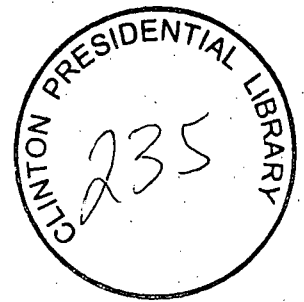
Now, a court for the first time in history has held that a sitting President is required to litigate private civil damages claims. This holding breaches historical understandings that are as appropriate today as ever before.¹³ The court in *Fitzgerald* specifically anticipated the threat posed by suits of this kind. Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled ... they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion). In these circumstances, the fact that there is "no historical record of numerous 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.

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There is no question that the issues raised by this case will have profound consequences for both the Presidency and the Judiciary. The last word on issues of this importance should not be a decision by a splintered panel of a court of appeals -- a decision that we believe is inconsistent with the precedents of this Court and with the constitutional tradition of separation of powers. The Court has recognized that a "special solicitude [is] due to claims alleging a threatened

¹³ Heretofore, there have been no private civil damages suits initiated or actively litigated while the defendant was serving as President. While there are recorded private civil suits against Theodore Roosevelt, Harry Truman and John F. Kennedy, all were underway before the defendant assumed office. The first two were dismissed by the time the defendant became President; after each took office, the dismissal was confirmed on appeal. See *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904); *DeVault v. Truman*, 194 S.W.2d 29 (1946). The Kennedy case was filed while he was a candidate, and was settled after President Kennedy's inauguration, without any discovery against the Chief Executive. See, *Bailey v. Kennedy*, No. 757200, and *Hills v. Kennedy*, No. 757201 (Los Angeles County Superior Court, both filed Oct. 27, 1960).

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breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743. The Court should grant review now, to protect those prerogatives.

CONCLUSION

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

Respectfully submitted,

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- 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]
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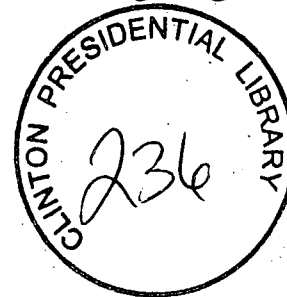
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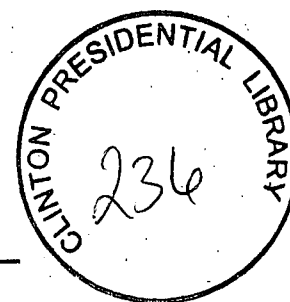
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COMMENTS:



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 *all caps*
For The Eighth Circuit

Robert S. Bennett
Counsel of Record

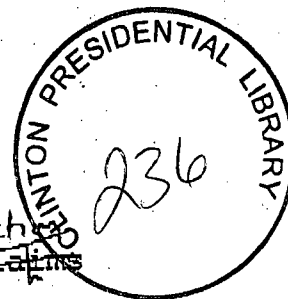
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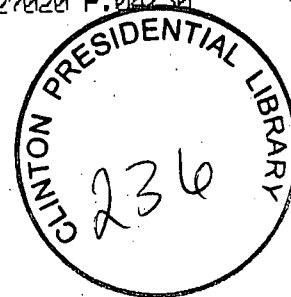
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President William Jefferson Clinton

QUESTIONS PRESENTED

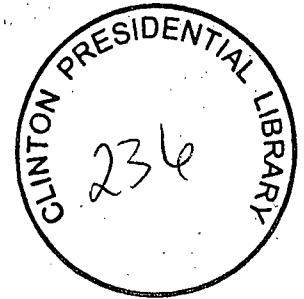


1. Whether the litigation of ^(a) private civil damages ~~claims~~ ^(ach) against an incumbent President must in all but the most exceptional cases be deferred until he leaves office.
2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.



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.



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

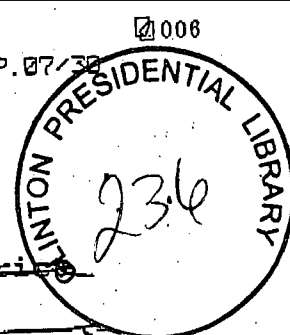
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~~PETITION FOR A WRIT OF CERTIORARI~~

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



~~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

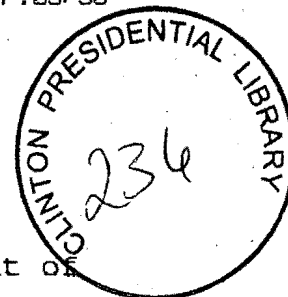
50 U.S.C. app. § 510

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Fed. R. Civ. P. 40

These provisions ^{are set forth} ~~appear verbatim~~ at pages App. 79-85 of the Petitioner's Appendix.

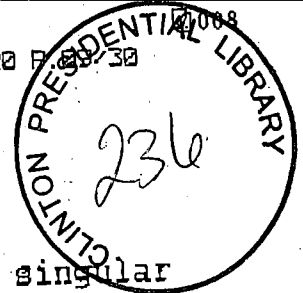
~~STATEMENT OF THE CASE~~

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.

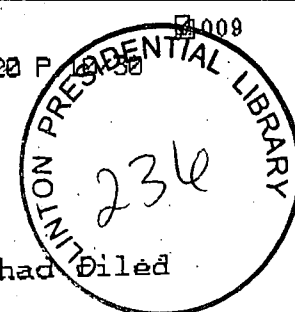
Arkansas State Trooper Danny Ferguson was named as co-defendant in two counts. Respondent alleges that Trooper Ferguson approached her on the President's behalf, thereby conspiring with the President to deprive the respondent of her civil rights in violation of 42 U.S.C. § 1985. Respondent also alleges 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.



