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[001a]

No. 95-1853

CLINTON PRESIDENTIAL LIBRARY
238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

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

BRIEF FOR RESPONDENT

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September 9, 1996

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CLINTON PRESIDENTIAL LIBRARY
238

QUESTIONS PRESENTED

This uncomplicated civil action for damages against petitioner, who is President of the United States, for acts committed before he became President, bears no possible relation to his official responsibilities. No showing was made in the district court that the lawsuit, or any aspect of it, would impair the functioning of the presidency. The court of appeals ordered the district court to refrain from "creating scheduling conflicts" for petitioner on remand. The following questions are presented:

1. Whether the court of appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his presidency, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond "the outer perimeter of [the President's] official responsibility," the limit for presidential immunity set forth in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

2. Whether the court of appeals erred in reversing the district court's grant to petitioner of what the district court termed a "limited or temporary immunity from trial," Pet. App. 68, for acts beyond the outer perimeter of his official responsibility.

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY
238
PAGE

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY
238

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY
238
PAGE

Other Materials

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY
238
PAGE

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY
238

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a \$6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Mrs. Jones (Miss Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Mrs. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite

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CLINTON PRESIDENTIAL LIBRARY 238

an unidentified trooper (clearly Mr. Ferguson) told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and escorted her to Mr. Clinton's room at the Excelsior Hotel. The article reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Mrs. Jones was one of the many women who, according to the article, had consensual sexual relationships with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Mrs. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances and asked that Mr. Clinton acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Mrs. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, only four months after learning about the damaging magazine article, and after attempting unsuccessfully to obtain an acceptable statement by Mr. Clinton to settle the matter and to restore her reputation, Mrs. Jones filed suit against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

supposed reason for delay

Mr. Ferguson's answer to complaint admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY 238

App. 68. The court found Mr. Clinton's contention to be "contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." Pet. App. 68. Nevertheless, in a self-contradictory holding that was apparently premised upon isolated language in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the district court granted Mr. Clinton what it called a "limited or temporary immunity from trial," Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief and properly managed, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton *and* Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be 1997 or 2001. Pet. App. 68-71. The court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Mrs. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the district court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74. Mr. Clinton asserted that appellate jurisdiction existed under the rule that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." Opening Brief of Appellant President William Jefferson Clinton 10, 23, *Jones* v. *Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995).

On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never*

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CLINTON PRESIDENTIAL LIBRARY 238

> this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .
>
> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .
>
> The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

Judge Beam, concurring, emphasized that Mr. Clinton had failed to point out *any* "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case

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CLINTON PRESIDENTIAL LIBRARY 238

(1982), or in this Court's immunity case law, however, supports his theory. The essential rationale of official immunity is that the imposition of personal damages liability on public officials for official acts would cause them to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Id.* at 744-75 (citation omitted). As a consequence, presidential immunity was limited in *Fitzgerald* to "acts within the *'outer perimeter'* of [the President's] *official responsibility*," *id.* at 756 (emphasis added), and Chief Justice Burger's concurring opinion in that case made clear that Presidents "are *not* immune for acts outside official duties," *id.* at 759 (Burger, C.J., concurring). The claim that *Fitzgerald* supports protection for unofficial acts is based upon language taken out of context.

only one rationale applies.

Mr. Clinton's other authorities do not support his immunity claim. The Framers did not intend to place the President above the law, and thus did not confer upon Presidents any personal privileges akin to those of a monarch who is sovereign in both person and office. Nor do *United States* v. *Burr*, 25 F. Cas. 30, 187 (C.C.D. Va. 1807) (Nos. 14,692d and 14,694), and *United States* v. *Nixon*, 418 U.S. 683 (1974), support immunity. They simply stand for the proposition that confidential and official presidential communications are presumptively protected by executive privilege, which may nonetheless be overcome upon a sufficient showing of need. Here, no official acts or confidential communications are involved, and no balancing of interests between privilege and need is required. This Court's cases, indeed, have always limited Presidential privileges to official communications and acts, and there is no reason to abandon that course here.

Nor is Mr. Clinton's immunity claim supported by separation-of-powers principles. He made no showing below that this case will actually prevent him from carrying out his duties. Nor could he, given the manifest simplicity of the case. Mr. Clinton is thus reduced to the contention that in general, litigation (including a hypothetical torrent of future

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CLINTON PRESIDENTIAL LIBRARY
238

basis of the claim, "one [cannot] hale an incumbent President into court and seek damages from him personally," Pet. Br. 17, and "indicates that the instant suit should be deferred," Br. for United States as *Amicus Curiae* 4. Neither the *Fitzgerald* holding nor its rationale, however, supports the extraordinary and novel immunity claim advanced here.

Didn't claim holding does. Also recog'ed one rationale doesn't — but one does

In *Fitzgerald*, a five-Justice majority of this Court held that Presidents are entitled to an absolute immunity for suits for civil damages relating to any of their official acts. Four Justices dissented, arguing that presidential immunity should be limited only to particular functions performed by the President. Both the majority and concurring opinions made clear that the President's official immunity only forecloses "damages liability for acts within the *'outer perimeter'* of [the President's] *official responsibility*." *Fitzgerald*, 457 U.S. at 756 (emphasis added). Chief Justice Burger explained that presidential immunity covers only *official* actions and "*does not extend beyond such actions*"—that "a President, like Members of Congress, judges, prosecutors or congressional aides . . . [is] *not* immune for acts outside official duties." *Id.* at 761 n.4, 759 (Burger, C.J., concurring; emphasis added). That very limitation, Chief Justice Burger observed, was precisely why the Court's decision did not "place[ ] a President 'above the law,' " as the dissent had vigorously argued. *Id.* (Burger, C.J., concurring); *see id.* at 766-67 (White, J., dissenting); *id.* at 797 (Blackmun, J., dissenting).

have to answer?

The limitation of immunity to official acts is backed by a long and unbroken line of authority cited in *Fitzgerald*. As Judge Learned Hand once explained, "[t]he decisions have, indeed, *always* imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (emphasis added), *cert. denied*, 339 U.S. 949 (1950). The essential rationale of immunity is that imposing personal liability for *official* acts would distort official judgment or make officials unwilling to act. Thus, *Fitzgerald* observed that,

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY 238

Id. at 749, 756 (emphasis added). These words were not mere dicta. Sharply disputed in *Fitzgerald* was the issue of which acts were to be subject to immunity. The Court noted that, in the past, it had linked absolute immunity to particular official functions: "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Id.* at 755. But because of the variety of functions performed by the President, the Court selected the broadest scope of absolute immunity recognized in the case law: immunity "for acts within the 'outer perimeter' of . . . official responsibility." *Id.* at 756; *see, e.g., Spalding* v. *Vilas, supra*, 161 U.S. at 498; *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959). The Court then applied its holding to the facts of the case. Citing a specific provision of the United States Code, it held that the alleged conduct for which President Nixon had been sued indeed fell within the outer perimeter of presidential responsibility. *Id.* at 757.

But this not at issue.

Conceding, as he must, that "[t]his case is different from *Fitzgerald* . . . in that it largely does not touch upon official actions," Mr. Clinton nevertheless contends that "[t]he logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here—the temporary deferral of private civil litigation." Pet. Br. 20. In support of this argument, Mr. Clinton points to two sentences in a single paragraph of *Fitzgerald*: one sentence stating that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government"; and another stating that "the sheer prominence of the President's office [cannot] be ignored." *Fitzgerald, supra*, 457 U.S. at 751-53, *quoted in* Pet. Br. 20. This language, the argument goes, applies as fully to lawsuits involving private conduct as to those involving official conduct, and so requires recognition of the temporary immunity sought here. *See* Pet. Br. 20-21; *see also* Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 10; Br. for United States 16.

Is this all?

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CLINTON PRESIDENTIAL LIBRARY
238

> lawsuits would raise unique risks to the effective functioning of government. *As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings."* Pierson v. *Ray*, 386 U.S., at 554. *Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979). *This concern* is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the presidency was designed to serve.

457 U.S. at 751-53 (footnotes omitted; emphasis added). In short, the Court reasoned that the President was potentially more vulnerable than other officials to lawsuits for *official* acts, and that absolute, not qualified, immunity should therefore apply to those acts.

But obviously also more vuln to suits re unoff'l acts.

The Court's reasoning in *Fitzgerald* thus has no application to the case at bar. As the court of appeals concluded, "[i]t is clear from a careful reading of *Fitzgerald*" that this Court was "concern[ed] that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process," and might cause the President to "make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid

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CLINTON PRESIDENTIAL LIBRARY 238

of government." *Id.* Indeed, to the extent that there is any "traditional practice" on the point at all, it is that lawsuits involving a President's unofficial acts must be allowed to proceed.

The Framers believed that every constitutional power and every constitutional actor must be constrained. "Federalists and antifederalists both agreed . . . that no one should ever be entrusted with unqualified authority." Bernard Bailyn, *The Ideological Origins of the American Revolution* 368 (1992). Having fought to escape the reign of a king whose power was unchecked, they were certain "that any release of the constraints on the executive—any executive—was an invitation to disaster." *Id.* at 379 (citing remarks of Edward Rutledge); *see also* 4 Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention of Philadelphia in 1787* 276 (2d ed., reprinted 1987).

As a result, the Framers adhered to a notion reflected time and again in this Court's decisions: "No man in this country is so high that he is above the law." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). It was understood that the President had no personal privileges beyond those of an ordinary citizen:

> *His person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law.*

An American Citizen (Tench Coxe) I, Independent Gazetteer (Philadelphia) September 26, 1787, reprinted in I Bernard Bailyn, ed., *The Debate on the Constitution* 20, 24 (1993) (emphasis in original). As Charles Coatsworth Pinckney, an important Framer, explained on the Senate floor only a few years after the Constituion's adoption, the Framers

> well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.

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CLINTON PRESIDENTIAL LIBRARY 238

"*official* inviolability," and described only the protections for actions taken by a President "*while he is in the discharge of the duties of his office*," *id.* (citation omitted), and thus goes no farther than *Nixon* v. *Fitzgerald*, which did not recognize any "immun[ity] for acts *outside* official duties," *Fitzgerald*, 457 U.S. at 759 (Burger, C.J., concurring). Beyond this, Justice Story was referring only to a presidential privilege from "arrest, imprisonment, or detention"—none of which, of course, is involved here—and the "official inviolability" he described was only for "*this* purpose." Pet Br. 16 (citation omitted; emphasis added).[2] And as for Mr. Clinton's citation of Presidents Adams and Jefferson to the effect that "the President personally is not subject to any process whatsoever," Pet. Br. 16, that view was refuted by Chief Justice Marshall early in our Nation's history in *United States* v. *Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) ("That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted"). *See also Nixon* v. *Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc; per curiam) (noting that Chief Justice Marshall "squarely ruled that a subpoena may be directed to the President).[3] It is thus now

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[2] An ordinary modern civil case, of course, presents no danger of arrest, imprisonment or detention of the defendant. Accordingly, the debate over whether a "President must be impeached and removed from office before he can be prosecuted" for a crime, Pet. Br. 14-15 & n.11; *see also* Br. for United States 15 n.8, is irrelevant here.

[3] In fact, the Jefferson letter that Mr. Clinton quotes was one in which President Jefferson was expressing his criticisms of the Chief Justice's decision in *Burr*. *See Fitzgerald*, 457 U.S. at 751 n.31; *see also* Bradford E. Biegon, Note, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's* Commentaries, 82 Va. L. Rev. 677, 698 & nn.127-28 (1996) ("Jefferson's close of the letter is illustrative of the distemper that Marshall's opinion must have caused him").

As for President Adams, he is almost universally regarded as an exponent of an excessively expansive view of executive power. He was regarded by most of his contemporaries as being almost a monarchist. *See*

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CLINTON PRESIDENTIAL LIBRARY
238

become relevant whether a judicial proceeding is civil or criminal in nature. *See id.* at 707-13.

Thus, the executive privilege recognized by this Court in *United States* v. *Nixon* in no way supports Mr. Clinton's argument. Executive privilege is analogous to the protection recognized in *Nixon* v. *Fitzgerald*, and its limitations are similar. Both protections are designed to preserve the presidential decision-making process, and both are narrowly crafted to achieve that end. Executive privilege is necessary because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States* v. *Nixon*, 418 U.S. at 708. Because official conduct and communications are not involved here, there is no warrant to engage in the balancing of interests required in *United States* v. *Nixon*, and no basis to hold that there must be Sixth Amendment interests at stake for this litigation to proceed.[4] This case would no more threaten "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," *id.*, than it would threaten to cause Presidents "to hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' " *Nixon* v.

Did we argue this??

Last 2 pages — again ignoring key rationale: time

[4] Mr. Clinton is accordingly wrong to suggest that *United States* v. *Nixon* can be read as implying that the testimony of someone serving as President cannot be compelled in "civil proceedings." Pet. Br. 27. The Court simply left open the question whether the presumptive *executive privilege* for executive communications could be overcome in civil proceedings. *See Nixon*, 418 U.S. at 711-12 & n. 19. Here, of course, there is no question of privilege, and therefore no need to look to whether the need to produce evidence in a civil case may be overcome by the need to protect the privacy of official presidential deliberations. Similarly, Mr. Clinton's observation that the Court in *Nixon* twice quoted Chief Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual," Pet. Br. 27 (quoting *Nixon*, 418 U.S. at 708, 715 (quoting *Burr*, 25 F. Cas. at 192)) is beside the point: both Chief Justice Marshall in *Burr* and the *Nixon* Court were addressing the question of how claims of executive privilege must be handled by the courts.

Didn't we say this?

missing the point

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CLINTON PRESIDENTIAL LIBRARY 238

dent Nixon *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States* v. *Nixon*, *supra*, and then later, in his briefs in *Nixon* v. *Fitzgerald*, *supra*.[6] In any event, the understanding reflected in Mr. Clinton's brief is that such litigation may indeed be brought, but must be stayed. If *that* were the universal historical understanding, then plaintiffs with claims against Presidents for unofficial acts would not have withheld their claims, but would have *asserted* them to preserve their timeliness, even if the claims were going to be stayed.

In short, to create a blanket rule protecting a President from litigation relating to his unofficial acts would cross a line that this Court has never crossed and that the Framers never contemplated would be crossed. It would create the first purely personal presidential privilege. It would provide, as the court of appeals noted, a "degree of protection from suit for

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Supp. V 1993), Pet. App. 14 n. 10, but the state trial court denied his motion, which was plainly meritless in light of this Court's decision in *Boone* v. *Lightner*, 319 U.S. 561 (1943).

6 At oral argument in *United States* v. *Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

> QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?
>
> MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument at 80, *United States* v. *Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon at 8-9 n.6, *Nixon* v. *Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY 238

Need to respond to this general point: delay → disadvantage to π

a trial, to give a deposition, to produce any document, or even to admit or to deny any of the allegations of a complaint. During this period of many years, evidence inevitably will be lost, as witnesses become unavailable, memories fade, and documents are mislaid or destroyed, all to the likely detriment of the plaintiff, who still must bear the burden of proof. If such delay were commanded by law, a plaintiff might be wise not to bother to assert even the strongest of claims. And in a case such as this, where the plaintiff seeks vindication for damage to her reputation, no amount of prejudgment interest will compensate for any delay. The presumptive "deferral" rule sought by Mr. Clinton is indeed a special privilege or "immunity"—which is why Mr. Clinton repeatedly described it as such throughout the proceedings below.

Mr. Clinton's description of stays in other litigation contexts only serves to confirm the extraordinary nature of the privilege he seeks here. With one execption—the stay provision in the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993) (Pet. Br. 36)—each of the examples of stays he cites are ones required in order to allow *other* judicial or administrative cases to proceed. And none of these examples involves the creation of a special, personal privilege. Thus, the automatic bankruptcy stay (Pet Br. 34-35), which is the product of a statute, 11 U.S.C. § 362 (1994), serves to allow claims to be immediately addressed in the bankruptcy forum; and it affords protection not only to debtor-defendants but to claimant-plaintiffs, by preserving the value of the bankrupt estate. And as for the protection afforded debtors, it is available to any person who may file a bankrupcy petition—and not to a special privileged class of one. Similarly, the stay of civil litigation in favor of criminal litigation (Pet. Br. 35) serves the interests of justice, judicial economy, and constitutional rights such as the privilege against self-incrimination, and, through the doctrines of res judicata or collateral estoppel, may even benefit the civil plaintiff. And facilitating the conduct of criminal litigation

need to answer this too

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY
238

Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)), or would otherwise "prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). Mr. Clinton's burden of showing a separation-of-powers violation, or showing that a stay of all proceedings is otherwise justified, is unmet. Nor is a blanket temporary-immunity protection required in *every* personal action against the President as a matter of law.

1. This simple civil case will not prevent the Executive Branch from accomplishing its constitutionally assigned functions.

As the court of appeals observed, Mr. Clinton has presented a "sweeping claim that this suit . . . will violate the constitutional separation of powers doctrine . . . without detailing any specific responsibilities so explaining how or the degree to which they are affected by the suit." Pet. App. 12. He made no attempt in the district court to show how this case could possibly keep him from carrying out his official duties. He did not do so for a very simple reason—he cannot.

It is not even necessary to look to Mr. Clinton's duties to establish the point. Given its simple factual predicate and the utterly barren record, this case could ~~not be deemed to~~ impose hardship upon the Executive Branch. It has nothing to do with Mr. Clinton's official duties. It is at bottom a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably he has already spent with his counsel the short time required to obtain his recollection of events, for according to what he has publicly said, his recollection is nonexistent. By its nature, the case will not require the production of many

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potentially burdensome that the two are bound to conflict, and a blanket rule requiring a stay is called for.

These arguments fail. The Chief Executive's duties are difficult and important, but the fact remains that they are, as Chief Justice John Marshall once observed, "not unremitting," and do not "demand his whole time for national objects." *United States* v. *Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692d). That is no doubt because, as common sense makes clear, a President does not and cannot exercise all executive power himself; unlike legislative or judicial powers, executive powers can be, and for the most part, are, delegated. "Although the Constitution says that '[t]he executive Power shall be vested in a President of the United States of America,' Art. II, it was never thought that the President would have to exercise that power *personally*. He may generally authorize others to exercise executive powers, with full effect of law, in his place." *Mistretta* v. *United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) (emphasis in original). The President's powers are mostly exercised through others. As a result, Presidents have always had time to fulfill personal commitments that do not involve the exercise of their Article II powers. Mr. Clinton's activities in the weeks after his brief was filed, which are a matter of public record, provide an apt example: a book that Mr. Clinton had authored was published; he spent a week vacationing in Wyoming, where he hiked and played golf; he spent a day in New York to attend a large birthday party in his honor; he spent four days riding a train through the Midwest; attended a political convention in Chicago; went on a two-day bus trip through another route in the Midwest and South; and spent a day in Little Rock, where he played golf.[10] There is, of

Respond! [illegible] press [illegible] say on [illegible] head.

Silly same thing.

10 *E.g.*, *Clinton's Book Reinforces Administration's Themes*, Wash. Post, Aug. 22, 1996, at A8, col. 1; *Clinton Puts Off Politics As Vacation Winds Down*, Wash. Post, Aug. 17, 1996, at A15, col. 1; Alison Mitchell, *Clinton Has $10 Million Wish for Birthday Bash*, N.Y. Times, Aug. 19, 1996, at A1, col. 4; John F. Harris, *President Finds 'Heaven' on the Campaign Rails*, Wash. Post, Aug. 27, 1996, at A1, col. 3; Dan Balz, *Despite*

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238

the fact that they were indeed criminal proceedings, that Mr. Clinton is expressly a principal subject of the Independent Counsel's criminal investigation into Whitewater,[13] and given that this investigation encompasses a number of complex and disparate financial transactions, Mr. Clinton has surely already spent more time dealing with Whitewater than he ever will with this case. At the least, it is clear that he has had to do in the criminal realm the burdensome things he now claims he cannot do in any civil litigation against him: "to review [pleadings]; prepare and assure the veracity of discovery responses; retrieve and review documents; . . . review . . . other evidence in the case; review the opposition's pleadings and motions; . . . consult with counsel throughout the case"—and testify. Pet. Br. 23; *see also* Br. for United States 9. If the Independent Counsel's investigation has not kept Mr. Clinton from his official duties, neither will most personal civil cases—and *certainly* not *this* one.

[illegible] respond?

The very trial judge who will try this case, indeed, was very solicitous of Mr. Clinton in one of the Whitewater trials,[14] and even came to Washington to moderate his videotaped deposition in that case. She also granted his request that the tape not be shown to third parties. Far from intruding into presidential business, she has managed litigation to prevent judicial intrusion. She would no doubt be very accomodating of Mr. Clinton's scheduling concerns in this case through the use of her case-management experience (and through *in camera* and *ex parte* conferences when needed), and could ensure that no presidential business would be impaired. And she would no doubt be highly cognizant of the public mistrust of

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Weiner, *Clinton Testifies on Tape in Trial of Bankers*, N.Y. Times, July 8, 1996, § A, p. 11, col. 1.