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 ^{stated} ~~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." ^{Pet. App. 67} [The district court further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." ^{Id. at} Pet. App. 68-69. Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the ^{district judge} ~~court~~ stayed ^{the} trial "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." ^{Id. at} ~~Pet. App.~~ 72.2

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



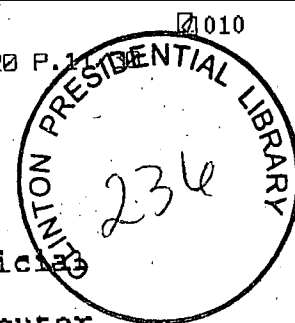
The trial court, observing that the plaintiff had filed suit three years after the alleged events, further concluded that the plaintiff would not be significantly inconvenienced by delay of trial. Pet. App. 70. However, it found "no reason why the discovery and deposition process could not proceed,"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

^{Jones} 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 "inappropriate 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.

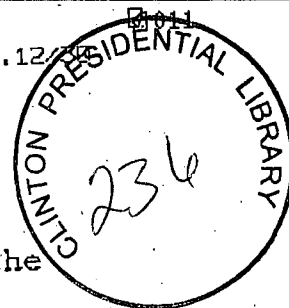
3 Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 and the collateral order doctrine, as articulated in Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) and Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent 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.



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. ^{Judge Bowman} ~~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.

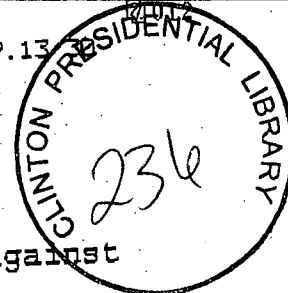
Judge Bowman also put aside concerns that the separation of powers could be jeopardized by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial. He stated that any separation of powers problems could be avoided by "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. Judge Bowman ⁱⁿ ~~further concluded~~ that the court of appeals had "pendent appellate jurisdiction" to entertain respondent's challenge to that stay, Pet. App. 5 n.4 (citing Kincade v. City of Blue Springs, Mo., 64 F.3d 389, 394 (8th Cir. 1995)), and then reversed the stay of trial as an abuse of discretion. Pet. App. 13 n.9.

Quote Beam [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



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.

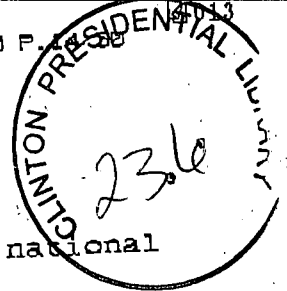
quite
Judge Ross dissented, concluding that the "language, logic and intent" of Fitzgerald "directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until 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.



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. "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.

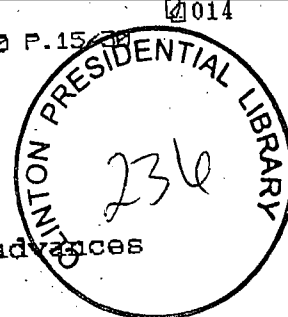
REASONS FOR GRANTING THE PETITION



This case presents a question of extraordinary national importance, which was resolved erroneously by the court of appeals. For the first time in our history, a court has ordered a sitting President to submit, as a defendant, to ^a civil ^{damages action} ~~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 ^(cure) ~~solution~~ for the separation of powers ^{problems} ~~dilemma~~ ^{creates} created by its ~~own~~ ruling, -- "judicial case management sensitive to the demands of the President's schedule" (Pet. App. 13) ^{is worse than the disease:} ~~only~~ ^{exacerbates the problem,} ~~by giving~~ ^(as judges) a trial court a general power to pass judgment on how the President spends his time and energies. And,

The panel majority ~~also~~ grossly overstated the supposedly extraordinary character of the relief that the President seeks. The deferral of litigation for a specified, limited period is far from unknown in our judicial system, and it is routinely afforded in order to protect interests that are not



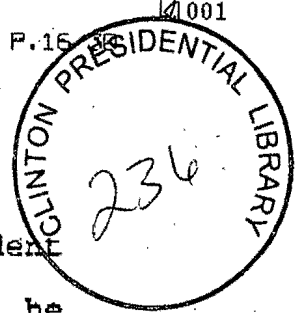
comparable in importance to the interests the President advances here.

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.

1. The Decision Below Is ^{the} Inconsistent With The Court's ^{is} 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 ^(never off) ~~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

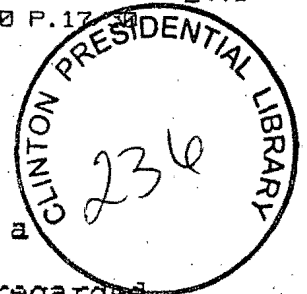


form of "judicial deference and restraint" that the President seeks here -- merely postponing the suit ~~against him~~^{NOT} until he leaves office -- is ^{modest} much more modest, for example, than the absolute immunity that Fitzgerald accorded all Presidents for actions taken within the scope of their presidential duties.

The panel majority concluded that because 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 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.



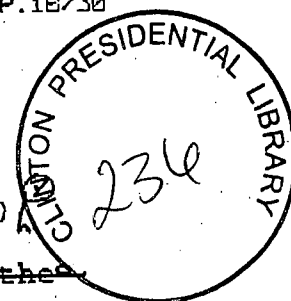
Fitzgerald -- the burden^s inevitably attendant upon being a defendant in a lawsuit. The court of appeals simply disregarded this "unique risk" [] to the effective functioning of government."