[13] Order, *In re Madison Guaranty Savs. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir., Sp. Div. Aug. 5, 1994) (appointing Independent Counsel).

[14] *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.).

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CLINTON PRESIDENTIAL LIBRARY 238

are unjustified or purely partisan, one would think that litigation—which gives the public figure access to discovery and to a neutral forum in which to obtain vindication—is the *least* likely mode of attack. Mrs. Jones, for example, has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a neutral, nonpartisan forum empowered not only to dismiss her claims, but to impose severe sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including purely private ones against Presidents.

Further, Mrs. Jones's life as a plaintiff is not attractive. She is subject to scurrilous comments in the media and minute examination of her past, is living in a controlled environment to prevent unwanted intrusion, and is exposed to intense interest and comments whenever she is recognized in public by all manner of people. It takes a person with great courage to sue someone with more influence, wealth, privilege, and power. If anything, Mrs. Jones's experiences would discourage others from ever suing a sitting President, especially since her case has now been delayed for more than two years.[16]

[16] To compound matters, a supposed delay in filing her claim is claimed by Mr. Clinton to suggest that Mrs. Jones's motives were bad. Pet. Br. 41-42. If a political strike suit was her desire, the presidential campaign of 1992 would have been the time to attempt to politically harm Mr. Clinton. The possibility that Mrs. Jones had no such motive, as proven by her lack of desire to sue for almost three years until she was libeled, does not suggest itself to Mr. Clinton, who can see no harm in any post-filing delay to Mrs. Jones's cause in quickly restoring her reputation.

An improper motive is also implied by Mr. Clinton when he notes that Mrs. Jones did not sue the publication that published the libel. Pet. Br. 3 n.1. But the standard of proving libel in the face of the First Amendment rights of the press is difficult.

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238

The opinion under review emphasized that a different record could indeed lead to a different result, and that the district court is *required* to do everything necessary to allow the President to carry out his constitutional duties:

> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15. Thus, the trial judge remains completely free under the circuit court's decision to "halt[ ] or delay[ ] or reschedul[e] *any* proposed action by *any* party at *any* time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (Beam, J., concurring; emphasis added). And Mr. Clinton remains free "to pursue motions for rescheduling, additional time, or continuances." Pet. App. 16.

Contrary to Mr. Clinton's assertions, such motions would not "entangle[ ]" the Judicial and Executive Branches "in an ongoing and mutually harmful relationship," would not require "the President . . . to provide detailed information about the nature of pending Executive Branch matters," and would not involve "the trial judge . . . passing judgment on the President's priorities." Pet. Br. 29. The court of appeals' decision directs *deference* to the presidency and mandates "judicial case management *sensitive* to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13 (emphasis added). The circuit court's reference to the need to "control[ ] the scheduling of the case as necessary to avoid interference with specific, particularized, clearly

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238

even mitigated here, because Mr. Clinton is reportedly covered by insurance for an amount in excess of the *ad damnum* and by a legal defense fund.

Mr. Clinton attempts to assail the benefits of judicial deference by postulating remote hypotheticals that in any event do not advance his claim. His "national security" scenarios, for example, raise no realistic specter of danger to the functioning of the Executive Branch. The trial judge, under the court of appeals' decision, is to show deference to presidential interests in all circumstances, and surely there is no reason to believe that this deference will not be maintained when national-security issues are at stake. *Ex parte* and *in camera* procedures, moreover, may be used to protect the interests of the presidency. As for the hypothetical crisis offered by Mr. Clinton in which a President must "seek to maintain a pretense of 'business as usual' " and "simply having to ask a court for a change in the litigation schedule . . . . could be highly damaging," Pet. App. 31, any difficulty there would not be caused or exacerbated by the litigation; if the President were previously scheduled to give a speech, attend a conference, play golf, conduct a meeting, or go on a campaign tour, "simply having to [seek] a change in the . . . schedule" would be just as "damaging" in those circumstances as well.

Should be not worth resp to

Mr. Clinton's assertions about hypothetical litigation in state courts do not help his argument. This case is in federal court, and there is no need for this Court to address events in a state-court litigation that may never occur. And if a President is ever to be sued for personal acts in a state court, it would most likely be in a court of his own home state, a forum that would likely be convenient and familiar to him.[17]

[17] One scenario would be assertion of purely state-law claims by a plaintiff from his own state, in which case there would be no diversity jurisdiction, 28 U.S.C. § 1332(a)(1) (1994). Such claims, given the citizenship of the parties, would most likely be brought in the state courts of that state. Another scenario would be the situation in which a diverse plaintiff chose to sue the President in the state courts of his home state,

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238

(quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). It will instead ensure that this case will not cause even the slightest impairment of presidential business.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT, ON THIS BARREN FACTUAL RECORD, THERE IS NO BASIS FOR A STAY OF THE TRIAL OR THE LITIGATION GENERALLY.

Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary *immunity* from trial," an "immunity from trial as [*Nixon* v.] *Fitzgerald* seems to require." Pet. App. 68 (emphasis added); *see* Pet. Br. 45-47. Citing this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248 (1936), which governs the issuance of discretionary litigation stays, Mr. Clinton argues that the district court did not abuse its discretion in ordering a postponement of trial. But he made no record below that would justify *any* stay whatsoever under *Landis*. Accordingly, the Court of Appeals correctly found that what the District Court ordered—a postponement of the trial until perhaps the year *2001*—not only was "the functional equivalent of a grant of temporary immunity," but was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays. Pet App. 13 n.9.[19]

In *Landis* v. *North American Co.*, 299 U.S. 248 (1936), the Court did indeed hold that "the power to stay proceedings is incidental to the power inherent in every court to control the

[19] The district judge cited her equity powers and Fed. R. Civ. P. 40, together with a finding of a "temporary or limited immunity from trial," to put the case on hold as far as a trial is concerned. Pet. App. 70-71. But her equity powers and Rule 40 were invoked because she incorrectly found an immunity from trial, as both she and the court of appeals made clear. *Id.*; *accord id.* at 13 & n.9. Thus, if her holding as to an immunity from trial fails, so should the alternative grounds for postponement fail as an abuse of discretion.

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such facts). The closest the district court came to a finding was a conclusory statement that "[n]either is this a case that would likely be tried with few demands on Presidential time"—a statement that not only came without any indication of whether those demands would amount to clear inequity or hardship, but was manifestly insupportable in a case centering upon a short encounter between two people in a room.

On the other side of the balance, as Judge Beam explained, the danger of harm to Mrs. Jones is manifest. She "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." Pet. App. 17. The district court not only incorrectly disregarded this harm, but ignored Mrs. Jones's well-pleaded reasons why the commencement of this action was delayed, and ignored the fact that public aspersions upon Mrs. Jones reputation had made it necessary for her to proceed. Complaint ¶¶ 41-51.[20] Beyond this, the passage of time contemplated by the District Court's order—possibly into the next century—was surely "immoderate" and impermissible under *Landis*. Even in "cases of extraordinary public moment"—which this one, given the lack of burden, is not—*Landis* requires that a delay cannot be "immoderate in extent." 299 U.S. at 256. In *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year." 299 U.S. at 256.

[20] Throughout the briefs of Mr. Clinton's Solicitor General and academic *amici*, the importance of Mrs. Jones' case is downplayed because of a supposed delay in filing her case. As noted above, public defamation in early 1994 caused her to proceed immediately to file a case that would not otherwise have been brought when few people knew about the harassment in 1991. Also to be noted is that the defamation action had recently accrued when she sued in May 1994. Of course, the speed of filing has never, so far as we can tell, governed the speed of litigation. Otherwise, a litigant Smith, whose cause of action arose after another plaintiff, Jones, had filed a similar action just before the limitations deadline, would have precedence on the court's docket even if Smith filed one day after his cause of action arose!

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238

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

   Nixon v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .

3. Whether the District Court, having found that it is not in the national interest to distract the President with the burdens of trial in private civil litigation, erred in refusing on the same basis to stay the proceedings in their entirety, until such time as the President leaves office.

   Nixon v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .

Id. at vii-ix.

All of Mr. Clinton's questions presented in the Eighth Circuit were to the same effect: *Nixon* v. *Fitzgerald* and the principles of immunity expressed in that case required the postponement of *both* discovery and trial (regardless of whether the postponement takes the form of a stay or dismissal). Jurisdiction over Mr. Clinton's appeal was premised upon the principle that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." *Id.* at vii (citing *Nixon* v. *Fitzgerald*, *supra*); *accord* Pet. Br. 4 n.3 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). Mrs. Jones cross-appealed, arguing (as she does here) precisely the converse of what Mr. Clinton was arguing—namely, that *Nixon* v. *Fitzgerald* justified *neither* the postponement of discovery nor the postponement of trial—and argued that jursidicton over her cross-appeal was proper under principles of pendent appellate jurisdiction.

The Eighth Circuit correctly held that the cross-appeal could properly be entertained as an exercise of pendent appel-

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238

the pendent order," *Gilda Marx, Inc.* v. *Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996) (per curiam). One group of defendants appealed the denial of their summary judgment motion, which was based upon a claim of qualified immunity; that appeal was plainly proper under *Mitchell* v. *Forsyth, supra. See* 115 S. Ct. at 1207. Another defendant, the Chambers County Commission, appealed the denial of its separate summary judgment motion, which did not involve the immunity issue and was not independently appealable. *Id.* at 1207-08. This Court, noting that "[w]e need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable," held that pendent appellate jurisdiction was not proper because the parties did not, and could not, "contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 1212.

As noted in *Swint*, this Court "ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." *Id.* at 1211 (citing cases). And since *Swint*, the courts of appeals have continued to recognize the validity of pendent appellate jurisdiction, and have carefully confined the exercise of that jurisdiction to questions that are "inextricably intertwined" with those as to which independent bases of jurisdiction exist.[21] There is no

---

[21] *See, e.g., Martin* v. *Memorial Hospital*, 86 F.3d 1391, 1401 (5th Cir. 1996) (noting that *Swint* implied that pendent appellate jurisdiction was proper where "inextricably intertwined" standard was met); *Eagle* v. *Morgan*, 88 F.3d 620, 628 (8th Cir. 1996) (applying "inextricably intertwined" standard, and exercising pendent appellate jurisdiction); *Gilda Marx, Inc.* v. *Wildwood Exercise, Inc.*, 85 F.3d 675, 678-79 (D.C. Cir. 1996) (per curiam) (recognizing continued validity of pendent appellate jurisdiction under "inextricably intertwined" standard); *Cooper* v. *Town*

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238

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 9, 1996

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238

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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. It provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act ~~[illegible]~~[1]

[1]President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation. Rather, the relief sought here emanates from the nature of the President's constitutional duties and principles of separation of powers.

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238

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238

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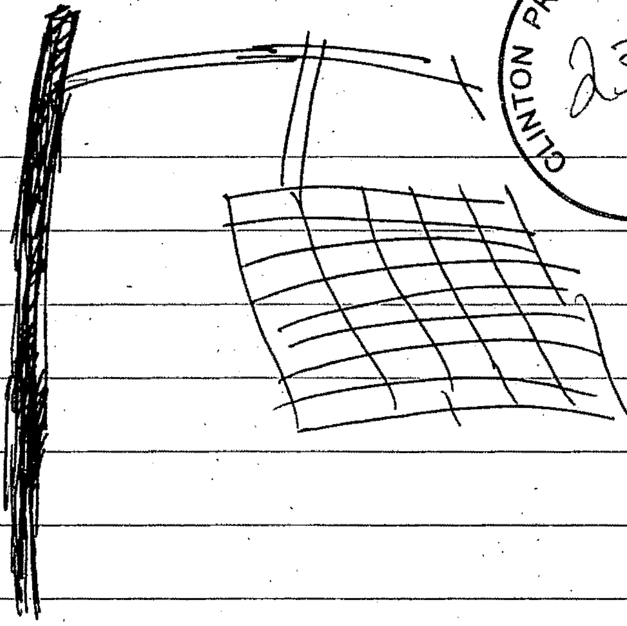

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239

No. 95-1853

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

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

bold

BRIEF FOR THE PETITIONER

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

STET

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. ~~A petition for certiorari was filed on May 15, 1996.~~ This Court's jurisdiction is ~~invoked pursuant to~~ 28 U.S.C. § 1254(1) (1994).

, and granted on June 24, 1996.

based on

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239

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. art. II, § 1, cl. 1

U.S. CONST. art. II, §§ 2-4

U.S. CONST. amend. XXV

42 U.S.C. § 1983 (1994)

42 U.S.C. § 1985 (1994)

FED. R. CIV. P. 40

These ~~and other~~ provisions are set forth at Pet. App. 79-85.

STATEMENT

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 based principally on conduct alleged to have occurred three years earlier, before the President took office. The complaint included two claims arising under federal civil rights statutes and two arising under state tort law, and sought $175,000 in actual and punitive damages for each of the four counts.[1] Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1332 and 1343 (1994).

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

(continued . . .)

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239

The President moved to stay the litigation or to dismiss it without prejudice to its reinstatement when he left office. He asserted that such a course was warranted by the singular nature of the President's Article II duties and by principles of separation of powers. The district court stayed the trial until the President left office, 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 liability for his official acts as President. The district court noted that the holding of *Fitzgerald* did not directly apply to this case because President Clinton was sued primarily for actions taken before he became President, but concluded that a significant part of the rationale in *Fitzgerald* did apply here:

> [T]he majority opinion by Justice Powell [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.

all block quotes throughout should be indented only one indent from left, not two

Pet. App. 68-69. The district court stated that these concerns "are not lessened by the fact that [the conduct alleged] preceded his Presidency." Pet. App. 69. In this connection, the district court stated that "this [is not] a case that would likely be tried with few demands on Presidential time." Pet. App. 70.

[1](. . . continued)
dent 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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The district court also stated that "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Noting that respondent "filed this action two days before the three-year statute of limitations expired" and that she "[o]bviously . . . was in no rush to get her case to court," the district court found that "a delay in trial . . . will not harm [respondent's] right to recover or cause her undue inconvenience." *Id.* Invoking Federal Rule of Civil Procedure 40 and the court's equitable power to manage its own docket, the district judge concluded that the trial should be stayed, "[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 ruled, however, that there was "no reason why the discovery and deposition process could not proceed," and said that this would avoid the possible loss of evidence with the passage of time. Pet. App. 71.

The President and respondent both appealed.[3] A divided panel of the court of appeals reversed the district court's order staying trial, and affirmed its decision allowing discovery to proceed. The majority opinion, by Judge Bowman, ~~began by characterizing~~ the question as whether ~~the President "is entitled to immunity from civil liability for~~ his unofficial acts." determined that the Constitution does not confer on the President any protection from civil actions that arise from Pet. App. 8c. Judge Bowman acknowledged that "the fundamental authority" on the question before the Court was *Nixon v. Fitzgerald*, but stated that the reasoning of *Fitzgerald* is

16.

[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.

[3] The court of appeals' jurisdiction over the President's appeal was based on 28 U.S.C. § 1291 (1994). *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In our view, however, the court of appeals lacked jurisdiction to entertain respondent Jones's cross-appeal. *See infra* pp. ~~xx-xx~~ 43-45.

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239

"inapposite where only personal, private conduct by a President is at issue." Pet. App. 8, 11. After asserting 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), Judge Bowman overturned even that limited stay as an abuse of discretion. Pet. App. 13 n.9.

Judge Bowman also put aside concerns that a trial court's exercise of control over the President's time and priorities through the supervision of discovery and trial would do violence to the separation of powers. Pet. App. 12-14. 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 acknowledged that the issues in this case "raise matters of substantial concern given the constitutional obligations of the office" of the Presidency. *Id.* He also recognized 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 asserted, 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 not attending his own trial and not participating in discovery, and by limiting the number of pretrial encounters between the President and respondent's counsel. Pet. App. 23-24.

Judge Ross dissented. Pet. App. 25-31. Noting that "[n]o other branch of government is entrusted to a single person," he stated: "It is this singularity of the President's constitutional position that calls for protection from civil litigation." Pet. App. 26.

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239

> The burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability. That result would disserve the substantial public interest in the President's unhindered execution of his duties and would impair the integrity of the role assigned to the President by Article II of the Constitution.

Id. Judge Ross concluded 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. He stated that this conclusion was compelled by the "language, logic and intent" of *Fitzgerald*. Pet. App. 25. STET

Judge Ross further explained that a lawsuit against a sitting President would "create opportunities for the judiciary to intrude upon the Executive[]" and "set the stage for potential constitutional confrontations between courts and a President." Pet. App. 28. In addition, he noted, such litigation "permit[s] the civil justice system to be used for partisan political purposes." Pet. App. 28. At the same time, he stated, postponing litigation "will rarely defeat a plaintiff's ability to ultimately obtain meaningful relief." Pet. App. 30. Judge Ross concluded that litigation should proceed against a sitting President only if a plaintiff can "demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that . . . [it] will not significantly impair the President's ability to attend to the duties of his office." Pet. App. 31.

Id. italic

The court of appeals denied the President's request for rehearing *en banc*. Three judges did not participate, and Judge McMillian dissented. Judge McMillian stated that the

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239

panel majority's holding "demean[ed] the Office of the President." Pet. App. 32. He further stated that the holding "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.

SUMMARY OF ARGUMENT

I.A. The President, unlike any other federal official, has the sole responsibility for an entire branch of the federal government. For that reason, litigation against the individual who is serving as President unavoidably impinges on the constitutional responsibilities of the Executive Branch. The Framers explicitly recognized this point, as has this Court, on several occasions.

A personal damages action is bound to be burdensome and disruptive. This is especially so in a lawsuit that seeks to impugn a defendant's reputation and threatens him with enormous financial liability. It is inconceivable that anyone, including the President, could remain disengaged from such proceedings. Even if a President ultimately prevails, protracted personal damages litigation would make it impossible for him to devote his undivided energies to one of the most demanding jobs in the world. Judge Learned Hand once commented that, as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness and death." [4] In this respect the President is like any other litigant. The President's litigation, however, like the President's illness, becomes the nation's problem.

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[4] 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105 (1926), *quoted in Fitzgerald*, 457 U.S. at 763 n.6 (Burger, C.J., concurring).

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CLINTON PRESIDENTIAL LIBRARY
239

There is also no reason to believe that, if it is established that private damages actions against sitting Presidents may go forward, such suits would be rare. To the contrary, parties seeking publicity, partisan advantage or a quick settlement will not forbear from using such litigation ~~as a means of~~ advancing their objectives. The usual means of discouraging or disposing of unfounded civil complaints would be especially ineffective in these cases.

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B. Even the panel majority did not dispute the basic point that personal damages litigation against an incumbent President threatens the functioning of the Executive Branch. Deferral of litigation against an incumbent President would wholly eliminate this problem, while still enabling courts to provide effective relief for wrongdoing. The panel, however, rejected deferral of the litigation as a remedy, and instead concluded that "case management" by the trial court could adequately protect the interests at stake. But "case management" only exacerbates separation of powers problems. ~~It entangles~~ the Executive and Judicial Branches in an ongoing and mutually damaging relationship.

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In concrete terms, trial court "case management" means that whenever a President believes that his responsibilities require a change in the schedule of litigation against him, he will have to seek the approval of the trial judge, state or federal. That judge will be authorized to insist on an explanation of the President's reasons for seeking a schedule change, a problematic state of affairs in itself. The trial judge will then review the President's explanation and decide whether to accept it, or whether the President should instead rearrange his official priorities to devote more time and attention to the litigation.

The President's priorities, however, are inseparable from the priorities of the Executive Branch of the federal government. Judges should not be in the position of reviewing those priorities. If they are, the effect will be to enmesh the Presi-

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239

dent and the Judiciary, to the great detriment of both branches, in a series of controversies over highly sensitive and, in an important sense, deeply political issues about the President's official priorities.

Moreover, state courts are likely to become the natural venue for private civil damages actions against an incumbent President, because such suits often will not involve federal claims. The Framers were well aware of the potential for conflict between the states and the federal government, particularly the Executive Branch of the federal government. They could not possibly have contemplated that state trial judges would have the power to control a President that is inherent in "case management" -- much less that they would have the power to compel an incumbent President to stand trial in a state court. This further demonstrates that deferral, not "case management," is more consistent with our constitutional scheme.

C. The temporary deferral that the President seeks here is not, contrary to the court of appeals, an extraordinary remedy, and it does not place the President "above the law." In a variety of circumstances -- ranging from the automatic stay in bankruptcy to the doctrine of primary jurisdiction to the suspension of civil actions while criminal proceedings are pending -- litigation is delayed in our system in order to protect significant public or institutional interests. The interest in protecting the Presidency from disruption is at least as strong as, if not stronger than, the interests underlying these well-established doctrines.

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Deferral also does not place unreasonable burdens on respondent. In many cases -- for example, where absolute, qualified, or diplomatic immunities apply -- settled doctrines deny recovery outright to innocent individuals who may have been grievously injured. Deferral of this litigation, by contrast, will not preclude respondent from ultimately seeking a remedy and, if warranted, recovering damages. Deferral

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239

leaves the President no less accountable for his conduct. Only the timing of the litigation is affected.

II. Respondent's suit, in particular, should be deferred under separation of powers principles. The suit is based on conduct that occurred before the President took office, and therefore presents no risk of abuse of Presidential power. Respondent seeks only damages, and can be made whole even if the proceedings are delayed. The suit involves the President personally and directly, not peripherally, so it is especially likely to impinge on his ability to perform his official duties. And respondent could have sought relief long before the President assumed office, or sought other avenues of relief, but chose not to do so.

For these and all the reasons set forth more fully below, the decision of the court of appeals should be reversed, and this litigation should be deferred in its entirety until the President leaves office.

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239

ARGUMENT

I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.

A. A Personal Damages Action Against An Incumbent President Would Interfere With The Discharge Of A President's Article II Responsibilities And Jeopardize The Separation Of Powers.

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1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.

Under our system of government, the Executive Branch is the sole responsibility of the individual who has been elected President. Anything that significantly affects that individual will affect the functioning of the Executive Branch as well. For this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

That the President "occupies a unique position in the constitutional scheme" (*Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power. The President alone is director of all the executive departments and Commander-In-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. CONST. art. II,

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239

§§ 2-3. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See* THE FEDERALIST Nos. 70-77 (Alexander Hamilton).[5]

The extraordinary character of the Presidency in this respect is woven into the very fabric of the Constitution. The Constitution envisions that Congress will be in session for a period of time and then adjourn. U.S. CONST. art. I, §§ 4, 5, 7. The Presidency, however, is always "in session;" the Presidency never adjourns.[6] The Constitution further provides specific steps to replace the President in the event of his disability. U.S. CONST. amend. XXV, §§ 3-4. These provisions, made for no other federal officer, further confirm that the Presidency is inseparable from the individual who is President.

The unadorned words of the Constitution do not fully convey the momentous and unrelenting burdens on every President. "[T]he President, for all practical purposes . . . affords the only means through which we can act as a nation . . . ."[7]

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[5] *See* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978): "The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government."

[6] Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon And Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995)("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.").

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[7] George E. Reedy, *Discovering the Presidency*, N.Y. TIMES, Jan. 20, 1985, at G1, *quoted in* LOU CANNON, PRESIDENT REAGAN -- THE ROLE OF A LIFETIME 147 (1991).

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239

> The range of the President's functions is enormous. He is ceremonial head of the state. He is a vital source of legislative suggestion. He is the final source of all executive decision. He is the authoritative exponent of the nation's foreign policy.[8]

Although he has many advisers, the President alone is ultimately accountable for a myriad of decisions affecting profoundly important questions of national and international policy — such as dispatching military forces as exigencies require; helping to negotiate peace in regions vital to our national interest; deciding whether to sign or veto legislation; ~~determining the administration's position on the nation's budget and taxes~~; and negotiating with Congress on budgetary, tax ~~these~~ and many other crucial issues. The President's obligations to the office, moreover, never cease; serious crises can, and often do, erupt unexpectedly, commanding the President's immediate attention.[9]

[8] HAROLD J. LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION 26 (1940), *quoted in* CANNON, *supra* note 7, at 147.

[9] This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of a KAL Flight 007 while on vacation. CANNON, *supra* note 7, at 191, 399, 420. President Carter spent one vacation reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. JIMMY CARTER, KEEPING FAITH — MEMOIRS OF A PRESIDENT 57 (1982). President Clinton was notified of the terrorist bombing of U.S. military personnel on the eve of the G-7 economic summit, causing him both to change his priorities for the summit and to return to the U.S. before it was over to attend memorial services. Associated Press, *Clinton Calls For Unity Against Terrorism*, CHI. TRIB., June 27, 1996, at A1.

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> To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the energies of a single man unsurpassed by the exigencies of any other political office in the world.[10]

2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With The Historic Understanding Of Relations Between The Executive And Judicial Branches.

The nation's courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753 & n.34. Accordingly, courts historically have refrained from exercising jurisdiction over the President personally, except in cases of imperative need, and then only to the most limited extent possible. *See id.* at 753-54.

This Court repeatedly has recognized that the President's unique status and range of responsibilities under the Constitution distinguish him from all other federal officers. *Id.* at 749-50. A President is absolutely immune from personal liability for any action taken in connection with his official duties. *Id.* at 749. A President's communications are presumptively privileged, and that privilege can be overridden only in cases of exceptionally strong public need. *United States v. Nixon*, 418 U.S. 683, 705 (1974). Similarly, there is an "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular executive acts. *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992)(Scalia, J., concurring); *see id.* at 802-03 (plurality opinion of O'Connor, J.). And the De-

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[10] LASKI, *supra* note 8, ~~&~~ 26.

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partment of Justice, speaking through then-Solicitor General Robert H. Bork, has taken the position -- based on explicit language in *The Federalist* -- that while an incumbent Vice-President is subject to a criminal prosecution, the President must be impeached and removed from office before he can be prosecuted.[11] All of these protections are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.[12]

This tradition of judicial deference and restraint toward the Presidency -- a tradition that "can be traced far back into our constitutional history" (*Fitzgerald*, 457 U.S. at 753 n.34) -- bars personal damages litigation against an incumbent President. Over 150 years ago, Justice Story explained why such litigation cannot go forward while the President is in office:

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[11] *See* THE FEDERALIST No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 77, at 464 (Alexander Hamilton); *id.* No. 65, at 398-99 (Alexander Hamilton); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1966) (noting the comment of Gouverneur Morris); *id.* at 626 (comment of James Wilson). Solicitor General Bork explained that the unique burdens of the President's duties distinguished him in this regard from all other federal officers:

> [The Framers] assumed that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 17, *In re Proceedings of The Grand Jury Impaneled Dec. 5, 1972*, (No. 73-965) (D. Md. filed Oct. 5, 1973) (C.A. App. 92).

[12] This Court repeatedly has stated that a specific textual basis is not necessary to support such incidents of the President's office. *Fitzgerald*, 457 U.S. at 750 n.31; *Nixon*, 418 U.S. at 705 n.16.

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239

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them. . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833), *quoted in Fitzgerald*, 457 U.S. at 749.

The second and third Presidents of the United States held the same view. John Adams explained that the President personally is not subject to any process whatever, for to permit otherwise would "put it in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government."[13] President Jefferson was even more emphatic:

> [W]ould the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?[14]

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[13] THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (recording a discussion between then-Vice President Adams and Senator Oliver Ellsworth during the first Congress) (Kenneth R. Bowling and Helen E. Veit eds., 1988).

[14] 10 THE WORKS OF THOMAS JEFFERSON 404 n. (Paul L. Ford ed., 1905) (emphasis in original), *quoted in Fitzgerald*, 457 U.S. at 751 n.31.

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239

As this court stated 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. at 751 n.31.[15]

The traditional practice has been fully consistent with this historical doctrine. It is, of course, "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President," *Fitzgerald* at 753-54, and Presidents, including this one, have sought to accommodate the interests of the courts, particularly their interest in the fair administration of criminal justice, where accommodation can be accomplished consistent with Presidential functions. *See infra* pp. 26-28. These interests have not heretofore been thought to require an incumbent President's participation as a defendant in a private civil damages suit, however.

To the contrary, it "has been taken for granted for nearly two centuries," *Id.* at 758 (Burger, C.J., concurring), that one could not hale an incumbent President into court and seek damages from him personally. So far as can be determined, no President has ever been required to give evidence in a civil proceeding, let alone appear as a defendant. No President has ever been compelled to appear personally and testify at trial in any case, civil or criminal. President Jefferson was sued for official actions he took while he was President, but notably, not until after he left office.[16] Three other Presidents had

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[15] While there are some statements by contemporaries of the Framers that questioned the notion of presidential immunity to civil suit, the majority in *Fitzgerald* observed in response that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

[16] *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411) (suit for trespass, based on federal seizure of land, dismissed for want of venue).

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239

civil damages litigation pending against them during their tenure in office, but in each case, suit was filed before they took office; two were effectively disposed of before the President was sworn in; and none was actively litigated while the defendant served as President.[17] This "prolonged reticence" about suing an incumbent President is powerful evidence of a nearly universal understanding that such litigation is inconsistent with our constitutional scheme. *See Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1458 (1995).

In *Fitzgerald*, the Court explained that historically the President has been subjected to a court's jurisdiction only when necessary to serve a compelling, broad-based constitu-

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[17] In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, *id.*, nine months before he assumed the Presidency. The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. *Id.*

In *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944, *id.* at 31, and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. *Id.* at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable for injuries incurred while riding in a car leased to his campaign. 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) (C.A. App. 128, 135) (hereinafter "*Bailey*"). The court did not permit the plaintiffs to take the President's deposition, permitting the President to respond by way of written interrogatories. *Bailey*, Order Denying Motion for Deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. *See infra* note 22.

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CLINTON PRESIDENTIAL LIBRARY 239

tional or public interest, and only when the exercise of jurisdiction would not unduly intrude on the functions of the office. 457 U.S. at 753-54. The Court gave two examples of such exceptional cases: those seeking to curb abuses of Presidential authority and maintain separation of powers, *id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)) and those seeking to vindicate the public interest in criminal prosecutions. *Id.* (citing *United States v. Nixon*, 418 U.S. at 703-13). Noting that there is a lesser public interest in actions for civil damages than in criminal proceedings, *id.* at 754 n.37, the Court in *Fitzgerald* concluded that a "merely private suit for damages based on a President's official acts" does not warrant the exercise of jurisdiction over a President. *Id.* at 754.[11]

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Until the unprecedented decision by the court of appeals in this case, private civil damages litigation has not been thought to warrant an exception to the teaching of the Framers. To the contrary, such litigation does not serve the broad-based, compelling public or constitutional interests enumerated in *Fitzgerald*. To allow it to proceed would be an abrupt break with well-established principles of American jurisprudence.

[11] In the few cases where plaintiffs have sought to compel or restrain official action by a President, courts consistently have resorted to procedural or jurisdictional devices to dismiss the claims or to avoid issuing relief directed at the President personally. *See, e.g., Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866) (discretionary presidential decision-making held unreviewable); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissed for lack of ripeness). *See also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion of O'Connor, J.) (relief may be directed to defendants other than President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (same).

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3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To ~~Fulfill~~ His Constitutional ~~Functions.~~ Responsibilities.

In *Nixon v. Fitzgerald*, this Court held that the President enjoys absolute immunity from damages liability for acts within the "outer perimeter" of his official duties. 457 U.S. at 756. The logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here -- the temporary deferral of private civil litigation.

Fitzgerald relied upon three significant grounds. First, the Court was concerned that to subject a President to liability for official conduct would inhibit him in carrying out his duties fearlessly and impartially, and would inject courts improperly into Presidential decision-making. *Id.* at 752 & n.32. Second, the Court stated, "[b]ecause of the singular importance of the President's duties," the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. And third, the Court was concerned that the "sheer prominence of the President's office" would make him "an easily identifiable target for suits for civil damages." *Id.* at 752-53.

This case is different from *Fitzgerald*, of course, in that it largely does not touch upon official actions. Accordingly, it does not warrant, and the President does not seek, any immunity from liability. But because this case involves a sitting President, it directly implicates the two other critical concerns that prompted the decision in *Fitzgerald*: the President's vulnerability to civil damages actions and the diversion of the President's time and attention to attend to such litigation. These concerns are equally present whether the lawsuit is based on private conduct or official conduct. Defending a suit based on private conduct is not any less of an imposition on the President's ability to attend to his constitutional responsi-

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bilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. Protection for the Presidency therefore is still required, albeit the much more limited protection of holding litigation in abeyance until the President leaves office.

A protracted lawsuit not only "ties up the defendant's time [but] prolongs the uncertainty and anxiety that are often the principal costs of being sued." *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993). The discovery phase alone of civil damages litigation would be an enormous imposition on a President's time and attention. "No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage to survive that ordeal, once again at trial."[19] Discovery, "used as a weapon to burden, discourage or exhaust the opponent," makes even a relatively minor case a costly and lengthy ordeal.[20] As this Court has recognized, "pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted).

The instant case clearly illustrates these points. Respondent's counsel have revealed their intention to pursue discovery aggressively, stating that, "all is on the table in . . . discovery . . . including evidence that can lead to admissible evidence." They announced that they will "fully pursue, and exhaustively pursue" allegations of purportedly related

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[19] Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 GA. L. REV. 1, 11 (1992).

[20] Hon. William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 179 (1991).

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wrongdoing that go far beyond the limited contacts between the President and the respondent alleged in the complaint, ostensibly for the purpose of showing an alleged "pattern" of harassment and misuse of government resources. They also have suggested they will ask the trial court to compel an unprecedented physical examination of the President.[21]

No President could ignore, or leave to others to handle, a lawsuit such as this, which focuses on his personal conduct, aims to impugn his integrity, and seeks to impose hundreds of thousands of dollars in damages on him personally. Indeed, one of the most significant misconceptions in the panel majority's reasoning is the notion that the President can remain disengaged from a personal damages action brought against him. The panel majority seemed to envision that, perhaps apart from giving a deposition and consulting briefly on a few occasions with his trial counsel, the President can essentially ignore the litigation. It was even suggested that the President could forego attending his own trial. Pet. App. 23-24 (Beam, J., concurring). In fact, if the President is a defendant, he will be entitled to -- and, as a practical matter, will simply have to -- devote considerable time and attention to his defense.

This would be true whether the litigation involved allegations regarding personal misconduct, as here, or a disputed commercial transaction. Any case relating to events in which the President personally was involved would require the President's participation at almost every stage. In order to protect his interests adequately, the President, like any responsible litigant, would be required to review the complaint and answer; prepare and assure the veracity of discovery responses; retrieve and review documents; assist counsel to pre-

[21] Transcript, *Daybreak* (CNN television broadcast, Dec. 29, 1994) at 3-4 (comments of Joseph Cammarata) (C.A. App. 117-18); Transcript, *Nightline* (ABC television broadcast, Dec. 28, 1994) at 3-4 (comments of Gilbert Davis) (C.A. App. 122-23).

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CLINTON PRESIDENTIAL LIBRARY
239

pare for other witnesses' depositions; review those depositions and other evidence in the case; review the opposition's pleadings and motions; and consult with counsel throughout the case. He also would have the right and the obligation to review and approve all pleadings and motions filed on his behalf. Beyond that, the President would have to prepare for and participate in his own deposition, and finally, attend trial -- perhaps for weeks -- in a courtroom far from Washington.

The panel majority's antiseptic notion that the President can remain aloof from a personal damages action against him simply does not conform to reality. The litigation would command a significant part of the President's time, while the urgent business of the nation competed for his attention. The President would be put to an impossible choice between attending to his official duties or protecting his personal interests in the litigation -- a choice that is unfair not just to the President, but more importantly, to the nation he serves.

Even one lawsuit would have the potential seriously to disrupt the President's conduct of his official duties, just as one lawsuit could disrupt the professional and personal life of any individual. But if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events. As this Court has envisioned, Presidents likely would become "easily identifiable target[s]" for private civil damages actions in the future. *Fitzgerald*, 457 U.S. at 753. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas at the expense of the public's interest in unimpeded constitutional governance.

In particular, any President is ~~particularly~~ especially vulnerable to politically motivated "strike suits" financed or stimulated by partisan opponents of whatever stripe, hoping to undermine a President's pursuit of his policy objectives or to attack his integrity, and thereby diminish his effectiveness as a leader.

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CLINTON PRESIDENTIAL LIBRARY 239

Partisan opponents would also be tempted to file suit in order to take advantage of modern discovery techniques, unknown throughout most of our history, to uncover personal and financial information about the President, his family and close associates.[22] Use of the judicial system in this manner would corrode the political process.

Even if a claimant has a legitimate grievance, litigation against an incumbent President can deflect the exercise of the popular will by appropriating the President's time and energy, which properly belongs not to the individual who sued the President, but to the nation as a whole. Therefore, "[w]e should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."[23]

Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents against meritless lawsuits filed for purposes of harassment,

[22] The suit against John F. Kennedy, *supra* note 17, illustrates how plaintiffs can use litigation for purposes of political mischief and potential extortion. The plaintiffs believed President Kennedy's policies were inimical to their state. *Bailey*, Reply to Objections to Cross-Interrogatories at 4-5 (Sept. 28, 1962) (C.A. App. 156). They attempted to propound politically embarrassing interrogatories to Attorney General Robert F. Kennedy, who had been the President's campaign manager. They also sought to obtain information about Kennedy family finances, and used pleadings to allege that the President was using his office to harass them and their state. *See Bailey*, Cross-Interrogatories to Robert F. Kennedy (Sept. 20, 1962) (C.A. App. 162); *Bailey*, Reply To Objections To Cross-Interrogatories at 3-4 (Sept. 28, 1962) (C.A. App. 156). As fatuous as the allegations were, President Kennedy settled the suit for $17,750, a significant sum in 1963. *Two Suits Against Kennedy Settled*, L.A. HERALD-EXAMINER, Apr. 2, 1963 (C.A. App. 181). Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency.

[23] Amar & Katyal, *supra* note 6, at 713.

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CLINTON PRESIDENTIAL LIBRARY 239

publicity or partisanship. *See* Pet. App. 15; Resp. C.A. Br. 30, 32-33. But those devices are far from foolproof, and for a variety of reasons are likely to be ineffective in protecting the President.

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The strongest deterrent of unfounded lawsuits is typically financial: usually an individual will not incur the expense of suit if there is no prospect of prevailing, and will not risk sanctions under Rule 11 of the Federal Rules of Civil Procedure if the suit is found to be frivolous. But financial restraints are overcome by other incentives when -- as many prominent business, entertainment and public figures have learned to their dismay -- plaintiffs can attain instant celebrity status or political impact simply by including allegations against such figures in a complaint filed in court. The notoriety that accompanies such a lawsuit is lucrative in and of itself, in the form of book or movie contracts, for both client and lawyer. Likewise, a frivolous but embarrassing claim may be filed because the target is perceived, as a President surely would be, as vulnerable to quick settlement. As Chief Justice Burger observed, suits against Presidents can be "used as mechanisms of extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And a party whose objective is to divert the President's energy and resources, or to uncover information through discovery, or to embarrass the President by making sensational allegations, might willingly incur the costs of litigation even if there is no hope of success on the merits.

Nor does a motion to dismiss or for summary judgment promise swift or painless relief for the target of meritless litigation. A potential private ~~claim~~ easily could be drafted to entangle a President in embarrassing or protracted litigation simply by alleging claims based on unwitnessed one-on-one encounters, or by otherwise raising credibility issues. These kinds of claims are exceedingly difficult to dispose of under the standards that govern pre-trial motions. And, as Chief Justice Burger recognized in *Fitzgerald*, "even a lawsuit ultimately found to be frivolous . . . often requires significant ex-

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penditures of time and money" to defend. "Ultimate vindication on the merits does not repair the damage." 457 U.S. at 763 (Burger, C.J., concurring).

4. Criminal Cases Where A President Has Been A Third-Party Witness Provide No Precedent For Requiring A Sitting President To Participate As A Defendant In Civil Damages Litigation.

The respondent and the panel majority below minimized the disruptive effect of civil litigation on the Presidency by comparing the full-scale defense of a personal damages action to the few occasions when a President has testified as a nonparty witness in a criminal or legislative proceeding. *See* Pet. App. 22-23 (Beam, J., concurring). This comparison is not plausible. The isolated event of giving testimony in a proceeding to which one is not a party bears no resemblance to the burdens borne by a defendant in a civil action for damages. In fact, the lesson of cases involving Presidential testimony is more nearly the opposite of what respondent and the panel majority say: those cases show that requiring an incumbent President to submit as a defendant in a private damages action would go beyond anything a court has done before, with less justification.

As this Court has emphasized, the interests at stake in criminal cases are of an altogether different magnitude from the interests affected by private damages actions. *See e.g.*, *Fitzgerald*, 457 U.S. at 754; *United States v. Gillock*, 445 U.S. 360, 371-72 (1980). Not only is the public interest in the accurate outcome of a criminal prosecution far greater, *see, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935), but the defendant has a constitutional right under the Compulsory Process Clause of the Sixth Amendment to obtain evidence in a criminal proceeding. *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807)(No. 14,692d). This right, of course, has no constitutional counterpart in civil cases.

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Only once in our history, in *United States v. Nixon*, 418 U.S. 683 (1974), has the Supreme Court required a sitting President to give evidence. That case, of course, involved physical evidence, not the President's own testimony. Even so, the Court could not have been clearer that the limitation on Presidential autonomy was warranted only because of the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court expressly declined to extend its holding to civil proceedings. *See Nixon*, 418 U.S. at 709-10, 711-12 & n.19. In addition, the Court quoted, not once but twice, Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Id.* at 708 and 715 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807)(No. 14,694)). insert a space

Consistent with *Nixon* and *Burr*, lower courts have required a strong showing of need for the President's testimony.[24] Even then, courts have allowed it to be obtained only in a manner that limits the disruption of the President's official functions, such as by videotaped deposition.[25] Thus, ob-

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[24] *See Nixon*, 418 U.S. at 713 (subpoena enforced against the President because there was a "demonstrated, specific need for evidence in a pending criminal trial"); *see also United States v. Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996) (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (quoting *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990)); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (quashing subpoena to President when defendant failed to show "that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

[25] *See Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *Branscum*, *supra* note 24

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239

taining even third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need or where the constitutional right to compulsory process is at stake.