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).

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President Jefferson was even more emphatic:

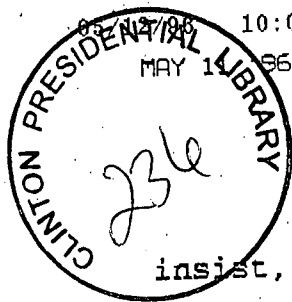
The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him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



10 The Works of Thomas Jefferson 404 n. (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. It ruled that
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." *uniquisthm
(get another
view)*
Pet. App. 16. Instead, the panel majority's solution was "judi-
cial case management sensitive to the burdens of the presidency
and the demands of the President's schedule." Pet. App. 13.
Rather than solve the separation of powers problems raised by
allowing a suit to go forward against a sitting President, this
Panel's approach ~~proposed course of action~~ only *exacerbates* ~~perpetuates~~ them.

~~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



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as witnesses

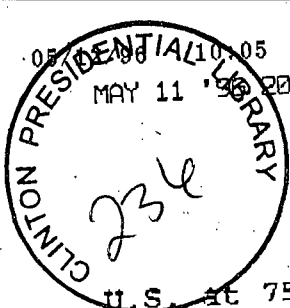
notion
implausibly
This comparison is ~~misconceived~~ on its face; there is no
comparison between being a defendant in a civil damages
action and merely being a witness. Even so, Presidents have
been called ~~to testify~~

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 ~~the~~ ^{trial} court ~~discharged~~ this mission with the greatest judiciousness, it is difficult to think of anything more inconsistent with the separation of powers than to put ^a court in the position of continually passing judgment on whether the President is spending his time in a way ^{it} ~~they~~ find ^s 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. This has occurred, however, only in cases of exigent need, and only under carefully controlled circumstances.~~

A sitting President has never been compelled to testify at a civil trial. A President ^{has} ~~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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(compulsory process)
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 ^{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 his official functions, such as by videotaped deposition.⁵

~~More significantly~~ ^{More significantly}, there is ^{in any event,} an enormous difference between being a third-party witness and being a defendant

threatened with financially ruinous personal liability. This is ~~obviously true~~

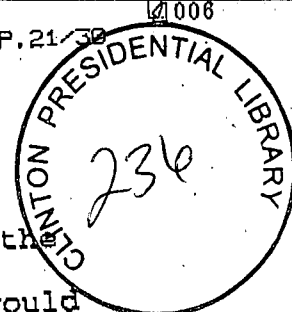
~~even~~ ^{even} for a person with only the normal business and personal responsibilities of everyday life -- which are, of course,

incalculably less demanding than those of the President. A

President as a practical matter could never wholly ignore a suit ^{equal}

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. Norch, 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).



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).

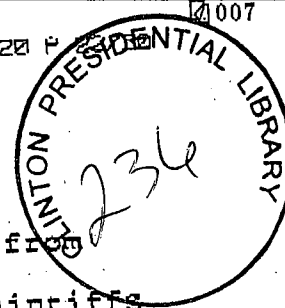
Judge Learned Hand once commented that as a litigant, he would "dread a lawsuit beyond anything else short of sickness and death."⁶ In this regard the President is ^{like} ~~as different than~~ any other litigant, except that a President's litigation, like a President's illness, becomes the nation's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

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. ____.



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.

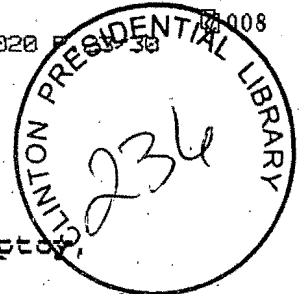
There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & supp. 1996), provides 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" ^{before the filing of the bankruptcy petition} prior to filing, ^{for the bankruptcy petition} and ordinarily ^{the stay} will remain in effect until the bankruptcy proceeding is completed. 11 U.S.C. § 362.⁹

Quotation
is from
§ 362?

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...)



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, in appropriate circumstances.

~~It is well established that courts may put off~~
~~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.~~ ^{Under} 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.

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).

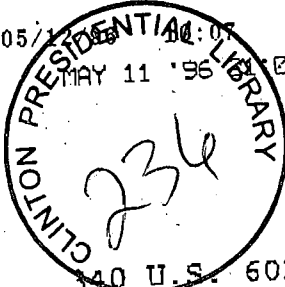
¹¹ See, e.g., Burford v. Sun Oil Co., 319 U.S. 313 (1943); Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).

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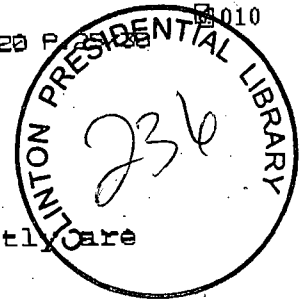


340 U.S. 602, 603-04 (1951) (nine-year delay). Many Presidents

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, ^{compels} ~~forces~~ plaintiffs to postpone the litigation of their civil claims while they ^{pursue} ~~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 which relief may be unavailable} ~~And~~ ^{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 does when significant institu-



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

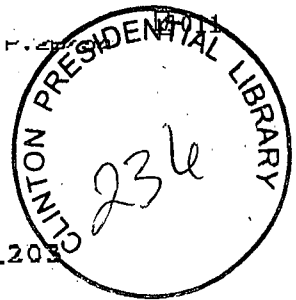
III. The Panel Majority Erred In Asserting Jurisdiction Over, And Reversing, The District Court's Decision To Stay The Trial Until After President Clinton Leaves Office.