Neither of these factors is present, however, in ordinary civil litigation. Criminal prosecutions additionally carry certain important safeguards that are absent in civil litigation: they must be approved by a public official, premised on a finding of probable cause, and often require approval by a grand jury. Civil litigation, by contrast, can be filed by any individual out of any motive. ~~For these reasons,~~ this Court has been careful never to suggest that a sitting President could be compelled even to give evidence as a third-party in a civil proceeding. *See United States v. Nixon*, 418 U.S. at 712 n. 19.

Accordingly,

✓ (n.19 -- No space)

The issue here, of course, is not whether the President can be compelled to testify as a mere witness. It is, rather, whether he can be sued as a defendant. Whatever difficulties may be involved in arranging for the President to testify as a third-party witness, those difficulties would be increased exponentially if the President were made a defendant in a civil action for damages, which has the potential to interfere much more severely, over a much more extended period, with his ability to fulfill the unique and extraordinarily demanding responsibilities of his office. It would be highly incongruous to subject the President -- and the nation -- to these burdens solely on the basis of a civil complaint filed against him by a private party, when the

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[20](. . . continued)
(videotaped deposition); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996)(videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parts would be shown at trial); *Poindexter*, 732 F. Supp. at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

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239

alternative -- deferral -- avoids these problems entirely and provides reasonable protection for the interests of all parties.

B. "Case Management" By The Trial Court Does Not Mitigate, But Instead Exacerbates, The Separation Of Power Problems Created By Suits Against An Incumbent President.

1. "Case Management" By Federal District ~~Courts~~ Impermissibly Entangles The Branches Of Government ~~, Rather Than Separating Them.~~ By Permitting Courts To Examine, And Re-order, Executive Branch Priorities.

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Even the panel majority did not deny that private damages actions against a sitting President threaten to interfere with the integrity of the Executive Branch and to undermine the separation of powers. Its solution to these problems, however, was not deferral, but was instead "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. This supposed cure is worse than the disease. "Case management" by the judiciary of a suit against the Chief Executive entangles the two branches in an ongoing and mutually harmful relationship, instead of maintaining the separation of the branches, as the Constitution envisions.

The panel majority suggested that throughout the litigation, 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. Under this approach, the President would have to provide detailed information about the nature of pending Executive Branch matters requiring his attention, and the trial judge would have to pass judgment on the President's priorities. If the trial judge -- state or federal -- decided that the President should devote more time to the private litigation than to official duties, the question would arise whether it could enforce that decision by threatening the President with contempt of court or sanctions. *See* FED. R. CIV. P. 16(f). If the President disagreed with a decision of

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239

the trial court, he could "petition [the court of appeals] for a writ of mandamus or prohibition." Pet. App. 16.

Such a state of affairs is an extraordinary affront to the separation of powers. A trial judge -- state or federal -- would be examining the official priorities of the individual in whom the whole of "the executive Power" is vested. And the judge would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them.

The nature of the President's responsibilities makes it especially inappropriate for the courts to insist on answers to the kinds of questions that inevitably would be posed under this regime. In situations involving matters of national security, sensitive diplomatic issues, or confidential intelligence or law enforcement operations -- to take just ~~three~~ a few obvious examples -- the trial judge immediately would be enmeshed in disputes that could ripen into deeply troubling constitutional confrontations. Moreover, even seemingly minor changes in the President's schedule are imbued with significant portent by observers, both foreign and domestic. It is therefore not uncommon for a President to seek to maintain a pretense of "business as usual" to mask an impending crisis, while simultaneously having to attend to the urgent matter at hand.[26] In such circumstances, simply having to ask a court for a

[26] The experiences of Presidents Carter and Reagan provide dramatic examples: when the invasion of Grenada was being planned, President Reagan was week-ending at a Georgia golf club. He wanted to hurry back to Washington, but his advisors told him "that a change in [his] schedule might draw attention to the possibility of U.S. intervention." He decided to remain in Georgia, but participated in meetings by way of telephone. CANNON, *supra* note 7, at 441-42. Similarly, during the 1980 mission to rescue the hostages in Iran, President Carter "wanted to spend every moment monitoring the progress of the rescue mission, but had to stick to [his] regular schedule and act as though nothing of the kind was going on." CARTER, *supra* note 9, at 514.

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239

change in the litigation schedule obviously could be highly damaging.

Even in areas not involving sensitive foreign or domestic concerns, a trial court would, under the panel's "case management" approach, be able to second-guess judgments that are properly made only by the President. A myriad of important Presidential activities might warrant a change in a litigation schedule: foreign or domestic travel; contacting members of Congress to persuade them to vote for legislation; meetings with groups of citizens to call public attention to an issue; intensive briefings from advisers on complex subjects. If the President moved for a change in the litigation schedule to accommodate these interests, the denial of such a motion would effectively preempt the priorities of the Executive Branch.[27]

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The panel majority seemed to believe that untoward consequences can be averted so long as "case management" is "sensitive" enough to the demands of the President's office. Pet. App. 13. But this misunderstands both the nature of the problem and the nature of separated powers. Because the President embodies a branch of government, his priorities *are* the priorities of the Executive Branch. It follows that "case management," when the President is the defendant, necessarily means management of the business of the Executive Branch -- both in setting priorities for the President's time and

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[27] President Carter, for example, cut short a vacation to return to Washington to urge natural gas legislation that he deemed crucial to his national energy policy. CARTER, *supra* note 9, at 322. If the President had been involved in some aspect of litigation rather than on vacation, under the panel majority's scenario, he would have had to ask a court -- perhaps even a state court -- for permission to change his plans. The court then would be deciding if the President's interest in passage of the natural gas legislation was sufficiently important to warrant an interruption in judicial proceedings.

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239

in controlling the disclosure of information about the President's schedule.

"Case management" by trial judges not only threatens the independence of the Executive from the Judicial Branch; it also unfairly ~~inappropriately~~ places judges in a position they should not have to occupy -- the political arena. In suits against the President, the trial judge will be operating in an atmosphere that is almost certain to be highly charged politically. Any significant decision that a judge makes will be scrutinized for signs of partisan bias for or against the President. Decisions that are routine in any other case, such as a decision to postpone the defendant's deposition, will if the President is the deponent become the subject of partisan speculation and comment.

Moreover, judges attempting to assess the sufficiency of a President's explanation inevitably will be asked to distinguish between a President's "political" activities, on the one hand, and his "official" activities on the other. Political activity, of course, is one of the responsibilities of a democratically-elected official, and, as has often been recognized, these kinds of distinctions are inappropriate for judges to make.[28] These problems can, and should, be avoided altogether by holding the litigation in abeyance until the defendant is no longer President.

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[28] *See United States* ex rel. *Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)(courts lack "manageable standards" by which to distinguish between political and official functions), *cert. denied*, 455 U.S. 999 (1982); *Winpisinger v. Watson*, 628 F.2d 133, 140 (D.C. Cir.) (claim deemed not justiciable because it required judicial determination of whether executive actions were motivated by genuine concern for public interest or by "political expediency"), *cert. denied*, 446 U.S. 929 (1980).

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239

2. "Case Management" By State Trial Courts Is Inconsistent With Principles Of Federalism Inherent In The Constitutional Scheme.

Perhaps the clearest evidence of the superiority of deferral to "case management," given the postulates of our constitutional system, emerges when one considers that if private civil actions could be brought against a sitting President, they are likely to be brought in state courts. Two of the claims in this case are state tort claims, and one would expect that civil suits in damages against a President for matters unrelated to his official duties will often, as here, involve causes of action under state law.[29] If suit is brought in state court, decisions about the activities and priorities of the Executive Branch of the federal government will be made in the first instance by state trial court judges, including those chosen by partisan election. The President, moreover, ~~will probably~~ may not be able to obtain immediate review of these decisions in a federal forum. The availability of interlocutory review would turn on the judicial procedures of the state forum, and then, the only federal forum available to the President would likely be this Court.

The vast majority of state judges would, of course, be highly conscientious in carrying out their responsibilities in such a situation, but even the possibility that an incumbent President could be subject to the jurisdiction of a state court further demonstrates that suits against a sitting President are inconsistent with our constitutional scheme. The Framers were well aware that state governments might come into conflict with the federal government, and particularly with the Executive Branch. It would take little ingenuity to contrive a

[29] In the absence of diversity jurisdiction, suits based on a President's personal conduct ordinarily would not be removable. *See* 28 U.S.C. §§ 1441(b), 1442(a)(1994); *Mesa v. California*, 489 U.S. 121, 138-139 (1989).

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239

state law damages action against a President unrelated to the conduct of his office. In an atmosphere of local partisan hostility to the President, the ability to bring such a suit in state court would be a powerful weapon in the hands of state interests -- one that the Framers could not possibly have intended to permit. This is further evidence that the approach most faithful to our constitutional scheme is not "case management," but the simple deferral of litigation until after the President leaves office, at which time any risk of disruption of the orderly functioning of the Executive is eliminated.

C. The Relief Sought Here Is Not Extraordinary, And Would Not Place the President "Above The Law."

A recurrent theme of both respondent and the panel majority is that the President's claim in this case is somehow extraordinary, both in the relief that it seeks and in the burden that it would place on respondent. This is wrong. The relief that the President seeks does not provide, in the panel majority's words, a "degree of protection from suit for his private wrongs enjoyed by no other public official (much less ordinary citizens)". Pet. App. 13. On the contrary, the relief that the President seeks is afforded in a variety of circumstances to public officials and private citizens alike. At the same time, the burdens that temporary deferral of the litigation would impose on plaintiffs are limited and reasonable.

1. Deferring Litigation Is Not Extraordinary.

The deferral that the President seeks is properly classified with an unexceptional group of doctrines that provide for litigation to be stayed to protect important institutional or public interests. There are numerous such instances where civil plaintiffs must accept the temporary postponement of litigation:

- The automatic stay provision of the Bankruptcy Code provides that litigation against a debtor must be stayed as

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239

soon as a party files a bankruptcy petition. The institutional interest in the orderly resolution of the bankruptcy estate justifies the imposition of delay on the plaintiff's claims. The stay ordinarily remains in effect until the bankruptcy proceeding is completed or the bankruptcy court lifts the stay. 11 U.S.C. § 362 (1994). That stay affects all litigation that "was or could have been commenced" prior to the filing of the petition. *Id.* Under this provision, civil actions can be stayed for extended periods.[30] Thus, if respondent had sued a party who entered bankruptcy, respondent would automatically find herself in a position similar to that she would be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.

- Courts defer civil litigation until the conclusion of a related criminal prosecution against the same defendant, if doing so is in the interests of justice or the public's interest in criminal law enforcement. That process may, of course, take several years. During that time, the civil plaintiff -- who may have been injured by a party who engaged in criminal conduct -- is afforded no relief.[31]

Eng'g italics

[30] *See, e.g., Moser v. Universal ~~Engineering~~ Corp.*, 11 F.3d 720, 721-722 (7th Cir. 1993); *Panzella v. Hills Stores Co.*, 171 B.R. 22, 23 (E.D. Pa. 1994). A bankruptcy judge also has discretion to order a stay even of third-party litigation, to which the debtor is not a party, if that litigation conceivably could have an effect on the bankruptcy estate. *See* 11 U.S.C. § 105 (1994); 2 COLLIER ON BANKRUPTCY ¶ 105.02 (Lawrence P. King ed., 15th ed. 1994), and cases cited therein.

[31] *See, e.g., Koester v. American Republic Invs., Inc.*, 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); *Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967).

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239

- The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), ~~provides that~~ permits civil claims by or against military personnel ~~are~~ to be tolled and stayed while they are on active duty. It provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act.[32] §§ (2 section signs)

- 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. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 302-06 (1973). The process, which can take several years, is needed to ensure that a regulatory agency will be able to pursue its institutional agenda in an orderly fashion. *See, e.g., United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952)).

- Public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals routinely can delay litigation for a substantial period, even though the official ultimately may be found not to be entitled to immunity. In fact the stay attaches only in those cases where a trial court has initially rejected the claim of immunity.

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[32] President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation. Rather, the relief sought here emanates from the nature of the President's constitutional duties and principles of separation of powers.

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239

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 dispel any suggestion that the President, in asking that this litigation be deferred, is somehow seeking extraordinary relief, or that holding this or any other litigation in abeyance violates a plaintiff's right to access to the courts.

2. Presidents Remain Accountable For Private Misconduct.

The panel majority, invoking the term "immunity," also suggested at various points that the President was seeking a rule that would bar liability for alleged wrongful conduct committed outside the scope of his official responsibilities. This is untrue. The President seeks only to defer the litigation until he leaves office. He remains accountable for his conduct and will be amenable to potential liability at that time. Accordingly, relieving a President temporarily of the requirement to defend private civil damages action does not, as the respondent suggests, place the President "above the law." Resp. C.A. Br. 9.

Deferring damages litigation manifestly does not give Presidents free license to engage in private misconduct. As this Court has observed, there are formal and informal checks quite apart from civil damages that deter unlawful, tortious or unconstitutional behavior by Presidents or those who may run for office in the future. These include the prospect of impeachment in egregious cases, as well as "constant scrutiny by the press." *Fitzgerald*, 457 U.S. at 757. Plaintiffs can take their charges to the newspapers and broadcast media, as has been done here. "Other incentives to avoid misconduct . . . include a desire to earn reelection," *id.*, or in the case of those who seek the Presidency, the desire to be elected in the first instance. Further deterrence may be found in the concern of a President "for his historical stature." *Id.* And of course, a President would still remain liable for damages after leaving office.

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239

Indeed, deferral stands in sharp contrast to much more sweeping protection -- absolute or qualified immunity from damages -- that the law provides to literally tens of thousands of public employees. These immunity doctrines do not just delay litigation, but leave innocent victims wholly without compensation, sometimes even in cases where an official's conduct amounts to gross abuse of individual rights.[33] Similarly, diplomats, members of their families and foreign heads of state are wholly immune from liability in this country, even for personal misconduct and criminal acts.[34] In all these cases, protection from liability is needed to "advance compelling public ends." *Fitzgerald*, 457 U.S. at 758. Temporarily excusing the President from the burdens of private civil litiga-

[33] For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978), a judge was held absolutely immune from damages notwithstanding undisputed allegations that he ordered a mildly retarded teenager sterilized in an *ex parte* proceeding, without a hearing, without notice to the young woman, and without appointment of a guardian *ad litem*. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor ~~held~~ was held absolutely immune from damages even though the plaintiff had obtained habeas corpus relief on the ground that the prosecutor knowingly used false testimony at a trial which led to plaintiff's murder conviction and death sentence.

[34] *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Skeen v. Brazil*, 566 F. Supp. 1414 (D.D.C. 1983); *In re Terrence K.*, 524 N.Y.S.2d 996 (N.Y. Fam. Ct. 1988). Head-of-state immunity, founded on long-standing principles of international common law, permits heads of state, including our own, "to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." *Lafontant*, 844 F. Supp. at 132. Diplomatic immunity, founded on the Vienna Convention, is a reciprocal immunity that exists "[t]o protect United States diplomats from criminal and civil prosecution in foreign lands with differing cultural and legal norms as well as fluctuating political climates." *Tabion v. Mufti*, 877 F. Supp. 285, 293 (E.D. Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996).

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CLINTON PRESIDENTIAL LIBRARY
239

tion, a far more modest accommodation, serves even more "compelling public ends."[35]

In sum, the President asserts a limited form of protection that is calibrated to accommodate a plaintiff's right to seek redress in the courts and the right of the people to have the person they elected President available to perform the unique and demanding responsibilities of that office. Because the plaintiff's right ultimately to seek redress is preserved, deferral also is in accordance with Chief Justice Marshall's declaration that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

II. THE LITIGATION OF THIS PARTICULAR PRIVATE DAMAGES SUIT AGAINST THE PRESIDENT SHOULD, IN ANY EVENT, BE DEFERRED.

A. Several Factors Weigh Heavily In Favor Of Deferring This Litigation In Its Entirety.

Even if it were determined that temporary insulation from private civil damages litigation is not presumptively mandated in every case involving the President, there remains the question of whether, under principles enunciated in this Court's separation of powers cases, litigation of this particular nature should go forward while the President is in office. We respectfully submit that it should not.

[35] Indeed, while we seek here only to defer the plaintiff's opportunity to pursue redress, we note that courts have, with few qualms, denied damages remedies altogether in other cases. "It never has been denied that . . . immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Fitzgerald*, 457 U.S. at 754 n.37.

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In *Fitzgerald*, the Court framed the analysis that must be undertaken as follows: "a court, before exercising jurisdiction [over a President], 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." 457 U.S. at 754. As the Court recently explained, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996). Accordingly, when action by another branch -- in this case the judiciary -- has "the potential for disruption" of Executive Branch functions, a court must "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority" of the Judicial Branch. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)(hereinafter "*Nixon v. GSA*"). # (insert a space)

Providing a forum for the redress of civil rights and common law torts is, of course, an appropriate and important objective within the constitutional authority of the federal judiciary. The issue here, though, is whether there is an "overriding need" to promote this objective at this time, if doing so has the potential to disrupt the President's ability to perform his constitutional functions. The key is "to resolve those competing interests in a manner that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974). Temporarily deferring this litigation does just that.

Under the separation of powers principles elaborated in *Fitzgerald*, *United States v. Nixon*, and *Nixon v. GSA*, there is no justification for requiring this litigation to proceed while the President is in office. First, this suit involves the President both directly and personally. He is not a peripheral figure or one among many co-defendants. As the district court found, he is the "central figure in this action." Pet. App. 77. Moreover, given the nature of the allegations, this is the kind of litigation that he must attend to personally. It alleges

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239

events in which only he and the respondent purportedly were involved, and directly attacks his reputation and integrity. Such litigation cannot be handled by, for example, the President's accountants or business associates. As discussed above, litigation of this nature is especially disruptive, because it would require the President's personal time and attention.

Second, this suit concerns alleged pre-Presidential conduct, rather than unofficial conduct that the President engaged in while in office. In a case of this kind, the plaintiff's need to press a claim during the President's incumbency is less compelling, because the plaintiff generally will have had an opportunity to sue before the President was elected, ~~Indeed, respondent had the opportunity to do so here.~~ as was the case here.

The public interest in allowing the suit to go forward is also less, ~~compelling~~ because there is no risk that the defendant was seeking to take advantage of the Presidency at the time of the alleged wrong ~~and the danger that the suit~~

Third, and related, this is a case in which the plaintiff's delay in bringing suit after the President was elected is not readily understandable. Respondent claims that deferring the suit will prejudice her interests, but respondent is the author of her own predicament. This case does not involve a latent harm that only became known long after the fact. The facts alleged in the complaint were known to respondent at once, and the claims accrued well before the President took office. Moreover, respondent chose not to pursue other available avenues of potential recovery, such as a timely claim under Title VII, or a suit against the publisher and the author of the article in which she was allegedly defamed. Respondent instead waited three years to act, filing barely within the limitations period for civil rights actions, 16 months after the defendant became President. Irrespective of whether the doctrine of laches should formally apply, these facts suggest that deferral is especially appropriate here. When the plaintiff has delayed extensively before suing, there is reason to think that further delay will not harm the plaintiff's interests. By the same token, when a plaintiff waits to bring suit based on pre-Presidential conduct until the President is elected, and chooses

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CLINTON PRESIDENTIAL LIBRARY
239

not to pursue other available remedies, the danger that the suit was prompted by illegitimate motives is obviously greater.

Finally, as the district court observed, "[t]his is not a case in which any necessity exists to rush to trial." Pet. App. 70. Respondent seeks only damages. If she ultimately prevails, she will be made whole regardless of the delay.[36] Respondent also does not identify any special need for the damages she seeks and, in fact, has stated that she intends to donate any award to charity. Transcript, *CNN: Paula Jones Interview* (CNN television broadcast, June 27, 1994) (C.A. App. 85). Again, in a suit seeking only damages, where a plaintiff can be made whole by prejudgment interest and has disclaimed personal or expedient need for financial recovery, the danger that respondent will be prejudiced is diminished, and the justification for the potential interference with the functioning of the Executive Branch is even further diminished.

FN

Respondent's interest in vindicating her asserted rights, and the judiciary's interest in providing a forum for vindicating such rights, are not significantly impaired by deferring this litigation. When the burden on the Presidency is compared with the very minimal impairment of these interests, it becomes clear that this litigation should be deferred in its entirety until the President leaves office.

[36] Prejudgment interest generally is available in appropriate circumstances under 42 U.S.C. § 1983 (1994). *See Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991). Prejudgment interest also is available under Arkansas law in appropriate cases. *Wooten v. McClendon*, 612 S.W.2d 105 (Ark. 1981) (prejudgment interest available in contract and tort actions, provided that at time of injury, damages are immediately ascertainable with relative certainty).

FN

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239

B. At A Minimum, The District Court's Decision To Stay Trial Should Have Been Sustained.

conform table of contents

1. The Court Of Appeals Lacked Jurisdiction ~~To Review The~~ Over Respondent's ~~Request To Overturn The District Court's Decision To Stay Trial.~~ Cross Appeal.

Respondent cross-appealed below to challenge the district court's order to stay trial. A district court's decision to stay proceedings, however, is ordinarily 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). While such orders may in some circumstances be reviewed on an interlocutory basis by way of writ of mandamus (*see* 28 U.S.C. § 651 (1994)), respondent never sought such a writ.[37]

Respondent instead asserted that the Court of Appeals had "pendent appellate jurisdiction" over respondent's cross-appeal. The panel majority agreed, even though this Court recently ruled that "pendent appellate jurisdiction" should not be used "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995).

Swint exhibits strong skepticism toward the type of pendent jurisdiction exercised in this case. There, the Court explained that under 28 U.S.C § 1292(b), Congress gave a

---

[37] 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. Hufstedler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, ~~the~~ respondent did not assert this ground as a basis for jurisdiction, perhaps in recognition that it clearly is not applicable here, where the district court's order contemplated further proceedings in federal court. *See Boushel*, 985 F.2d at 408-09.

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239

district court "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable," thus

> confer[ring] on district courts first line discretion to allow interlocutory appeals. If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.

115 S. Ct. at 1210 (footnote omitted). Notwithstanding this language, and without any certification of the issue by the district court, the Eighth Circuit asserted pendent appellate jurisdiction over the respondent's interlocutory appeal of the stay of trial.[38]

The panel majority reasoned that *Swint* did not apply because respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4. *See Swint*, 115 S. Ct. at 1212. The issues in the two appeals were not, however, "inextricably intertwined." That these two appeals raise very distinct issues is evident from the distinct nature of the inquiries they generate. The issue of whether the President can defer litigation raises a question of law; the issue of whether a district court can stay litigation is a discretionary determination determined by the facts of a particular case. While a district court's legal decisions are entitled to no

---

[38] Since *Swint*, numerous other circuit courts have eschewed asserting pendent jurisdiction in appeals such as this. *See Woods v. Smith*, 60 F.3d 1161, 1166 & n.29 (5th Cir. 1995), *cert denied*, 116 S. Ct. 880 (1996); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Garraghty v. Virginia*, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

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239

special deference, its exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion. *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936).

The district court here, in deciding to postpone trial, invoked its discretionary powers over scheduling. Pet. App. 71 (citing FED. R. CIV. P. 40). The court then expressly based its decision on the particular circumstances of this case:

> This is not a case in which any necessity exists to rush to trial. . . . 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.

As this passage makes clear, the district court's decision to stay trial rested upon the particular facts at hand, and review of that stay -- unlike review of its decision to reject the President's position that the entire case must be deferred as matter of law -- must address these particular facts. Accordingly, even if the concept of "pendent appellate jurisdiction" survived *Swint*, the two appeals here were not "inextricably intertwined," and the panel majority's exercise of such jurisdiction over the interlocutory appeal was erroneous.

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239

2. The Court Of Appeals Erred In Reversing The District Court's Decision To Stay Trial In This Case.

The district court clearly had the authority to stay trial in this case. In *Landis*, Justice Cardozo wrote for this Court that

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

299 U.S. 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 (emphasis added). Obviously, a trial here, which would require the heavy involvement of a sitting President, is a case of "extraordinary public moment."

The panel majority in this case showed none of the deference to the district court's determination required by *Landis*. Instead, it rejected the trial court's order with a single sentence: "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. This sweeping and conclusory ruling hardly represents the careful weighing of particular facts and circumstances necessary to support a conclusion that the trial court abused its discretion.

The district court, by contrast, specifically assessed the case and appropriately concluded that trial here should not

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proceed. For all the reasons enumerated above, the trial court found that it simply would not be possible to try the case without enormous and extraordinary demands on the President's time, and that the respondent's interests would be substantially preserved notwithstanding the stay. Due to these case-specific factors, the district court correctly stayed trial until the President left office. That decision was not an abuse of discretion and, if reviewed at all, should have been sustained.

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239

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed, and this litigation should be held in abeyance, in its entirety, until the President leaves office.

Respectfully Submitted,

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August 8, 1996

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002. letter	Bob Bennett to Jack Quinn; RE: Clinton v. Jones Brief (2 pages)	08/06/1996	P5 241
003. letter	Elena to Amy; RE: Clinton Vs. Jones (2 pages)	n.d.	P5 242
004. draft	Kathy Wallman to Elena; RE: Clinton vs. Jones (2 pages)	08/04/1996	P5 243

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~~By way of analogy,~~ The Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC app. §§ 501-25, provides that civil claims by or against military personnel are to be tolled and stayed while they are on active duty. ~~This is to enable members of the armed forces "to devote their entire energy to the defense needs of the Nation." 50 USC app. § 510.~~[1]

This Act thus offers yet ~~another~~ one more analogy, though the President does not claim, and has never claimed, that he is entitled to relief under that Act.

[1]Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S. C. app. § 521. The president here does not claim to be on active military status. Nor does he claim protection under this act, or any other legislation. Rather the relief sought here emanates from the nature of the President's constitutional duties and principles of separation of power.

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241

August 6, 1996

Jack Quinn, Esq.
Counsel To The President
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C.

Re: Clinton v. Jones Brief

Dear Jack:

I write concerning the Soldiers' & Sailors' Civil Relief Act. While we obviously will defer to the White House's decision on this matter, Geoff Stone, David Strauss, myself and our team feel strongly that it would be a mistake, both legally and politically, to drop any reference to the act in the brief, and believe the attached language should be included in Section I(C)(1). It is a sound analogy and strengthens our case, while making clear that the President is not claiming relief under the act. We believe that omission of any reference to the act, by contrast, will attract legal and political attention and will result in stories in the press that the President and his lawyers backed down in the face of criticism.

Please let us know of your final decision, and feel free to call me to discuss this. I can be reached at 406-222-8510.

Sincerely,

Bob

Bob Bennett

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241

~~By way of analogy,~~ The Soldiers' and Sailors' Civil Relief Act of 1940, 50 USC app. §§ 501-25, provides that civil claims by or against military personnel are to be tolled and stayed while they are on active duty. ~~This is to enable members of the armed forces "to devote their entire energy to the defense needs of the Nation."~~ 50 USC app. § 510.[1]

under which the petitioner does not seek relief, provides similarly analogous support. That Act

[1] Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." ~~50 U.S.C. app. § 521.~~ The president here does not claim ~~to be on active~~ military status. Nor does he claim protection under this act, or any other legislation. Rather the relief sought here emanates from the nature of the President's constitutional duties and principles of separation of power.

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242

Amy —
One general note:

The first argument — That entertaining these suits is a problem because the President is a busy guy — is of course necessary and right. But it's also — unavoidably, I think — a bit obvious; there's only so much to be said about it, and everything that can be said, the Court probably has already thought of.

Because of this, I would try to set up the brief a bit differently, perhaps in the Summary of Argument. We should try to communicate to the Court that there's obviously a problem involved in subjecting the

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242

President to suit and the real ~~choice~~ to be made here is in choice of remedy: Do we go with case management or with deferral?

I am not suggesting any large-scale structural changes here — just some well-placed language that will focus the Court on the "choice of remedy" aspect of its decision.

Elena

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To Elena

From Kathy Wallman - more coming. [004]

this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

CLINTON PRESIDENTIAL LIBRARY 243

That the President "occupies a unique position in the constitutional scheme" (*Fitzgerald*, 457 U.S. at 749) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power.[4] The President alone is director of all the executive departments and Commander-in-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. Const. Art. II, § 2. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See generally* THE FEDERALIST Nos. 70-77 (Alexander Hamilton). What do we say to argument that POTUS doesn't really execute these duties alone? He has lots of people to delegate to. Don't we

[4] PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) ("The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government.").

need to acknowledge he has these resources at his disposal but core of duties cannot be delegated? (He can take a vacation, can't he?)

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Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents against lawsuits filed for purposes of harassment, publicity or partisanship. See Pet. App. 15; Resp. C.A. Br. xx. But those devices are, of course, far from foolproof, and for a variety of reasons are likely to be ineffective in protecting the President.

The strongest deterrent of unfounded lawsuits is typically financial: usually an individual will not incur the expense of suit if there is no prospect of prevailing, or will not risk sanctions under Fed. R. Civ. P. 11 if the suit is found to be frivolous. But financial restraints are insufficient to deter such claims when -- as many prominent business, entertainment and public figures have learned to their dismay -- plaintiffs can attain instant celebrity status or political impact simply by including allegations in a complaint filed in court, and when the notoriety that accompanies such a lawsuit is lucrative in and of itself, in the form of book or movie contracts, for both client and lawyer. Likewise, a frivolous but embarrassing claim may be filed because the target is perceived -- as a President surely would be -- as vulnerable to quick settlement. As Chief Justice Burger observed, suits against Presidents can be "used as mechanisms for extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And an individual whose objective is to divert the President's energy and resources, or to uncover information through the discovery process, or to embarrass the President by

The President already gets an incredible volume of lawsuits filed against him, virtually all of them frivolous, that we pass on to DoJ. Would it be useful to know something about that volume?

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244

PAGE

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244

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 rehearing *en banc*. Three judges did not participate, and Judge McMillian dissented. Judge McMillian stated that the panel majority's holding "demean[ed] the Office of? the President." Pet. App. 32. He further stated that the holding "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.

SUMMARY OF ARGUMENT

The President, uniquely among federal officials, has the sole responsibility for an entire branch of the federal government. For that reason, litigation against the individual who is serving as President unavoidably impinges on the constitutional responsibilities of the Executive branch. The Framers explicitly recognized this point, as has this Court, on many occasions.

A personal damages action is a particularly burdensome and disruptive form of litigation. As a practical matter, no President can be disengaged from a lawsuit that seeks to impugn his reputation and threatens him with enormous financial liability. Even if a President ultimately prevails, protracted personal damages litigation can make it impossible for an individual to devote his undivided energies to any demanding job, much less to one of the most demanding jobs in the world. Judge Learned Hand

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CLINTON PRESIDENTIAL LIBRARY 244

once commented that as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness or death." In this respect the President is like any other litigant, except that the President's lawsuits, like the President's sickness, becomes the nation's problem.

There is also no reason to believe that, if it is established that private damages actions against sitting Presidents may go forward, such suits would be rare. To the contrary, parties seeking publicity, partisan advantage or a quick settlement will not forbear from using such litigation as a means of advancing their objectives. The usual means of discouraging or disposing of unfounded civil complaints are especially ineffective ~~with respect to~~ ~~at deterring~~ ~~these kinds of suits, which are~~ in these cases. ~~disproportionately likely to be filed against the President.~~

Even the panel majority did not dispute the basic point that personal damages litigation against an incumbent President threatens the functioning of the Executive Branch. But the panel rejected deferral of the litigation as a remedy, and instead concluded that "case management" by the trial court could adequately protect the President's interests. "Case management," however, only exacerbates the separation of powers problems, by entangling the executive and judicial branches in an ongoing and mutually damaging relationship.

In concrete terms, trial court "case management" means that whenever a President believes that his responsibilities require a change in the schedule of the litigation against him, he will

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244

have to seek the approval of the trial judge, state or federal. That judge will be authorized to insist on an explanation of the President's reasons for seeking a schedule change, a problematic state of affairs in itself. The trial judge will then review the President's explanation and decide whether to accept it, or whether the President should instead rearrange his priorities to devote more time and attention to the litigation.

The President's priorities, however, are inseparable from the priorities of the Executive branch of the federal government. Judges should not be in the position of reviewing those priorities. If they are, the effect will be to enmesh the President and the judiciary, ~~in~~ a series of controversies over highly sensitive and, in an important sense, deeply political issues about the President's official priorities, to the great detriment of both branches,

Moreover, state courts are likely to become the natural venue for private civil damages actions against an incumbent President, because such suits often will not involve federal claims. The Framers were well aware of the potential for conflict between the states and the federal government, particularly the Executive branch of the federal government. They could not possibly have contemplated that state trial judges would have the power to control a President that is inherent in "case management" -- much less that they would have the power to compel an incumbent President to stand trial in a state court. This

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further demonstrates that deferral, not "case management," is more consistent with our constitutional scheme.

CLINTON PRESIDENTIAL LIBRARY
244

The temporary deferral that the President seeks here is not, contrary to the court of appeals, an extraordinary remedy, and it does not place the President "above the law." In a variety of circumstances -- ranging from the automatic stay in bankruptcy to the doctrine of primary jurisdiction to the suspension of civil actions while criminal proceedings are pending -- litigation is delayed in our system in order to protect significant public or institutional interests. The interest in protecting the Presidency from disruption is at least as strong as the interests underlying these well-established doctrines.

Deferral also does not place unreasonable burdens on respondent. In many cases -- for example, where absolute, qualified, or diplomatic immunities apply -- settled doctrines deny recovery outright to innocent individuals who may have been grievously injured. While we do not deny the costs of delay to plaintiffs, it remains true that deferral of this litigation does not preclude respondent from ultimately seeking a remedy and, if warranted, recovering on the merits. Finally, deferral of course does not mean that the President is unaccountable for wrongdoing or is "above the law." Deferral leaves him no less accountable, not only in court but in other important forums, such as public opinion. Only the timing of the litigation is affected.

~~In any event, under separation of powers principles established by this Court's decisions,~~ Respondent's suit, in particu-

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under separation of powers principles established by this Court's decisions.

year, should be deferred. The suit is based on conduct that occurred before the President took office, and therefore, presents no risk of abuse of Presidential power. Respondent seeks only damages, and therefore can be made whole even if the proceedings are delayed. The suit involves the President personally and directly, not peripherally, so it is especially likely to impinge on his ability to perform his official duties. And respondent could have sought relief long before the President assumed office, but chose not to do so.

At a minimum, the court of appeals erred in overturning the district court's order staying the trial. The court of appeals lacked jurisdiction to review that order. On the merits, it erred by failing to conduct the kind of specific inquiry into the facts of this case that is a prerequisite of overturning a discretionary judgment by a trial court.

ARGUMENT

I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.

A. A Personal Damages Action Against An Incumbent President Would Seriously Interfere With The Discharge Of A President's Article II Responsibilities And Jeopardize The Separation Of Powers.

1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.

Under our system of government, the Executive Branch is the sole responsibility of the individual who has been elected President, and anything that significantly affects that individual will affect the functioning of the Executive Branch as well. For

CLINTON PRESIDENTIAL LIBRARY 244
WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY 244

this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

That the President "occupies a unique position in the constitutional scheme" (*Fitzgerald*, 457 U.S. at 749) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power.[4] The President alone is director of all the executive departments, including those responsible for foreign policy, and Commander-in-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. Const. Art. II, § 2. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See generally* THE FEDERALIST Nos. 70-77 (Alexander Hamilton).

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[4] PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) ("The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government.").

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The extraordinary character of the Presidency in this respect is woven into the very fabric of the Constitution. The Constitution envisions that Congress will be in session for a period of time and then adjourn. U.S. CONST., ART. I, §§ 4, 5, 7. The President, however, is always "in session;" the President never adjourns.[5] The Constitution further provides specific steps to replace the President in the event of his disability. U.S. Const. Amend. XXV, §§ 3-4. These provisions, made for no other federal officer, further confirm that the Presidency is inseparable from the individual who is President.

The unadorned words of the Constitution, moreover, cannot convey the momentous and unrelenting burdens of the Presidency. "[T]he President, for all practical purposes . . . affords the only means through which we can act as a nation."[6]

> The range of the President's functions is enormous. He is ceremonial head of the state. He is a vital source of legislative suggestion. He is the final source of all executive decision. He is the authoritative exponent of the nation's foreign policy.[7]

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5 *See* Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon And Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) ("Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.").

6 George E. Reedy, *Discovering the Presidency*, N.Y. Times, Jan. 20, 1985 *(quoted in* LOU CANNON, PRESIDENT REAGAN -- THE ROLE OF A LIFETIME, 147 (1991)).

7 Harold J. Laski, The American Presidency, an Interpretation, p. 26 (Harper & Bros. 1940) (quoted in Cannon, *supra* n. __, at 147).

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CLINTON PRESIDENTIAL LIBRARY
244

Although he has many advisors, the President cannot delegate ultimate decision making authority and accountability for matters of war and peace, international relations, domestic terrorism, the economy, and other profoundly important questions of national policy, which affect millions of people in this country and around the world. The President's obligations to the office never cease. Serious crises can and often do erupt unexpectedly, commanding the President's immediate attention.[8]

> To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the energies of a single man unsurpassed by the exigencies of any other political office in the world.[9]

2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With Historic Understanding.

Courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753, & n.34. Accordingly, throughout our nation's history, courts

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[8] This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of a KAL Flight 007 while on vacation. Cannon, *supra* n. __ at 191, 399, 420. President Carter spent one of his vacations reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. Jimmy Carter, Keeping Faith -- Memoirs Of A President, p. 57 (Bantam Books 1982)(hereinafter "Carter"). **[OTHER EXAMPLES TO COME]**

[9] Laski, *supra* n. __, p. 26.

Unless they're a lot better, I'd take this FN out. I'm not sure the need to work on vacation — or the occasional occurrence of sudden crisis — is a strong argument for the need to defer litigation.

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9 Laski, *supra* n. __, p. 26.

Does it look funny not to have any Clinton examples?

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The traditional practice has been fully consistent with this historical understanding. While "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President," *id.*, 457 U.S. at 753, it generally was assumed that one could not hale an incumbent President into court and seek damages from him personally. *See id.*, 457 U.S. at 758 & n.1 (Burger, C.J., concurring). In fact, so far as can be determined, no President has ever been required to give evidence in a civil proceeding -- let alone appear as a defendant -- and no President has ever been compelled to give testimony at trial or appear personally in court in any case, civil or criminal. President Jefferson was sued for official actions he took while he was President, but notably, not until after he left office.[15] Three other Presidents had civil damages litigation pending against them during their tenure in office, but in each case, suit was filed before they took office; two were effectively disposed of before the President was sworn in;

I'm not sure I get this. Hasn't Pres Clinton been compelled to do so twice? Do you mean only personal appearances? If so, this is not clear.

[14](...continued)
ratifying conventions. The Court noted that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

[15] *Livingston v. Jefferson*, 15 F.Cas. 660, ___ (C.C.D. Va. 1811) (No. 8,411) (suit for trespass, based on federal seizure of land, dismissed for want of venue).

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CLINTON PRESIDENTIAL LIBRARY 244

and none was actively litigated while the defendant served as President.[16]

In *Fitzgerald*, the Court explained that historically, the President has been subjected to a court's jurisdiction only when

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[16] In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. **[Cite]** An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, (179 N.Y. at 544), nine months before he assumed the Presidency. **[Cite]** The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. 179 N.Y. at 544.

In *DeVault v. Truman*, 194 S.W.2d 29 (1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944 (*id.* at 31), and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. **[Cite]**. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. 194 S.W.2d at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable for injuries incurred while riding in a car that had been rented to his campaign. 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) (C.A. App. 128, 135) (hereinafter "*Bailey*"). After he was inaugurated, President Kennedy argued that he was entitled to a stay as Commander in Chief of the Armed Forces, pursuant to the Soldiers' and Sailors' Civil Relief Act (discussed *infra*, at Part __). A Los Angeles Superior Court judge denied this motion without written opinion. *See Bailey*, Motion to Vacate Pre-Trial Date and Stay Further Proceedings (July 5, 1962) (C.A. App. 145) and Notice of Denial of same (July 31, 1962) (C.A. App. 153). The court did not permit the plaintiffs to take the President's deposition, requiring only that he respond to written interrogatories. *Bailey*, Order denying motion for deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. *See infra*, pp. ___.

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CLINTON PRESIDENTIAL LIBRARY
244

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Why is it helpful to elaborate on an instance where this was invoked + rejected?

Why not just say this

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244

of when a President is subject to the courts' jurisdiction.

Until the unprecedented decision by the court of appeals in this case, ~~however~~ private civil damages litigation has never been thought to warrant an exception to the Framers' general understanding. To the contrary, such litigation does not serve the broad-based, compelling public or constitutional interests enumerated in *Fitzgerald*, 457 U.S. at 754, and is an abrupt break with well-established tradition.

3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To Fulfill His Constitutional Functions.

In *Nixon v. Fitzgerald*, this Court held that the President enjoys absolute immunity from damages liability for acts within the "outer perimeter" of his official duties. 457 U.S. at 756. The logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here -- the temporary deferral of private civil litigation.

Fitzgerald relied upon three significant grounds. First, the Court was concerned that to subject a President to liability for official conduct would inhibit him in carrying out his duties fearlessly and impartially, and would inject courts improperly into Presidential decision making. *Fitzgerald*, 457 U.S. at 752 & n.32. Second, the Court stated, "[b]ecause of the singular importance of the President's duties," the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. And third, the Court was concerned that the "sheer prominence of the President's office" would make him "an easily identifiable

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244

target for suits for civil damages." 457 U.S. at 752-53 (footnote omitted).