1. Respondent cross-appealed to challenge the 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.



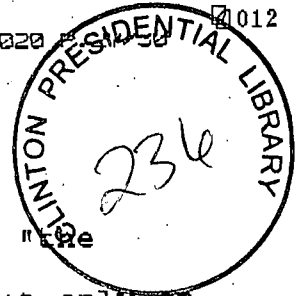
In Swint v. Chambers County Comm'n, 115 S. Ct. 1203

(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 ^(same)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 is incorrect. The question ^{is} 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 ^{the separation of powers} fundamental principles ~~such as these~~ 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. ____.



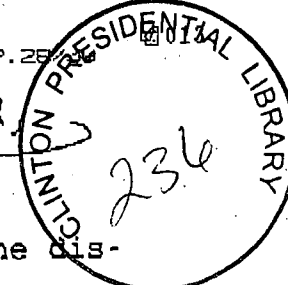
scheduling (Pet. App. 71 (citing Fed. R. Civ. P. 40 and "the equity powers of the Court")), and based its decision not only on the defendant's status at President -- certainly a relevant and valid factor -- but also on a detailed discussion of the particular circumstances of this case:

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 ^(accordingly) in error.



(over respondent's cross-appeal)

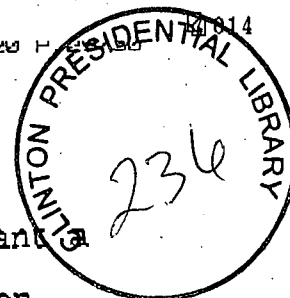
(If the ~~per~~ court of appeals had jurisdiction, its

2. ~~Also in error was its decision to reverse the dis-~~
~~trict court on the merits of this point.~~ As Justice Cardozo ex-
plained 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. ^{it} "The power to stay proceedings is inci-
dental 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.

OK?

The panel majority justified its reversal of the dis-
trict 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 equiva-
lent" 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



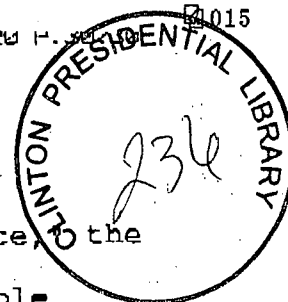
careful weighing of the particular facts that might warrant a conclusion that the trial court here abused its discretion.

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 denies review~~ ^{is declined} at this point, the case will proceed in the trial court, and the interests the President seeks to preserve by having the litigation deferred -- interests "rooted in the constitutional tradition of the separation of powers" -- will be irretrievably lost. Fitzgerald, 457 U.S. at 743, 749. Should the President prevail on the merits below, this Court will not even have the opportunity to provide guidance for future cases.

Now, moreover, a court for the first time has held that a sitting President is required to litigate private civil damages 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).



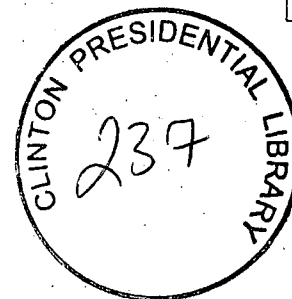
Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion).

In these circumstances, the fact that there is "no historical record of numerous 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~~ ^{*Id.*} 457 U.S. at 743. The Court should grant review in this case to protect those prerogatives.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted.



No. _____

IN THE
Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On _____

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

PETITION FOR A WRIT OF CERTIORARI

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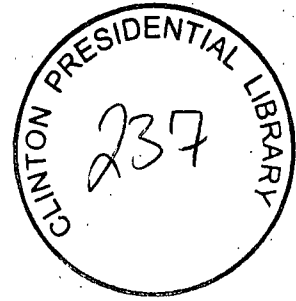
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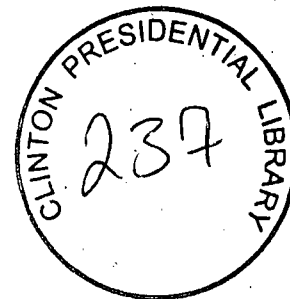
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QUESTIONS PRESENTED

1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until ~~he~~ the President leaves office.
- # 2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office.



ii

LIST OF PARTIES TO THE PROCEEDING

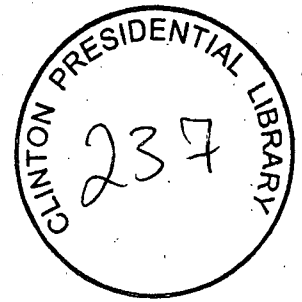
Petitioner, President William Jefferson Clinton, was a defendant in the district court and appellant in the court of appeals. Respondent Paula Corbin Jones was the plaintiff in the district court and cross-appellant in the court of appeals. Danny Ferguson was a defendant in the district court.