This case is different from *Fitzgerald*, of course, in that it largely does not touch upon official actions. Accordingly, it does not warrant, and the President does not seek, any immunity from liability. But because this case involves a sitting President, it directly implicates the other two concerns that prompted the decision in *Fitzgerald*: the President's vulnerability to civil damages actions, and the diversion of the President's time and attention to attend to such litigation. These concerns are present equally whether the lawsuit is based on private conduct or official conduct. Defending such a suit is not any less of an imposition on the President's ability to attend to his constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. Protection for the Presidency therefore is still required, albeit the much more limited protection of holding litigation in abeyance until the President leaves office.

The burdens of being a party to civil litigation are widely acknowledged and require little elaboration. Judge Learned Hand once commented that as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness and death."[18] In this regard, the President is like any other litigant, except

OK to say again as if we've never said before?

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[18] 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105(1926)(*quoted in Fitzgerald*, 457 U.S. at 763 n.6(Burger, C.J., concurring).

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that a President's litigation, like a President's illness, becomes the nation's problem.

This sentence is much weaker than the rest of the ¶. I don't think many would view "anxiety" as a particularly strong governmental interest.

A protracted lawsuit does more than "tie[] up the defendant's time"; it "prolongs the uncertainty and anxiety that are often the principal costs of being sued." *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993). The discovery phase alone of civil damages litigation would be an enormous imposition on a President's time and attention. "No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage to survive that ordeal, once again at trial."[19] Discovery, "used as a weapon to burden, discourage or exhaust the opponent," makes even a relatively minor case a costly and lengthy ordeal.[20] As this Court has recognized, "pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted).

The instant case clearly illustrates these points. Respondent's counsel have revealed their intention to pursue discovery aggressively, stating that, "all is on the table in []

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19 Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 Ga. L. Rev. 1, 8 (1992).

20 Hon. William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?*, 74 Judicature 178, 179 (Dec./Jan. 1991).

CLINTON PRESIDENTIAL LIBRARY 244
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CLINTON PRESIDENTIAL LIBRARY
244

a few occasions with his trial counsel, the President can essentially ignore the litigation. Pet. App. __. It was even suggested that the President could forego attending his own trial. Pet. App. __ (Beam, J., concurring). It should go without saying that when the President is a defendant he is entitled to -- and, as a practical matter, will simply have to -- devote considerable time and attention to his defense.

This would be true whether the litigation involved allegations regarding personal misconduct, as here, or a disputed commercial transaction. Any case relating to events in which the President personally was involved would require the President's participation at almost every stage. In order to adequately protect his interests, the President, like any responsible litigant, would be required to review the complaint and answer; prepare and assure the veracity of discovery responses; ~~retrieve and~~ review documents; assist counsel to prepare for other witnesses' depositions; review those depositions and other evidence in the case; review the opposition's pleadings and motions; and consult with counsel throughout the case. He also would have the right and the obligation to review and approve all pleadings and motions filed on his behalf. Beyond that, the President would have to prepare for and participate in his own deposition, and finally, attend trial -- perhaps for weeks or months, far from Washington -- as is, of course, his right.

Has the President in fact done all this? If not, we can't make this claim so starkly.

The panel majority's antiseptic notion that the President can remain aloof from a personal damages action against him

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CLINTON PRESIDENTIAL LIBRARY
244

simply does not conform with reality. In truth, the litigation would command a significant part of the President's time, while the urgent business of the nation competed for his attention. The President would be put to an impossible choice between attending to his official duties or protecting his personal interests in the litigation -- a choice that is unfair both to the President and to the nation he serves.

Even one lawsuit would have the potential seriously to disrupt the President's conduct of his official duties, just as one lawsuit could disrupt the professional and personal life of any individual. But if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events. Presidents likely would become "easily identifiable targets" for private civil damages actions in the future. *Fitzgerald*, 457 U.S. at 752-53. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas, at the expense of the public's interest in unimpeded constitutional governance.

In particular,

~~Civil damages litigation against the President also has the potential to corrode the political process.~~ Any President ~~is~~ would become ~~particularly~~ vulnerable to politically motivated "strike suits" financed or stimulated by partisan opponents of whatever stripe, hoping to undermine a President's pursuit of his policy objectives or to attack his integrity, and thereby diminish his effec-

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244

tiveness as a leader. Partisan opponents would also be tempted to file suit in order to take advantage of modern discovery techniques, unknown throughout most of our history, to uncover personal and financial information about the President, his family and close associates.[22] Use of the judicial system in this manner of course would corrode the political process.

Even if a claimant has a legitimate grievance, litigation against an incumbent President can deflect the exercise of the popular will by appropriating the President's time and energy, which properly belongs not to the party who sued the President, but to the electorate. Therefore, "[w]e should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."[23]

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22 The suit against John F. Kennedy, *supra* n.___, illustrates how plaintiffs can use litigation for purposes of political mischief and potential extortion. The plaintiffs, convention delegates from Mississippi who believed President Kennedy's policies were inimical to their state, were injured while riding in a Kennedy campaign car. *Bailey*, Reply to Objections to Cross-Interrogatories at 4-5 (Sept. 28, 1962) (C.A. App. 156). They attempted to propound politically embarrass~~ingly~~ interrogatories to Robert F. Kennedy, who had been the President's campaign manager; sought to obtain information about Kennedy family finances; and used pleadings to promote views that the President was using his office to harass them and their state. *See Bailey*, Cross-Interrogatories to Robert F. Kennedy (Sept. 20, 1962) (C.A. App. 162); *Bailey*, Reply To Objections To Cross-Interrogatories at 3-4 (Sept. 28, 1962) (C.A. App. 156). As fatuous as the allegations were, President Kennedy settled the suit for $17,750, a significant sum in 1963. Two Suits Against Kennedy Settled, Los Angeles Herald Examiner, April 2, 1963 (C.A. App. 181). Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency.

23 Amar & Katyal, *supra* ___ at 713.

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CLINTON PRESIDENTIAL LIBRARY
244

making sensational allegations, might willingly incur the costs of litigation even if there is no hope of success on the merits.

Nor does a motion to dismiss ~~or for summary judgment~~ promise swift or painless relief for the target of meritless litigation. A potential private claim could be drafted in such a way as to entangle a President in embarrassing or protracted litigation simply by alleging claims based on unwitnessed one-on-one encounters, or by otherwise raising credibility issues. These kinds of claims are exceedingly difficult to dispose of under the standards that govern pre-trial motions. And even where motions to dismiss are granted, it can take years -- and numerous, expensive additional motions -- to obtain final dismissal of the suit and sustain that dismissal on appeal.

As Chief Justice Burger recognized,

> [D]efending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . . . Ultimate vindication on the merits does not repair the damage.

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

4. Criminal Cases Where A President Has Been A Third-Party Witness Provide No Precedent For Requiring A Sitting President To Participate As A Defendant In Civil Damages Litigation.

The respondent and the panel majority below minimized the disruptive effect of civil litigation on the Presidency by comparing the full-scale defense of a personal damages action to the few occasions when a President has testified as a non-party witness in a criminal or legislative proceeding. *See* Pet. App. __; *id.* at 22-33 (Beam, J., concurring). This comparison is not

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This calls attention to the defendant/witness difference. But in the next paragraphs you focus on the criminal/civil difference. Shouldn't, then, this ¶ talk about both.

plausible. The isolated event of giving testimony in a proceeding to which one is not a party bears no resemblance to the burdens borne by a defendant in a civil action for damages. In fact, the lesson of cases involving Presidential testimony is more nearly the opposite of what respondent and the panel majority say: they show that requiring an incumbent President to submit as a defendant in a private damages action would go far beyond anything a court has done before.

As this Court has emphasized, the interests at stake in criminal cases are of an altogether different magnitude from the interests affected by private damages actions. *See e.g., Nixon v. Fitzgerald*, 457 U.S. at 754. Not only is the public interest in the accurate outcome of a criminal prosecution far greater (*see e.g, Berger v. United States*, 295 U.S. at 88), but the defendant has a constitutional right, under the Compulsory Process Clause of the Sixth Amendment, to obtain evidence in a criminal proceeding. *United States v. Burr*, 25 F.Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d).[24]

Only once in our history, in *United States v. Nixon*, 418 U.S. 683 (1974), has the Supreme Court ever required a President to give evidence. That case, of course, involved physical evidence, not the President's own testimony. Even so, the Court could not have been clearer that the limitation on Presidential autonomy was warranted only because of the "primary constitution-

[24] This right, of course, has no constitutional counterpart in civil cases. [CITE]

CLINTON PRESIDENTIAL LIBRARY 244

WJC LIBRARY PHOTOCOPY

CLINTON PRESIDENTIAL LIBRARY 244

deposition.[27] Thus even obtaining third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need -- or where the constitutional right to compulsory process is at stake -- and then only in a way that protects the Presidency from disruption. The difficulties involved in arranging for the President to testify as a third-party witness would be increased exponentially if the President were a defendant in a civil damages action, which has the potential to interfere severely, over an extended period, with any individual's ability to function in a highly demanding job.[28]

These criminal cases do not stand for the proposition that a sitting President could be called as a witness, much less a defendant, in a civil proceeding. Criminal prosecutions, moreover, must be approved by a public official and must be premised on probable cause. In the federal system and in many states, a

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27 *See United States v. Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark., Mar. 20, 1996)(videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parties would be shown at trial); *Poindexter*, 732 F. Supp., at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

are likely

28 Private civil damages actions against the President ~~would~~ also to be ~~significantly~~ more burdensome than cases where he is sued in his official capacity. *See supra*, n. __. The latter ~~These~~ cases ~~do not involve the President's personal conduct, and~~ often turn on questions of law that are disposed of without discovery or trial. To the extent a factual record is developed, this ~~is~~ can more often be accomplished by the President's delegates without his participation.

will more

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244

deposition.[27] Thus even obtaining third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need -- or where the constitutional right to compulsory process is at stake -- and then only in a way that protects the Presidency from disruption. The difficulties involved in arranging for the President to testify as a third-party witness would be increased exponentially if the President were a defendant in a civil damages action, which has the potential to interfere severely, over an extended period, with any individual's ability to function in a highly demanding job.[28]

These criminal cases do not stand for the proposition that a sitting President could be called as a witness, much less a defendant, in a civil proceeding. Criminal prosecutions, moreover, must be approved by a public official and must be premised on probable cause. In the federal system and in many states, a

Wouldn't it be more than this by the time it comes to trial?

[27] *See United States v. Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark., Mar. 20, 1996) (videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parties would be shown at trial); *Poindexter*, 732 F. Supp., at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

[28] Private civil damages actions against the President would also be significantly more burdensome than cases where he is sued in his official capacity. *See supra*, n. __. Those cases do not involve the President's personal conduct, and often turn on questions of law that are disposed of without discovery or trial. To the extent a factual record is developed, this is accomplished by the President's delegates without his participation.

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The panel majority suggested that throughout the litigation, 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. Under this approach, the trial judge would have to review the President's explanation to decide if it was adequate. If the trial court decided that the President should devote more time to the private litigation than official duties, the question would arise whether it could enforce that decision by threatening the President with contempt of court or sanctions. *See* Fed. R. Civ. P. 16(f). 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.

This state of affairs is an extraordinary affront to the separation of powers. A trial judge -- state or federal -- would be examining the official priorities of the individual in whom the whole of "the executive Power" is vested. And the judge would be not merely be reviewing the President's priorities, ~~but~~ conceivably could order the President to rearrange them.

The nature of the President's responsibilities makes it especially inappropriate to allow an entity outside the Executive to insist on an answer to the kinds of questions that the trial judge inevitably would have to ask under this regime. The most obvious examples would be if the President sought a change in the litigation schedule to attend to a national security matter, a

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sensitive diplomatic issue, or a matter on which he had received information from confidential intelligence or law enforcement sources. The trial court would immediately be enmeshed in the intractable problem of how to proceed when the basis for the President's request cannot be disclosed to anyone, perhaps even to the court.

Moreover, even seemingly minor changes in the President's schedule are imbued with significant portent by observers -- foreign and domestic -- such as when the President hastily schedules an unexpected meeting with his national security adviser, or with an ambassador, or even when the President must cancel a few hours' worth of appointments for unexplained reasons. Indeed, it is not uncommon for a President to seek to maintain a pretense of "business as usual" to mask an impending crisis. In such circumstances, simply having to ask a court for a change in the litigation schedule obviously would be highly damaging.[29]

not that easy for outside observers to learn this.

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[29] Presidents Carter and Reagan provide dramatic examples: during the 1980 mission to rescue the hostages in Iran, President Carter "wanted to spend every moment monitoring the progress of the rescue mission, but had to stick to [his] regular schedule and act as if nothing of the kind was going on." Carter, *supra* n.__, at 514. Similarly, when the invasion of Grenada was being planned, President Reagan was week-ending at a Georgia golf club. He wanted to hurry back to Washington, but his advisors told him "that a change in [his] schedule might draw attention to the possibility of U.S. intervention." He decided therefore to remain in Georgia, but participated in meetings by ~~way of~~ telephone. Cannon, *supra*, n. __ at 441-42. If either President had been in a position where he was required to ask a court to change his schedule -- even if no explanation whatsoever were required -- it could have posed a threat to the military operations.

l.c.

Reagan isn't "providing" this example

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244

the nature of separated powers. Because the President embodies a branch of government, his priorities are the priorities of the Executive Branch. It follows that "case management," when the President is the defendant, necessarily means management of the business of the Executive branch -- both in setting priorities for the President's time and [in the flow of information about the President's schedule.[31]] I'm not sure what this means. Is it a reference back to the argument on p. 36? If so, make more clear.

"Case management" by trial judges not only threatens the independence of the Executive from the Judicial branch; it also inappropriately places judges in a position they should not have to occupy -- the political arena. In suits against the President, the trial judge will be operating in an atmosphere that is almost certain to be highly politically charged. Any significant decision that a judge makes will be scrutinized for signs of partisan bias for or against the President. Decisions that might be routine in any other case, such as a decision to postpone the defendant's deposition, for example, will if the President is the deponent become the subject of partisan speculation and comment.

Moreover, judges attempting to assess the sufficiency of a President's explanation inevitably will be asked to distinguish between a President's "political" activities, on the one hand,

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31 Although some measure of judicial involvement in these very delicate matters may be necessary in the very limited situations in which a President is called as a third-party witness in a criminal prosecution or to serve some other compelling, broad-based constitutional or public interest, no such overriding necessity exists when the President is sued in a routine civil action for damages.

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CLINTON PRESIDENTIAL LIBRARY
244

public officials and private citizens alike. At the same time, the burdens that temporary deferral of the litigation would impose on plaintiffs are limited and reasonable.

1. Deferring Litigation Is Not Extraordinary.

The deferral that the President seeks is properly classified with an unexceptional family of doctrines -- those that provide for litigation to be stayed in certain relatively common circumstances. 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.

- The automatic stay provision of the Bankruptcy Code provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. The stay ordinarily remains in effect until the bankruptcy proceeding is completed. 11 U.S.C. § 362 (1994). That stay affects all litigation that "was or could have been commenced" prior to the filing of the petition. *Id.* Under this provision, civil actions by numerous plaintiffs -- in some proceedings, hundreds of plaintiffs -- can be stayed for extended periods.[34] Thus, if respondent had sued a party who entered bank-

[34] A bankruptcy judge also has discretion to order a stay even of third-party litigation, to which the debtor is not a party, if that litigation conceivably could have an effect on the bankruptcy estate. *See* 11 U.S.C § 105 (1994); 2 COLLIER ON BANKRUPTCY § 105.02 (Lawrence P. King ed, 15th ed. 1994), and cases cited therein.

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244

ruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office. The institutional interest in the orderly resolution of the bankruptcy estate justifies the imposition on the plaintiff. Surely the interest in the orderly conduct of the Presidency is at least as strong, if not stronger.

See K. Wallman's comments.

- 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. This is 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 (1988). This is straightforwardly analogous to the relief that President Clinton seeks here.[35]

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[35] Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988). The President here does not claim to be on active military status. Nor does he claim protection under this act, or any other legislation. Rather, the relief sought (continued...)

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244

should justify imposing a comparable burden on civil plaintiffs.

- Public officials who unsuccessfully raise a qualified immunity defense in a trial court are entitled, in the usual case, to a stay of discovery while they pursue an interlocutory appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such appeals routinely can delay litigation for a substantial period, even though, in the end, the official may be found not to be entitled to an immunity; in fact the stay attaches only in those cases where a trial court has initially rejected the claim of immunity.

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 dispel any suggestion that the President, in asking that this litigation be deferred, is somehow seeking extraordinary relief, or that holding this or any other litigation in abeyance violates a plaintiff's right to access to the courts. More specifically, these examples demonstrate that the President is seeking a form of relief that our judicial system routinely provides when significant institutional or public interests are at stake, as they manifestly are here.

2. Presidents Remain Accountable For Private Misconduct.

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historical stature." *Id.* And of course, the prospect of being held liable for damages *after* leaving office remains an effective regulator of private conduct on the part of a President or candidate for that office. Is this true if the acts at issue are before the person becomes President?

Like other protections available to public officials, holding private damages litigation against a President in abeyance seeks to "advance compelling public ends." *Fitzgerald*, 457 U.S. at 758. Indeed, the law recognizes far more invasive protection -- absolute or qualified immunity from damages -- for tens of thousands of public employees.[37] These immunity doctrines can leave innocent victims wholly without remedy, even in cases where an official's conduct amounts to gross abuse of individual rights. The law protects public employees, from an officer of the law to the governor of a state, because of the public's interest in the unfettered performance of their official duties. And diplomats, members of their families and foreign heads of

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[37] *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985)(Attorney General enjoyed qualified immunity for authorizing warrantless wiretaps, notwithstanding that such wiretaps were subsequently held to be a violation of constitutional rights); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge held absolutely immune from damages notwithstanding that he ordered a mildly retarded teenager sterilized in an ex parte proceeding, without a hearing, without notice to the young woman, and without appointment of a guardian *ad litem*); *Imbler v Pachtman*, 424 U.S. 409 (1976) (prosecutor held absolutely immune from damages notwithstanding that plaintiff had successfully established in a federal habeas corpus petition that the prosecutor knowingly used false testimony at trial which led to plaintiff's murder conviction and death sentence); *Scheuer v Rhodes*, 416 U.S. 232 (1974) (qualified immunity for Governor alleged to have "intentionally, recklessly and wantonly" ordered National Guard troops to college campus, with orders that resulted in students' deaths).

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CLINTON PRESIDENTIAL LIBRARY 244

jurisdiction [over a President], 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." *Id.* at 753-54. This Court has also ruled that when action by another branch -- in this case the judiciary -- has "the potential for disruption" of Executive Branch functions, a court must determine whether "that impact is justified by an overriding need to promote objectives within the constitutional authority" of the Judicial branch. *Nixon v. GSA*, 433 U.S. ____, 443 (19__). Without dispute, providing a forum for the redress of civil rights and common law torts is an appropriate and important objective within the constitutional authority of the federal judiciary. The issue here, though, is whether there is an "overriding need" to promote this objective at this time, if doing so has "the potential to disrupt" the President's ability to perform his constitutional functions. The key is "to resolve those competing interests in a manner that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. at 707. Temporarily deferring this litigation does just that.

Under the separation of powers principles elaborated in *Fitzgerald*, *United States v. Nixon*, and *Nixon v. GSA*, there is no justification for requiring this litigation to proceed while the President is in office: First, this suit involves the President both directly and personally. He is not a peripheral figure or one among many co-defendants; as the district court found, he is the "central figure in the action." Pet. App. 71. Moreover,

as well as to rebut the notion that employees and [illegible] can take care of this.

It seems to me we could use some of this earlier, to strengthen the argument about [illegible] lawsuits

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given the nature of the allegations, this is the kind of litigation that he must attend to personally. It alleges events in which only he and the respondent were involved, and directly attacks his reputation and integrity. It is not the kind of litigation that can be handled by, for example, the President's accountants or business associates. As discussed above, litigation of this nature is especially likely to be disruptive, because it requires the President's personal time and attention.

Second, this suit concerns alleged pre-Presidential conduct, rather than unofficial conduct that the President engaged in while in office. In a case of this kind, the plaintiff's interest in suing the incumbent President will often be less, because the plaintiff generally will have had an opportunity to sue before the President was elected, and indeed, had the opportunity to do so here. Yet the respondent chose not to file this action until 16 months after the President took office.

Third, and related, this is a case in which the plaintiff's delay in bringing suit after the President was elected is not readily understandable. Respondent claims that deferring the suit will prejudice her interests; but respondent is, in this respect, the author of her own predicament. This is not a case involving, for example, a latent harm that only become known long after the fact; the facts alleged in the complaint were known to respondent at once, and the claims accrued well before the President took office. Yet respondent waited three years to act, filing barely within the limitations period for civil rights

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244
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ence with the functioning of the Executive Branch is even further diminished.

CLINTON PRESIDENTIAL LIBRARY 244

Respondent's interest in vindicating her rights, and the judiciary's interest in providing a forum for vindicating those rights, are, of course, significant. But they are not ~~significantly~~ greatly impaired by deferring this litigation. When the burden on the Presidency is compared with the very minimal impairment of these interests, it becomes clear that this litigation should be deferred in its entirety until the President leaves office.