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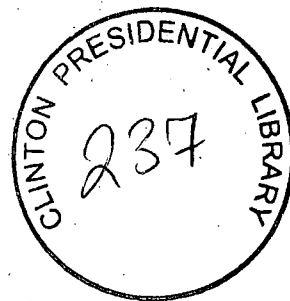
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iii

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
JURISDICTION	1
LEGAL PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
<i>A</i> . The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Separation Of Powers	8
<i>B</i> . The Court of Appeals Erred In Viewing The Relief Sought By The President As Extraordinary	14
<i>C</i> . The Panel Majority Erred In Asserting Jurisdiction Over, And Reversing, The District Court's Discretionary Decision To Stay The Trial Until After President Clinton Leaves Office	16
<i>D</i> . The Court Should Grant Review Now To Protect The Interests Of The Presidency	19
CONCLUSION	21

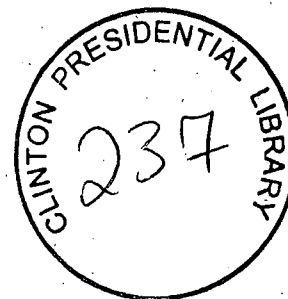


iv

TABLE OF AUTHORITIES

Cases

<i>Boushel v. Toro Co.</i> , 985 F.2d 406 (8th Cir. 1993)	16
<i>Cheyney State College Faculty v. Hufstedler</i> , 703 F.2d 732 (3d Cir. 1983)	16
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949).....	16, 17
<i>DeVault v. Truman</i> , 194 S.W.2d 29 (Mo. 1946)	20
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	15
<i>Kincade v. City of Blue Springs, Mo.</i> , 64 F.3d 389 (8th Cir. 1995), <i>cert. denied</i> , 1996 WL 26287 (Apr. 29, 1996)	5
<i>Koester v. American Republic Invs.</i> , 11 F.3d 818 (8th Cir. 1993).....	15
<i>Landis v. North Am. Co.</i> , 299 U.S. 248 (1936)	18
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	5
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	16
<i>New York ex rel. Hurley v. Roosevelt</i> , 179 N.Y. 544 (1904).....	20
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982)	<i>passim</i>
<i>Ricci v. Chicago Mercantile Exch.</i> , 409 U.S. 289 (1973).....	15
<i>Swint v. Chambers County Comm'n</i> , 115 S. Ct. 1203 (1995).....	17
<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d)	12
<i>United States v. Burr</i> , 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694)	12



v

Cases	Page(s)
<i>United States v. Fromme</i> , 405 F. Supp. 578 (E.D. Cal. 1975).....	13
<i>United States v. Mellon Bank, N.A.</i> , 545 F.2d 869 (3d Cir. 1976).....	15
<i>United States v. North</i> , 713 F. Supp. 1448 (D.D.C. 1989), <i>aff'd</i> , 910 F.2d 843 (D.C. Cir. 1990), <i>cert. denied</i> , 500 U.S. 941 (1991).....	13
<i>United States v. Poindexter</i> , 732 F. Supp. 142 (D.D.C. 1990).....	13
<i>Wehling v. Columbia Broadcasting Sys.</i> , 608 F.2d 1084 (5th Cir. 1979).....	15

Constitutional Provisions, Rules and Statutes

U.S. CONST. art. II, § 1, cl. 1	2, 9
---------------------------------------	------

<u>U.S. CONST. art. II, §§ 2-4</u>	<u>2</u>
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U.S. CONST. amend. VI	12
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<u>U.S. CONST. amend. XXV</u>	<u>2</u>
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11 U.S.C. § 105	15
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11 U.S.C. § 362	15
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28 U.S.C. § 651	16
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28 U.S.C. § 1254(1)	2
---------------------------	---

28 U.S.C. § 1291	16
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28 U.S.C. §§ 1331, 1332 and 1343	3
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42 U.S.C. § 1983	2, 3
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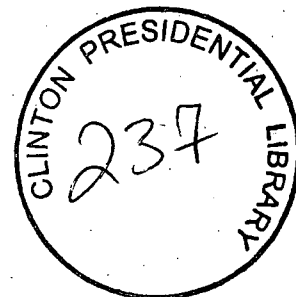
42 U.S.C. § 1985	2, 3
------------------------	------

Soldiers' and Sailors' Civil Relief Act of 1940, 50	
---	--

U.S.C. app. §§ 501-25 (1988 & Supp. V 1993)	14
---	----

50 U.S.C. app. § 510	2, 14
----------------------------	-------

50 U.S.C. app. § 521	2, 14
----------------------------	-------



vi

Page(s)

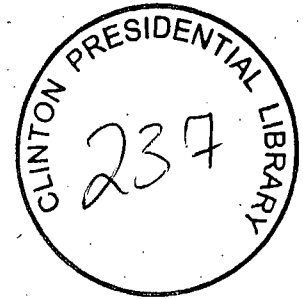
50 U.S.C. app. § 525.....	2
Fed. R. Civ. P. 40.....	2, 17

Pleadings From Other Cases

<i>Bailey v. Kennedy</i> , No. 757200 (Los Angeles County Superior Court filed Oct. 27, 1960).....	20
<i>Hills v. Kennedy</i> , No. 757201 (Los Angeles County Superior Court filed Oct. 27, 1960).....	20
<i>United States v. McDougal</i> , No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996).....	13

Other Authorities

2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994).....	15
10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905).....	11
JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed., 1890).....	10
3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833).....	10
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No. _____

IN THE
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October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On _____

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

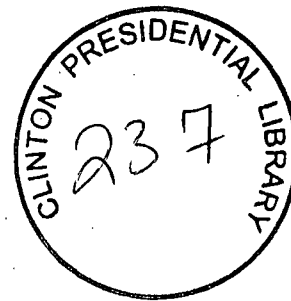
PETITION FOR A WRIT OF CERTIORARI
Petitioner William Jefferson Clinton respectfully re-
quests that a writ of certiorari issue to review the judgment of
the United States Court of Appeals for the Eighth Circuit en-
tered in this case on January 9, 1996.