B. At A Minimum, The District Court's Decision To Stay Trial Should Have Been Sustained.

1. The Court Of Appeals Lacked Jurisdiction To Review The Respondent's Request To Overturn The District Court's Decision To Stay Trial.

Respondent cross-appealed below to challenge the district court's order to stay trial. A district court's decision to stay proceedings, however, is ordinarily 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). While such orders may in some circumstances be reviewed on an interlocutory basis by way of writ of mandamus (*see* 28 U.S.C. § 651), respondent never sought such a writ.[41]

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[41] 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. Hufstedler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, the respondent did not assert this ground as a basis for jurisdiction, perhaps in recognition that it clearly is not (continued...)

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The panel majority reasoned that *Swint* did not apply because respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4.[43] Even if the court of appeals properly interpreted *Swint*, however, the respondent's cross-appeal was not "inextricably intertwined" with the President's appeal. That these two appeals raise issues that are distinct is evident from the distinct nature of the inquiries they generate. The issue of whether the President can defer litigation raises a question of law; while the issue of whether a district court can stay litigation is a discretionary determination determined by the facts of a particular case. While a district court's legal decisions are entitled to no special respect,

Too cryptic by half. Explain better what the issues are and how they are different.

[42](...continued) 1995); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Garraghty* v. *Virginia*, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

[43] The panel majority apparently was referring to the following dicta from *Swint*:

> The parties do not contend that the District Court's decision to deny the . . . summary judgment was inextricably intertwined with that court's decision to deny the . . . qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter.

115 S. Ct. at 1212 (emphasis added). However, the *Swint* Court nowhere indicated that this language was to serve as a new standard for pendent appellate jurisdiction, and disclaimed that it was definitively recognizing such an exemption. *Id.*

CLINTON PRESIDENTIAL LIBRARY 244

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244

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Suggest that we restate this. It may be mistaken ~~accept~~ as offering an affront ~~[illegible]~~ ~~[illegible]~~

[42](...continued)
1995); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Garraghty v. Virginia*, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 704 (1996).

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001. draft	Kathy Wallman to Ellen; RE: Clinton vs. Jones (10 pages)	08/04/1996	P5	245
002. letter	Robert Bennett to Elena Kagan; RE: Draft Brief, Clinton v. Jones (~~0~~2 pages)	08/04/1996	P5	246
003. letter	Elena to Amy; RE: Clinton vs. Jones (2 pages)	n.d	P5	247
004. draft	Clinton vs. Jones; RE: Brief for the Petitioner (25 pages)	08/04/1996	P5	248

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- 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]

To Elena

From Kathy Wallman - more coming. [001]

this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

CLINTON PRESIDENTIAL LIBRARY
245

That the President "occupies a unique position in the constitutional scheme" (*Fitzgerald*, 457 U.S. at 749) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power.[4] The President alone is director of all the executive departments and Commander-in-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. Const. Art. II, § 2. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See generally* THE FEDERALIST Nos. 70-77 (Alexander Hamilton). What do we say to argument that POTUS doesn't really execute these duties alone? He has lots of people to delegate to. Don't we

[4] PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) ("The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government.").

need to acknowledge he has these resources at his disposal but core of duties cannot be delegated? (He can take a vacation, can't he?)

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The extraordinary character of the Presidency in this respect is woven into the very fabric of the Constitution. The Constitution envisions that Congress will be in session for a period of time and then adjourn. U.S. CONST., ART. I, §§ 4, 5, 7. The President, however, is always "in session;" the President never adjourns.[5] The Constitution further provides specific steps to replace the President in the event of his disability. U.S. Const. Amend. XXV, §§ 3-4. These provisions, made for no other federal officer, further confirm that the Presidency is inseparable from the individual who is President.

The unadorned words of the Constitution, moreover, cannot convey the momentous and unrelenting burdens of the Presidency. "[T]he President, for all practical purposes . . . affords the only means through which we can act as a nation."[6]

> The range of the President's functions is enormous. He is ceremonial head of the state. He is a vital source of legislative suggestion. He is the final source of all executive decision. He is the authoritative exponent of the nation's foreign policy.[7]

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5 *See* Akhil R. Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon And Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995)("Unlike federal lawmakers and judges, the President is at 'session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps.").

6 George E. Reedy, *Discovering the Presidency*, N.Y. Times, Jan. 20, 1985 (*quoted in* LOU CANNON, PRESIDENT REAGAN -- THE ROLE OF A LIFETIME, 147 (1991)).

7 Harold J. Laski, The American Presidency, an Interpretation, p. 26 (Harper & Bros. 1940)(quoted in Cannon, *supra* n. __, at 147).

CLINTON PRESIDENTIAL LIBRARY 245

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245

Although he has many advisors, the President cannot delegate ultimate decision making authority and accountability for matters of war and peace, international relations, domestic terrorism, the economy, and other profoundly important questions of national policy, which affect millions of people in this country and around the world. The President's obligations to the office never cease. Serious crises can and often do erupt unexpectedly, commanding the President's immediate attention.[8]

> To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the energies of a single man unsurpassed by the exigencies of any other political office in the world.[9]

2. **To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With Historic Understanding.**

Courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753, & n.34. Accordingly, throughout our nation's history, courts

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8 This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of a KAL Flight 007 while on vacation. Cannon, *supra* n. __ at 191, 399, 420. President Carter spent one of his vacations reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. Jimmy Carter, Keeping Faith -- Memoirs Of A President, p. 57 (Bantam Books 1982) (hereinafter "Carter"). **[OTHER EXAMPLES TO COME]**

9 Laski, *supra* n. __, p. 26.

Does it look funny not to have any Clinton examples?

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and none was actively litigated while the defendant served as President.[16]

In *Fitzgerald*, the Court explained that historically, the President has been subjected to a court's jurisdiction only when

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[16] In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. [Cite] An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, (179 N.Y. at 544), nine months before he assumed the Presidency. [Cite] The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. 179 N.Y. at 544.

In *DeVault v. Truman*, 194 S.W.2d 29 (1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944 (*id.* at 31); and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. [Cite]. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. 194 S.W.2d at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable for injuries incurred while riding in a car that had been rented to his campaign. 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) (C.A. App. 128, 135) (hereinafter "*Bailey*"). ~~After he was inaugurated, President Kennedy argued that he was entitled to a stay as Commander in Chief of the Armed Forces, pursuant to the Soldiers' and Sailors' Civil Relief Act (discussed *infra*, at Part __). A Los Angeles Superior Court judge denied this motion without written opinion.~~ *See Bailey*, Motion to Vacate Pre-Trial Date and Stay Further Proceedings (July 5, 1962) (C.A. App. 145) and Notice of Denial of same (July 31, 1962) (C.A. App. 153). The court did not permit the plaintiffs to take the President's deposition, requiring only that he respond to written interrogatories. *Bailey*, Order denying motion for deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. *See infra*, pp. ___.

Why is it helpful to elaborate on an instance where this was invoked + rejected?

Why not just say this

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245

Respondent and the panel majority suggest that there are procedural devices available to protect incumbent Presidents against lawsuits filed for purposes of harassment, publicity or partisanship. See Pet. App. 15; Resp. C.A. Br. xx. But those devices are, of course, far from foolproof, and for a variety of reasons are likely to be ineffective in protecting the President.

The strongest deterrent of unfounded lawsuits is typically financial: usually an individual will not incur the expense of suit if there is no prospect of prevailing, or will not risk sanctions under Fed. R. Civ. P. 11 if the suit is found to be frivolous. But financial restraints are insufficient to deter such claims when -- as many prominent business, entertainment and public figures have learned to their dismay -- plaintiffs can attain instant celebrity status or political impact simply by including allegations in a complaint filed in court, and when the notoriety that accompanies such a lawsuit is lucrative in and of itself, in the form of book or movie contracts, for both client and lawyer. Likewise, a frivolous but embarrassing claim may be filed because the target is perceived -- as a President surely would be -- as vulnerable to quick settlement. As Chief Justice Burger observed, suits against Presidents can be "used as mechanisms for extortion." *Fitzgerald*, 457 U.S. at 763 (Burger, C.J., concurring). And an individual whose objective is to divert the President's energy and resources, or to uncover information through the discovery process, or to embarrass the President by

The Pres. dent already gets an incredible volume of lawsuits filed against him, virtually all of them frivolous, that we pass on to DoJ. Would it be useful to know something about that volume?

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deposition.[27] Thus even obtaining third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need -- or where the constitutional right to compulsory process is at stake -- and then only in a way that protects the Presidency from disruption. The difficulties involved in arranging for the President to testify as a third-party witness would be increased exponentially if the President were a defendant in a civil damages action, which has the potential to interfere severely, over an extended period, with any individual's ability to function in a highly demanding job.[28]

These criminal cases do not stand for the proposition that a sitting President could be called as a witness, much less a defendant, in a civil proceeding. Criminal prosecutions, moreover, must be approved by a public official and must be premised on probable cause. In the federal system and in many states, a

→ Wouldn't it be more than this by the time it comes to trial?

[27] *See United States v. Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark., Mar. 20, 1996) (videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parties would be shown at trial); *Poindexter*, 732 F. Supp., at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

[28] Private civil damages actions against the President would also be significantly more burdensome than cases where he is sued in his official capacity. *See supra*, n. __. Those cases do not involve the President's personal conduct, and often turn on questions of law that are disposed of without discovery or trial. To the extent a factual record is developed, this is accomplished by the President's delegates without his participation.

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The panel majority suggested that throughout the litigation, 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. Under this approach, the trial judge would have to review the President's explanation to decide if it was adequate. If the trial court decided that the President should devote more time to the private litigation than official duties, the question would arise whether it could enforce that decision by threatening the President with contempt of court or sanctions. *See* Fed. R. Civ. P. 16(f). 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.

This state of affairs is an extraordinary affront to the separation of powers. A trial judge -- state or federal -- would be examining the official priorities of the individual in whom the whole of "the executive Power" is vested. And the judge would be not merely reviewing the President's priorities, but be conceivably could order the President to rearrange them.

The nature of the President's responsibilities makes it especially inappropriate to allow an entity outside the Executive to insist on an answer to the kinds of questions that the trial judge inevitably would have to ask under this regime. The most obvious examples would be if the President sought a change in the litigation schedule to attend to a national security matter, a

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sensitive diplomatic issue, or a matter on which he had received information from confidential intelligence or law enforcement sources. The trial court would immediately be enmeshed in the intractable problem of how to proceed when the basis for the President's request cannot be disclosed to anyone, perhaps even to the court.

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245

Moreover, even seemingly minor changes in the President's schedule are imbued with significant portent by observers -- foreign and domestic -- such as when the President hastily schedules an unexpected meeting with his national security adviser, or with an ambassador, or even when the President must cancel a few hours' worth of appointments for unexplained reasons. Indeed, it is not uncommon for a President to seek to maintain a pretense of "business as usual" to mask an impending crisis. In such circumstances, simply having to ask a court for a change in the litigation schedule obviously would be highly damaging.[29]

not that easy for outside observers to learn this.

---

29 Presidents Carter and Reagan provide dramatic examples: during the 1980 mission to rescue the hostages in Iran, President Carter "wanted to spend every moment monitoring the progress of the rescue mission, but had to stick to [his] regular schedule and act as if nothing of the kind was going on." Carter, *supra* n.__, at 514. Similarly, when the invasion of Grenada was being planned, President Reagan was week-ending at a Georgia golf club. He wanted to hurry back to Washington, but his advisors told him "that a change in [his] schedule might draw attention to the possibility of U.S. intervention." He decided therefore to remain in Georgia, but participated in meetings by ~~way of~~ telephone. Cannon, *supra*, n. __ at 441-42. If either President had been in a position where he was required to ask a court to change his schedule -- even if no explanation whatsoever were required -- it could have posed a threat to the military operations.

l.c.

Reagan isn't "providing" this example. Change first sentence

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ruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office. The institutional interest in the orderly resolution of the bankruptcy estate justifies the imposition on the plaintiff. Surely the interest in the orderly conduct of the Presidency is at least as strong, if not stronger.

This needs to come out. If we need to discuss this, Harold + Leon will need to be consulted and will have to see this.

- ~~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. This is 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 (1988). This is straightforwardly analogous to the relief that President Clinton seeks here.[35]~~

[35] ~~Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988). The President here does not claim to be on active military status. Nor does he claim protection under this act, or any other legislation. Rather, the relief sought~~
(continued...)

I understand that this reference is intended to disclaim reliance, but the brief will be understood, nevertheless, to "use" the argument.

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- Courts also may defer civil litigation until the conclusion of a related criminal prosecution against the same defendant, if doing so is in the interests of justice or the public's interest in criminal law enforcement.[36] That process may, of course, take several years. During that time, the civil plaintiff -- who may have been injured by a party who engaged in criminal conduct -- is afforded no relief.

- The doctrine of primary jurisdiction, where it applies, also 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). This doctrine ensures that a regulatory agency will be able to pursue its institutional agenda in an orderly fashion. **[CITE; DS to provide]** The institutional interests of the Presidency are, again, surely as strong and

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[35] (...continued)
here emanates from the nature of the President's constitutional duties and principles of separation of power.

[36] *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. 1978); *Texaco Co. v. Borda*, 383 F.2d 607 (3d Cir. 1967).

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August 4, 1996

VIA FACSIMILE

Kathy ~~Wallman~~, Esq.
Elena Kagan, Esq.
Office of White House Counsel
1600 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Draft Brief, Clinton v. Jones

Ladies:

Attached please find a draft of the brief for the Supreme Court in the Jones matter. Per your discussion earlier today with Amy Sabrin, we are providing this draft on the following conditions:

- This draft will not be shown to anyone other than the President and lawyers in the White House Counsel's office, without advance notice to me.
- Copies of this draft will not be provided to members of Congress or their staff, even if requested by them. In the event you receive a subpoena, you will promptly notify us, so that we may take appropriate legal action, if necessary.
- Neither this draft, nor any portions thereof, or summaries of statements contained in it, will be disclosed to members of the press before it is filed with the Court.

Please note that cite checking is still underway on this draft. I would appreciate it if you would provide any comments or suggested edits that you have to Amy Sabrin by the close of business Monday.

Sincerely,

Bob

Robert S. Bennett

As I told Amy, we embrace and understand these concerns and will accommodate them. We need flexibility for exigent circumstances, and Amy agreed that this was reasonable. I think Jack would be troubled that there are "conditions", as such, attached to his review.

Sure, but not the final round, see next page.

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246

No. 95-1853

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON
Petitioner,

vs.

PAULA JONES,
Respondent.

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

BRIEF FOR PETITIONER

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President William Jefferson Clinton

Amy/
You asked for comments by COB Monday. We will give you what we can. Our comments will not be final. Jack gets back Tuesday morning. I think you already knew that, so I assume you already understood that our Monday comments would not be final.

~~conversations we discussed~~

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Draft August 4, 1996 - 6:07 pm

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[003]

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Amy —

One general note:

The first argument — that entertaining these suits is a problem because the President is a busy guy — is of course necessary and right. But it's also — unavoidably, I think — a bit obvious; there's only so much to be said about it, and everything that can be said, the Court probably has already thought of.

Because of this, I would try to set up the brief a bit differently, perhaps in the Summary of Argument. We should try to communicate to the Court that there's obviously a problem involved in subjecting the

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President to suit and the real choice to be made here is in choice of remedy: Do we go with case management or with deferral?

I am not suggesting any large-scale structural changes here — just some well-placed language that will focus the Court ~~of~~ on the "choice of remedy" aspect of its decision.

Elena

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248

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248

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 rehearing *en banc*. Three judges did not participate, and Judge McMillian dissented. Judge McMillian stated that the panel majority's holding "demean[ed] the Office of ? the President." Pet. App. 32. He further stated that the holding "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.

SUMMARY OF ARGUMENT

The President, uniquely among federal officials, has the sole responsibility for an entire branch of the federal government. For that reason, litigation against the individual who is serving as President unavoidably impinges on the constitutional responsibilities of the Executive branch. The Framers explicitly recognized this point, as has this Court, on many occasions.

A personal damages action is a particularly burdensome and disruptive form of litigation. As a practical matter, no President can be disengaged from a lawsuit that seeks to impugn his reputation and threatens him with enormous financial liability. Even if a President ultimately prevails, protracted personal damages litigation can make it impossible for an individual to devote his undivided energies to any demanding job, much less to one of the most demanding jobs in the world. Judge Learned Hand

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once commented that as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness or death." In this respect the President is like any other litigant, except that the President's lawsuits, like the President's sickness, becomes the nation's problem.

There is also no reason to believe that, if it is established that private damages actions against sitting Presidents may go forward, such suits would be rare. To the contrary, parties seeking publicity, partisan advantage or a quick settlement will not forbear from using such litigation as a means of advancing their objectives. The usual means of discouraging or disposing of unfounded civil complaints are especially ineffective ~~with respect to~~ ~~as deterring~~ ~~these kinds of suits, which are~~ in these cases. ~~disproportionately likely to be filed against the President.~~

Even the panel majority did not dispute the basic point that personal damages litigation against an incumbent President threatens the functioning of the Executive Branch. But the panel rejected deferral of the litigation as a remedy, and instead concluded that "case management" by the trial court could adequately protect the President's interests. "Case management," however, only exacerbates the separation of powers problems, by entangling the executive and judicial branches in an ongoing and mutually damaging relationship.

In concrete terms, trial court "case management" means that whenever a President believes that his responsibilities require a change in the schedule of the litigation against him, he will

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248

have to seek the approval of the trial judge, state or federal. That judge will be authorized to insist on an explanation of the President's reasons for seeking a schedule change, a problematic state of affairs in itself. The trial judge will then review the President's explanation and decide whether to accept it, or whether the President should instead rearrange his priorities to devote more time and attention to the litigation.

The President's priorities, however, are inseparable from the priorities of the Executive branch of the federal government. Judges should not be in the position of reviewing those priorities. If they are, the effect will be to enmesh the President and the judiciary, ~~in~~ a series of controversies over highly sensitive and, in an important sense, deeply political issues about the President's official priorities, to the great detriment of both branches.

Moreover, state courts are likely to become the natural venue for private civil damages actions against an incumbent President, because such suits often will not involve federal claims. The Framers were well aware of the potential for conflict between the states and the federal government, particularly the Executive branch of the federal government. They could not possibly have contemplated that state trial judges would have the power to control a President that is inherent in "case management" -- much less that they would have the power to compel an incumbent President to stand trial in a state court. This

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further demonstrates that deferral, not "case management," is more consistent with our constitutional scheme.

The temporary deferral that the President seeks here ~~is~~ not, contrary to the court of appeals, an extraordinary remedy, and it does not place the President "above the law." In a variety of circumstances -- ranging from the automatic stay in bankruptcy to the doctrine of primary jurisdiction to the suspension of civil actions while criminal proceedings are pending -- litigation is delayed in our system in order to protect significant public or institutional interests. The interest in protecting the Presidency from disruption is at least as strong as the interests underlying these well-established doctrines.

Deferral also does not place unreasonable burdens on respondent. In many cases -- for example, where absolute, qualified, or diplomatic immunities apply -- settled doctrines deny recovery outright to innocent individuals who may have been grievously injured. While we do not deny the costs of delay to plaintiffs, it remains true that deferral of this litigation does not preclude respondent from ultimately seeking a remedy and, if warranted, recovering on the merits. Finally, deferral of course does not mean that the President is unaccountable for wrongdoing or is "above the law." Deferral leaves him no less accountable, not only in court but in other important forums, such as public opinion. Only the timing of the litigation is affected.

~~In any event, under separation of powers principles established by this Court's decisions,~~ Respondent's suit, in particu-

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under separation of powers principles established by this Court's decisions.

lar, should be deferred. The suit is based on conduct that occurred before the President took office, and therefore, presents no risk of abuse of Presidential power. Respondent seeks only damages, and therefore can be made whole even if the proceedings are delayed. The suit involves the President personally and directly, not peripherally, so it is especially likely to impinge on his ability to perform his official duties. And respondent could have sought relief long before the President assumed office, but chose not to do so.

At a minimum, the court of appeals erred in overturning the district court's order staying the trial. The court of appeals lacked jurisdiction to review that order. On the merits, it erred by failing to conduct the kind of specific inquiry into the facts of this case that is a prerequisite of overturning a discretionary judgment by a trial court.

ARGUMENT

I. PRIVATE CIVIL DAMAGES LITIGATION AGAINST AN INCUMBENT PRESIDENT MUST, IN ALL BUT THE MOST EXCEPTIONAL CASES, BE DEFERRED UNTIL THE PRESIDENT LEAVES OFFICE.

A. A Personal Damages Action Against An Incumbent President Would Seriously Interfere With The Discharge Of A President's Article II Responsibilities And Jeopardize The Separation Of Powers.

1. The President, Unlike Any Other Official, Bears Sole Responsibility For An Entire Branch Of Government.

Under our system of government, the Executive Branch is the sole responsibility of the individual who has been elected President, and anything that significantly affects that individual will affect the functioning of the Executive Branch as well. For

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248

this reason, even a private lawsuit against the President impinges on the Presidency and the operations of the Executive.