OPINIONS BELOW

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

JURISDICTION

The judgment of the United States Court of Appeals for
the Eighth Circuit was entered on January 9, 1996. A petition



2

for rehearing was filed on January 23, 1996, and denied on March 28, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) ~~(220)~~ (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983

42 U.S.C. § 1985

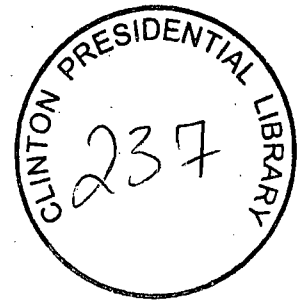
50 U.S.C. app. § 510

50 U.S.C. app. § 521

50 U.S.C. app. § 525

Fed. R. Civ. P. 40

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



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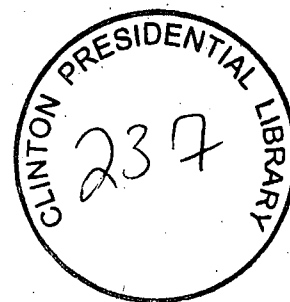
STATEMENT OF THE CASE

Petitioner William Jefferson Clinton is President of the United States. On May 6, 1994, respondent Paula Corbin Jones filed this civil damages action against the President in the United States District Court for the Eastern District of Arkansas. The complaint was premised in substantial part on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under the federal civil rights statutes and two arising under common law, and sought \$175,000 in actual and punitive damages for each of the four counts.¹ Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343₃ (1994).

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

¹ The first two counts allege that in 1991, when the President was Governor of Arkansas and respondent a state employee, he subjected respondent to sexual harassment and thereby deprived her of her civil rights in violation of 42 U.S.C. §§ 1983, 1985 (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. 1994

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



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

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

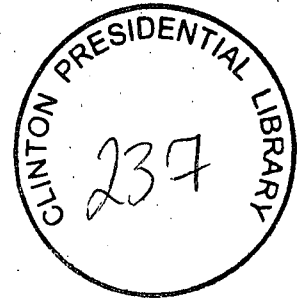
sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention . . . would be to interfere with the conduct of the duties of the office."⁶ Pet. App. 68-69. The district court

further found that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge stayed the trial "[t]o protect the Office of President . . . from unfettered civil litigation, and to give effect to the policy of separation of powers." Pet. App. 72.²

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

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

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

Judge Bowman found the reasoning in *Fitzgerald* "inapposite where only personal, private conduct by a President is at issue," (Pet. App. 11), and determined that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." Pet. App. 16. "The Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion . . . that beyond this outer perimeter there is still more immunity waiting to be discovered," he wrote Pet. App. 9.

He also wrote that [] he

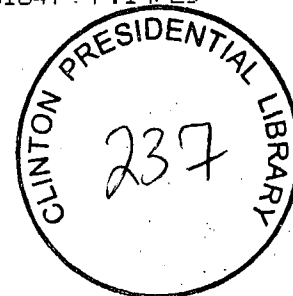
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Judge Bowman further concluded that it would be an abuse of discretion to stay all proceedings against an incumbent President, asserting that the President "is entitled to immunity, if at all, only because the Constitution ordains it. Presidential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

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³ Jurisdiction for the President's appeal was founded on 28 U.S.C. § 1291 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. 20-24. The district court stayed the litigation as to both defendants pending appellate review. Pet. App. 74.

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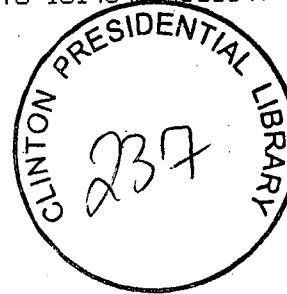
In reaching these conclusions, Judge Bowman put aside concerns that the separation of powers could be jeopardized by a trial court's exercising control over the President's time and priorities, through the supervision of discovery and trial. He stated that any separation of powers problems could be avoided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

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

Judge Ross dissented, stating that the "language, logic and intent" of *Fitzgerald* "directs a conclusion here that, unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term." Pet. App. 25. Judge Ross observed that "[n]o other branch of government is entrusted to a single person," and determined that "[t]he burdens and demands of civil litigation can be expected . . . to divert [the President's] energy and attention from the rigorous demands

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of his office to the task of protecting himself against personal liability. That result . . . would impair the integrity of the role assigned to the President by Article II of the Constitution.

Pet. App. 26.

Judge Ross also stated that private civil suits against sitting Presidents "create opportunities for the judiciary to intrude upon the Executive's authority, set the stage for potential constitutional confrontations between courts and a President, and permit the civil justice system to be used for partisan political purposes." Pet. App. 28. At the same time, he reasoned, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30.

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

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary national importance, which was resolved erroneously by the court of appeals. For the first time in our history, a court has ordered a sitting President to submit, as a defendant, to a civil damages action directed at him personally. We believe that absent ex-

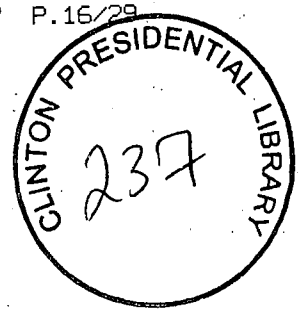
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ceptional circumstances, an incumbent President should never be placed in this position. But surely a President should not be placed in this position for the first time in our history on the basis of a decision by a fragmented panel of a court of appeals, without this Court's review.

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

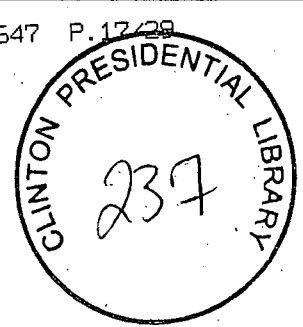
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Now is the appropriate time for the Court to address these issues. If review is declined, the President would have to undergo discovery and trial while in office, which would eviscerate the very interests he seeks to vindicate. Moreover, if the decision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

Such complaints

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

1. The President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Unlike the power of the other two branches, the



entire "executive Power" is vested in a single individual, "a President," who is indispensable to the execution of that authority. U.S. CONST. art. II, § 1. The President is never off duty, and any significant demand on his time necessarily imposes on his capacity to carry out his constitutional responsibilities.

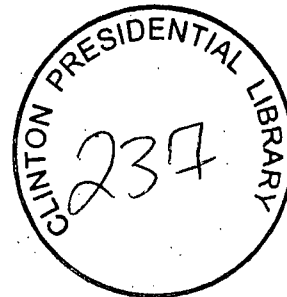
Accordingly, "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. 753. Indeed, "[t]his tradition can be traced far back into our constitutional history." *Id.* at 753 n.34. The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

limited,

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, largely not present here. ~~But in this~~

and accordingly,



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case the President does not seek immunity from liability.⁴ He ~~seeks protection only from~~ the second danger to the Presidency 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.]

-- clearly exists here.

2. As the *Fitzgerald* Court demonstrated, the principle that a sitting President may not be subjected to private civil lawsuits has deep roots in our traditions. See 457 U.S. at 751 n.31. Justice Story stated that [t]he president cannot ... be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.⁵

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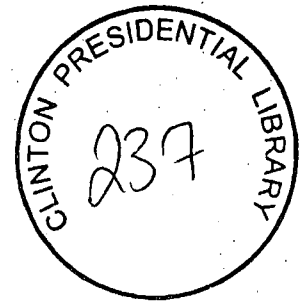
3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added) (quoted in *Fitzgerald*, 457 U.S. at 749). Senator Ellsworth and then-Vice President John Adams, both delegates to the Constitutional Convention, also agreed that the President, personally, was not ... subject to any process whatever. ... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.⁶ JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed., 1890) (quoted in *Fitzgerald*, 457 U.S. at 751 n.31).

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President Jefferson was even more emphatic:

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

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.

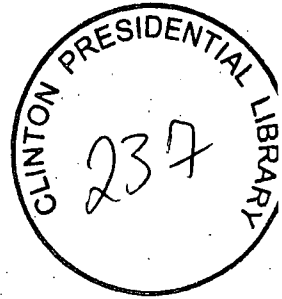


from north to south & east to west, and withdraw him entirely from his constitutional duties?

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

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

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



12

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

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

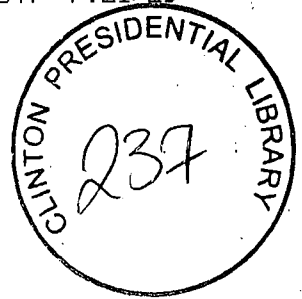
A sitting President has never been compelled to testify in civil proceedings. Presidents occasionally have been called upon to testify in criminal proceedings, in order to preserve the public's interest in criminal law enforcement (*Fitzgerald*, 457 U.S. at 754) and the defendant's Constitutional right to compulsory process (U.S. CONST. amend. VI; *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d)) — factors that are, of course, not present here. But even in those compelling cases, as Chief Justice Marshall recognized, courts are not "required to proceed against the president as against an ordinary individual." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). Instead, courts have required a heightened showing of need for the President's testi-

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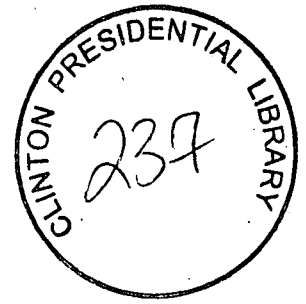
money, and have permitted it to be obtained only in a manner that ~~does not disrupt~~ his official functions, such as by videotaped deposition.⁵

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

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

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

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



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

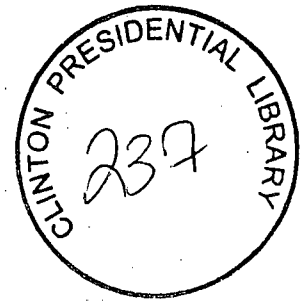
The court below appears to have viewed the President's claim in this case as exceptional, both in the relief that it sought and in the burden that it imposed on respondent.⁷ In fact, far from seeking a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less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

There are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected. For example, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), provides that civil claims by or against military personnel are to be tolled and stayed while they are on active duty.⁸ Such relief is deemed necessary to enable members of the armed forces "to devote their entire energy to the defense needs of the Nation." 50 U.S.C. app. § 510. *President Clinton* here thus seeks relief similar to that to which he may be entitled as Commander-In-Chief of the Armed Forces, and ~~to~~ *that* which is routinely available to service members under his command. *(1988)*

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

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

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



15

affects all litigation that "was or could have been commenced" prior to the filing of that petition, 11 U.S.C. § 362, and ordinarily will remain in effect until the bankruptcy proceeding is completed. *Id.*⁹ Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court — except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure of office. #

(1994),

It is well established that courts, in appropriate circumstances, may put off civil litigation until the conclusion of a related criminal prosecution against the same defendant.¹⁰ That process may, of course, take several years, and affords the civil plaintiff no relief. The doctrine of primary jurisdiction, where it applies, compels plaintiffs to postpone the litigation of their civil claims while they pursue administrative proceedings, even though the administrative proceedings may not provide the relief they seek. This process too can take several years. See, e.g., *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-07 (1973). And public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). ~~That this routinely delay litigation~~ for a substantial period.

well established

Such appeals can

⁹ Indeed, a bankruptcy judge's discretion has been held sufficient to authorize a stay of third-party litigation in other courts that conceivably could have an effect on the bankruptcy estate, even if the debtor is not a party to the litigation and the automatic stay is not triggered. See 11 U.S.C. § 103, 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994), and cases cited therein.

(1994)

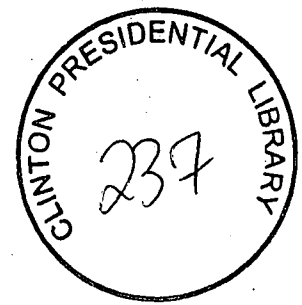
¹⁰ See, e.g., *Koester v. American Republic Invs.*, 11 F.3d 818, 823 (8th Cir. 1993); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *United States v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976).

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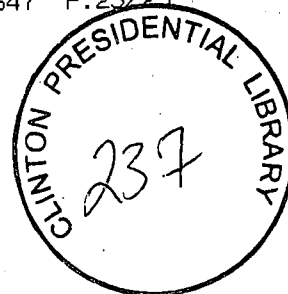
We do not suggest that all of these doctrines operate in exactly the same way as the relief that the President seeks here. But these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself "above the law," or that holding this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

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

1. Respondent cross-appealed to challenge the district court's order to stay trial. Ordinarily, a decision by a district court to stay proceedings is not a final decision for purposes of appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Such orders may be reviewed on an interlocutory basis only by writ of mandamus. See 28 U.S.C. § 651.¹¹ In asserting that jurisdiction existed for her cross-appeal, the respondent did not seek such a writ or contend that the stay was appealable under 28 U.S.C. § 1291, as a final order, or as a "collateral" order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, respondent asserted, and the panel majority found,

(1994)

¹¹ Some courts recognize that exceptions may exist in cases in which a stay is "tantamount to a dismissal" because it "effectively ends the litigation." See, e.g., *Boushel v. Toro Co.*, 985 F.2d 406, 408 (8th Cir. 1993); *Cheyney State College Faculty v. Hufstедler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, it is not applicable here, where the district court's order clearly contemplated further proceedings in federal court. See *Boushel*, 985 F.2d at 408-09.



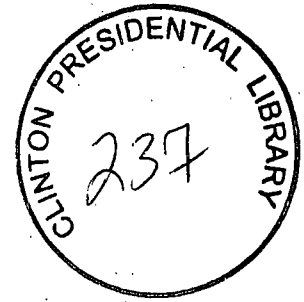
that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. Pet. App. 5 n.4.

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

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

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

This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident ... and desperately needs to recover ... dam-



18

ages It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an *in rem* foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience.

Pet. App. 70.

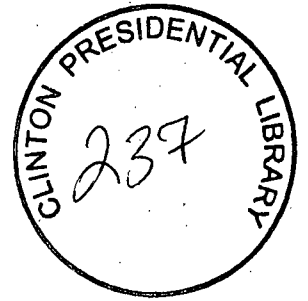
Review of the district court's ^{discretionary} decision to postpone the trial — unlike review of its decision to reject the President's position that the entire case should be deferred — must address these particular facts of this case. Thus the respondent's cross-appeal raised issues that, far from 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.

as a matter of law

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

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. ^{Id.} at 254-55. Indeed, the Court in *Landis* specifically stated that "[e]specially

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in cases of extraordinary public moment, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.* at 256.

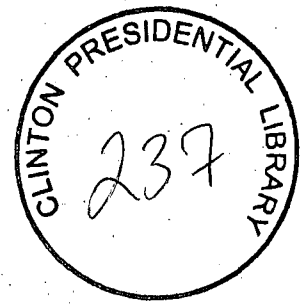
The panel majority justified its reversal of the district court with a single sentence in a footnote: "Such an order, delaying the trial until Mr. Clinton is no longer President, is the functional equivalent of a grant of temporary immunity to which, as we hold today, Mr. Clinton is not constitutionally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

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

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

Now, a court for the first time in history has held that a sitting President is required to defend private civil damages claims. This holding breaches historical understandings that

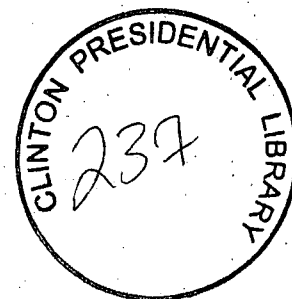
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are as appropriate today as ever before.¹² The court in *Fitzgerald* specifically anticipated the threat posed by suits of this kind. Because of "the sheer prominence of the President's office," the Court noted, the President "would be an easily identifiable target for suits for civil damages." 457 U.S. at 752-53. Chief Justice Burger added: "When litigation processes are not tightly controlled . . . they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage." *Id.* at 763 (concurring opinion). In these circumstances, the fact that there is "no historical record of numerous suits against the President" -- as there was no comparable record before *Fitzgerald* (*id.* at 753 n.33) -- provides no reassurance at all that this case will be an isolated one.

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

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



21

CONCLUSION

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

Respectfully submitted,

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