That the President "occupies a unique position in the constitutional scheme" (*Fitzgerald*, 457 U.S. at 749) has been a central and all but undisputed axiom of our constitutional system since the Founding. It is borne out by the statements of the Framers, the decisions of this Court, and of course the text and structure of the Constitution itself.

Article II, § 1, vests the entire "executive Power" in "a President," who is indispensable to the execution of that power.[4] The President alone is director of all the executive departments, including those responsible for foreign policy, and Commander-in-Chief of the armed forces. The Constitution places on him the responsibility to take care that the laws are faithfully executed. U.S. Const. Art. II, § 2. The Framers recognized that their decision to vest the executive power in a single individual, instead of in a group or council, was a crucial aspect of the constitutional plan, and in the Federalist papers they devoted as much attention to that decision as they did to any single provision of the Constitution. *See generally* THE FEDERALIST Nos. 70-77 (Alexander Hamilton).

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[4] PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 135 (1978) ("The President is . . . the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any . . . branch of government.").

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248

Although he has many advisors, the President cannot delegate ultimate decision making authority and accountability for matters of war and peace, international relations, domestic terrorism, the economy, and other profoundly important questions of national policy, which affect millions of people in this country and around the world. The President's obligations to the office never cease. Serious crises can and often do erupt unexpectedly, commanding the President's immediate attention.[8]

> To combine all [this] with the continuous need to be at once the representative man of the nation and the leader of his political party is clearly a call upon the energies of a single man unsurpassed by the exigencies of any other political office in the world.[9]

2. To Subject An Incumbent President To Civil Litigation In His Personal Capacity Would Be Inconsistent With Historic Understanding.

Courts "traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753, & n.34. Accordingly, throughout our nation's history, courts

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[8] This has been true of every modern Presidency. To give just a few examples, President Reagan was aroused from sleep to deal with the Libyan downing of two American Navy fighter planes; approved U.S. participation in a multinational peacekeeping force in Lebanon while at his ranch in Santa Barbara; and attended to the crisis occasioned by the Soviet downing of a KAL Flight 007 while on vacation. Cannon, *supra* n. __ at 191, 399, 420. President Carter spent one of his vacations reading psychological profiles of Anwar el-Sadat and Menachem Begin in preparation for the Camp David Summit. Jimmy Carter, Keeping Faith -- Memoirs Of A President, p. 57 (Bantam Books 1982)(hereinafter "Carter"). **[OTHER EXAMPLES TO COME]**

Unless they're a lot better, I'd take this FN out. I'm not sure the need to work on vacation — or the occasional occurrence of sudden crisis — is a strong argument for the need to defer litigation.

[9] Laski, *supra* n. __, p. 26.

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and none was actively litigated while the defendant served as President.[16]

In *Fitzgerald*, the Court explained that historically, the President has been subjected to a court's jurisdiction only when

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[16] In *New York ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Board, a position he held in 1895. [Cite] An intermediate court of appeals affirmed dismissal of the complaint on January 25, 1901, (179 N.Y. at 544), nine months before he assumed the Presidency. [Cite] The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. 179 N.Y. at 544.

In *DeVault v. Truman*, 194 S.W.2d 29 (1946), the plaintiff alleged that in 1931 Harry Truman and other judges in Jackson County, Missouri, improperly committed him to a mental institution. The action was initiated in November 1944 (*id.* at 31), and the trial court granted the defendants' motion to dismiss. Mr. Truman became President in April 1945. [Cite]. One year later, the Supreme Court of Missouri affirmed the order dismissing the complaint. 194 S.W.2d at 32.

A suit was filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. Certain delegates to the 1960 Democratic convention sought to hold him liable for injuries incurred while riding in a car that had been rented to his campaign. 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) (C.A. App. 128, 135) (hereinafter "*Bailey*"). After he was inaugurated, President Kennedy argued that he was entitled to a stay as Commander in Chief of the Armed Forces, pursuant to the Soldiers' and Sailors' Civil Relief Act (discussed *infra*, at Part __). A Los Angeles Superior Court judge denied this motion without written opinion. *See Bailey*, Motion to Vacate Pre-Trial Date and Stay Further Proceedings (July 5, 1962) (C.A. App. 145) and Notice of Denial of same (July 31, 1962) (C.A. App. 153). The court did not permit the plaintiffs to take the President's deposition, requiring only that he respond to written interrogatories. *Bailey*, Order denying motion for deposition (Aug. 27, 1962) (C.A. App. 155). The case was settled before further discovery against the President. *See infra*, pp. ___.

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248

The traditional practice has been fully consistent with this historical understanding. While "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President," *id.*, 457 U.S. at 753, it generally was assumed that one could not hale an incumbent President into court and seek damages from him personally. *See id.*, 457 U.S. at 758 & n.1 (Burger, C.J., concurring). In fact, so far as can be determined, no President has ever been required to give evidence in a civil proceeding -- let alone appear as a defendant -- and no President [has ever been compelled to give testimony at trial] or appear personally in court in any case, civil or criminal. President Jefferson was sued for official actions he took while he was President, but notably, not until after he left office.[15] Three other Presidents had civil damages litigation pending against them during their tenure in office, but in each case, suit was filed before they took office; two were effectively disposed of before the President was sworn in;

I'm not sure I get this. Hasn't Pres Clinton been compelled to do so twice? Do you mean only personal appearances? If so, this is not clear.

[14] (...continued)
ratifying conventions. The Court noted that "historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth." 457 U.S. at 752 n.31.

[15] *Livingston v. Jefferson*, 15 F.Cas. 660, ___ (C.C.D. Va. 1811) (No. 8,411) (suit for trespass, based on federal seizure of land, dismissed for want of venue).

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when a President is subject to the courts' jurisdiction

Until the unprecedented decision by the court of appeals in this case, ~~however~~ private civil damages litigation has never been thought to warrant an exception to the Framers' general understanding. To the contrary, such litigation does not serve the broad-based, compelling public or constitutional interests enumerated in *Fitzgerald*, 457 U.S. at 754, and is an abrupt break with well-established tradition.

3. Civil Damages Litigation Against A Sitting President Would Seriously Impair The President's Ability To Fulfill His Constitutional Functions.

In *Nixon v. Fitzgerald*, this Court held that the President enjoys absolute immunity from damages liability for acts within the "outer perimeter" of his official duties. 457 U.S. at 756. The logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here -- the temporary deferral of private civil litigation.

Fitzgerald relied upon three significant grounds. First, the Court was concerned that to subject a President to liability for official conduct would inhibit him in carrying out his duties fearlessly and impartially, and would inject courts improperly into Presidential decision making. *Fitzgerald*, 457 U.S. at 752 & n.32. Second, the Court stated, "[b]ecause of the singular importance of the President's duties," the "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. And third, the Court was concerned that the "sheer prominence of the President's office" would make him "an easily identifiable

CLINTON PRESIDENTIAL LIBRARY 248

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target for suits for civil damages." 457 U.S. at 752-53 (footnote omitted).

This case is different from *Fitzgerald*, of course, in that it largely does not touch upon official actions. Accordingly, it does not warrant, and the President does not seek, any immunity from liability. But because this case involves a sitting President, it directly implicates the other two concerns that prompted the decision in *Fitzgerald*: the President's vulnerability to civil damages actions, and the diversion of the President's time and attention to attend to such litigation. These concerns are present equally whether the lawsuit is based on private conduct or official conduct. Defending such a suit is not any less of an imposition on the President's ability to attend to his constitutional responsibilities, or any less of a "risk[] to the effective functioning of government." *Id.* at 751. Protection for the Presidency therefore is still required, albeit the much more limited protection of holding litigation in abeyance until the President leaves office.

The burdens of being a party to civil litigation are widely acknowledged and require little elaboration. Judge Learned Hand once commented that as a potential litigant, he would "dread a lawsuit beyond anything else short of sickness and death."[18] In this regard, the President is like any other litigant, except

OK to say again as if we've never said before?

[18] 3 *Lectures on Legal Topics*, Assn. of the Bar of the City of New York 105(1926)(*quoted in Fitzgerald*, 457 U.S. at 763 n.6(Burger, C.J., concurring).

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CLINTON PRESIDENTIAL LIBRARY

248

that a President's litigation, like a President's illness, becomes the nation's problem.

This sentence is much weaker than the rest of the ¶. I don't think many would view "anxiety" as a particularly strong governmental interest.

?

A protracted lawsuit does more than "tie[] up the defendant's time"; it "prolongs the uncertainty and anxiety that are often the principal costs of being sued." *Ball v. City of Chicago*, 2 F.3d 752, 759 (7th Cir. 1993). The discovery phase alone of civil damages litigation would be an enormous imposition on a President's time and attention. "No one disputes any longer that today the process requires lawyers to try their cases twice: once during discovery and, if they manage to survive that ordeal, once again at trial."[19] Discovery, "used as a weapon to burden, discourage or exhaust the opponent," makes even a relatively minor case a costly and lengthy ordeal.[20] As this Court has recognized, "pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984) (footnote omitted).

The instant case clearly illustrates these points. Respondent's counsel have revealed their intention to pursue discovery aggressively, stating that, "all is on the table in []

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[19] Griffin B. Bell, Chilton D. Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 Ga. L. Rev. 1, 8 (1992).

[20] Hon. William W. Schwarzer, *Slaying The Monsters Of Cost And Delay: Would Disclosure Be More Effective Than Discovery?*, 74 Judicature 178, 179 (Dec./Jan. 1991).

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CLINTON PRESIDENTIAL LIBRARY
248

a few occasions with his trial counsel, the President can essentially ignore the litigation. Pet. App. __. It was even suggested that the President could forego attending his own trial. Pet. App. __ (Beam, J., concurring). It should go without saying that when the President is a defendant he is entitled to -- and, as a practical matter, will simply have to -- devote considerable time and attention to his defense.

This would be true whether the litigation involved allegations regarding personal misconduct, as here, or a disputed commercial transaction. Any case relating to events in which the President personally was involved would require the President's participation at almost every stage. In order to adequately protect his interests, the President, like any responsible litigant, would be required to review the complaint and answer; prepare and assure the veracity of discovery responses; ~~retrieve and~~ review documents; assist counsel to prepare for other witnesses' depositions; review those depositions and other evidence in the case; review the opposition's pleadings and motions; and consult with counsel throughout the case. He also would have the right and the obligation to review and approve all pleadings and motions filed on his behalf. Beyond that, the President would have to prepare for and participate in his own deposition, and finally, attend trial -- perhaps for weeks or months, far from Washington -- as is, of course, his right.

Has the President in fact done all this? If not, we can't make this claim so starkly.

The panel majority's antiseptic notion that the President can remain aloof from a personal damages action against him

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248

simply does not conform with reality. In truth, the litigation would command a significant part of the President's time, while the urgent business of the nation competed for his attention. The President would be put to an impossible choice between attending to his official duties or protecting his personal interests in the litigation -- a choice that is unfair both to the President and to the nation he serves.

Even one lawsuit would have the potential seriously to disrupt the President's conduct of his official duties, just as one lawsuit could disrupt the professional and personal life of any individual. But if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events. Presidents likely would become "easily identifiable targets" for private civil damages actions in the future. *Fitzgerald*, 457 U.S. at 752-53. Those seeking publicity, financial gain or partisan political advantage would be altogether too willing to use the judicial system as an instrument to advance their private agendas, at the expense of the public's interest in unimpeded constitutional governance.

In particular, ~~Civil damages litigation against the President also has the potential to corrode the political process,~~ Any President ~~is~~ would become ~~particularly~~ vulnerable to politically motivated "strike suits" financed or stimulated by partisan opponents of whatever stripe, hoping to undermine a President's pursuit of his policy objectives or to attack his integrity, and thereby diminish his effec-

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tiveness as a leader. Partisan opponents would also be tempted to file suit in order to take advantage of modern discovery techniques, unknown throughout most of our history, to uncover personal and financial information about the President, his family and close associates.[22] Use of the judicial system in this manner of course would corrode the political process.

Even if a claimant has a legitimate grievance, litigation against an incumbent President can deflect the exercise of the popular will by appropriating the President's time and energy, which properly belongs not to the party who sued the President, but to the electorate. Therefore, "[w]e should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America."[23]

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[22] The suit against John F. Kennedy, *supra* n.__, illustrates how plaintiffs can use litigation for purposes of political mischief and potential extortion. The plaintiffs, convention delegates from Mississippi who believed President Kennedy's policies were inimical to their state, were injured while riding in a Kennedy campaign car. *Bailey*, Reply to Objections to Cross-Interrogatories at 4-5 (Sept. 28, 1962) (C.A. App. 156). They attempted to propound politically embarrass~~ingly~~ interrogatories to Robert F. Kennedy, who had been the President's campaign manager; sought to obtain information about Kennedy family finances; and used pleadings to promote views that the President was using his office to harass them and their state. *See Bailey*, Cross-Interrogatories to Robert F. Kennedy (Sept. 20, 1962) (C.A. App. 162); *Bailey*, Reply To Objections To Cross-Interrogatories at 3-4 (Sept. 28, 1962) (C.A. App. 156). As fatuous as the allegations were, President Kennedy settled the suit for $17,750, a significant sum in 1963. Two Suits Against Kennedy Settled, Los Angeles Herald Examiner, April 2, 1963 (C.A. App. 181). Not all Presidents will have access to personal wealth to dispose of vexatious litigation in the interest of an unimpeded Presidency.

[23] Amar & Katyal, *supra* ___ at 713.

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248

making sensational allegations, might willingly incur the costs of litigation even if there is no hope of success on the merits.

Nor does a motion to dismiss ~~or for summary judgment~~ promise swift or painless relief for the target of meritless litigation. A potential private claim could be drafted in such a way as to entangle a President in embarrassing or protracted litigation simply by alleging claims based on unwitnessed one-on-one encounters, or by otherwise raising credibility issues. These kinds of claims are exceedingly difficult to dispose of under the standards that govern pre-trial motions. And even where motions to dismiss are granted, it can take years -- and numerous, expensive additional motions -- to obtain final dismissal of the suit and sustain that dismissal on appeal.

As Chief Justice Burger recognized,

> [D]efending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . . . Ultimate vindication on the merits does not repair the damage.

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

4. Criminal Cases Where A President Has Been A Third-Party Witness Provide No Precedent For Requiring A Sitting President To Participate As A Defendant In Civil Damages Litigation.

The respondent and the panel majority below minimized the disruptive effect of civil litigation on the Presidency by comparing the full-scale defense of a personal damages action to the few occasions when a President has testified as a non-party witness in a criminal or legislative proceeding. *See* Pet. App. __; *id.* at 22-33 (Beam, J., concurring). This comparison is not

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This calls attention to the defendant/witness difference. But in the next paragraphs you focus on the criminal/civil difference. Shouldn't, then, this ¶ talk about both.

CLINTON PRESIDENTIAL LIBRARY

248

plausible. The isolated event of giving testimony in a proceeding to which one is not a party bears no resemblance to the burdens borne by a defendant in a civil action for damages. In fact, the lesson of cases involving Presidential testimony is more nearly the opposite of what respondent and the panel majority say: they show that requiring an incumbent President to submit as a defendant in a private damages action would go far beyond anything a court has done before.

As this Court has emphasized, the interests at stake in criminal cases are of an altogether different magnitude from the interests affected by private damages actions. *See e.g., Nixon v. Fitzgerald*, 457 U.S. at 754. Not only is the public interest in the accurate outcome of a criminal prosecution far greater (*see e.g, Berger* v. *United States*, 295 U.S. at 88), but the defendant has a constitutional right, under the Compulsory Process Clause of the Sixth Amendment, to obtain evidence in a criminal proceeding. *United States* v. *Burr*, 25 F.Cas. 30, 33 (C.C.D. Va. 1807)(No. 14,692d).[24]

Only once in our history, in *United States* v. *Nixon*, 418 U.S. 683 (1974), has the Supreme Court ever required a President to give evidence. That case, of course, involved physical evidence, not the President's own testimony. Even so, the Court could not have been clearer that the limitation on Presidential autonomy was warranted only because of the "primary constitution-

[24] This right, of course, has no constitutional counterpart in civil cases. [CITE]

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deposition.[27] Thus even obtaining third-party evidence from a President is a complex and delicate matter, to be done only in cases of great public need -- or where the constitutional right to compulsory process is at stake -- and then only in a way that protects the Presidency from disruption. The difficulties involved in arranging for the President to testify as a third-party witness would be increased exponentially if the President were a defendant in a civil damages action, which has the potential to interfere severely, over an extended period, with any individual's ability to function in a highly demanding job.[28]

These criminal cases do not stand for the proposition that a sitting President could be called as a witness, much less a defendant, in a civil proceeding. Criminal prosecutions, moreover, must be approved by a public official and must be premised on probable cause. In the federal system and in many states, a

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27 *See United States v. Nixon*, 418 U.S. at 711-15 (requiring in camera inspection of presumptively privileged presidential tapes to ensure that only relevant, admissible material was provided to grand jury); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark., Mar. 20, 1996)(videotaped deposition at the White House supervised by trial court via videoconferencing, after which only directly relevant parties would be shown at trial); *Poindexter*, 732 F. Supp., at 146-47 (videotaped deposition); *United States v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (videotaped deposition).

28 Private civil damages actions against the President ~~would~~ are likely also to be ~~significantly~~ more burdensome than cases where he is sued in his official capacity. *See supra*, n. __. The latter ~~These~~ cases ~~do not involve the President's personal conduct, and~~ often turn on questions of law that are disposed of without discovery or trial. To the extent a factual record is developed, this ~~is~~ can more often be accomplished by the President's delegates without his participation.

will more

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248

the nature of separated powers. Because the President embodies a branch of government, his priorities are the priorities of the Executive Branch. It follows that "case management," when the President is the defendant, necessarily means management of the business of the Executive branch -- both in setting priorities for the President's time and in the flow of information about the President's schedule.[31] I'm not sure what this means. Is it a reference back to the argument on p. 36? If so, make more clear.

"Case management" by trial judges not only threatens the independence of the Executive from the Judicial branch; it also inappropriately places judges in a position they should not have to occupy -- the political arena. In suits against the President, the trial judge will be operating in an atmosphere that is almost certain to be highly politically charged. Any significant decision that a judge makes will be scrutinized for signs of partisan bias for or against the President. Decisions that might be routine in any other case, such as a decision to postpone the defendant's deposition, for example, will if the President is the deponent become the subject of partisan speculation and comment.

Moreover, judges attempting to assess the sufficiency of a President's explanation inevitably will be asked to distinguish between a President's "political" activities, on the one hand,

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31 Although some measure of judicial involvement in these very delicate matters may be necessary in the very limited situations in which a President is called as a third-party witness in a criminal prosecution or to serve some other compelling, broad-based constitutional or public interest, no such overriding necessity exists when the President is sued in a routine civil action for damages.

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248

ruptcy, respondent would automatically find herself in the same position she will be in if the President prevails before this Court -- except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office. The institutional interest in the orderly resolution of the bankruptcy estate justifies the imposition on the plaintiff. Surely the interest in the orderly conduct of the Presidency is at least as strong, if not stronger.

See K. Wallman's comments.

- 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. This is 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 (1988). This is straightforwardly analogous to the relief that President Clinton seeks here.[35]

[35] Specifically, a lawsuit against an active-duty service member is to be stayed unless it can be shown that the defendant's "ability . . . to conduct his defense is not materially affected by reason of his military service." 50 U.S.C. app. § 521 (1988). The President here does not claim to be on active military status. Nor does he claim protection under this act, or any other legislation. Rather, the relief sought (continued...)

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jurisdiction [over a President], 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." *Id.* at 753-54. This Court has also ruled that when action by another branch -- in this case the judiciary -- has "the potential for disruption" of Executive Branch functions, a court must determine whether "that impact is justified by an overriding need to promote objectives within the constitutional authority" of the Judicial branch. *Nixon v. GSA*, 433 U.S. ____, 443 (19__). Without dispute, providing a forum for the redress of civil rights and common law torts is an appropriate and important objective within the constitutional authority of the federal judiciary. The issue here, though, is whether there is an "overriding need" to promote this objective at this time, if doing so has "the potential to disrupt" the President's ability to perform his constitutional functions. The key is "to resolve those competing interests in a manner that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. at 707. Temporarily deferring this litigation does just that.

Under the separation of powers principles elaborated in *Fitzgerald*, *United States v. Nixon*, and *Nixon v. GSA*, there is no justification for requiring this litigation to proceed while the President is in office: First, this suit involves the President both directly and personally. He is not a peripheral figure or one among many co-defendants; as the district court found, he is the "central figure in the action." Pet. App. 71. Moreover,

as well as to rebut the notion that employees and advisers can take care of this.

It seems to me we could use some of this earlier, to strengthen the argument about WJC [illegible] lawsuits [illegible]

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given the nature of the allegations, this is the kind of litigation that he must attend to personally. It alleges events in which only he and the respondent were involved, and directly attacks his reputation and integrity. It is not the kind of litigation that can be handled by, for example, the President's accountants or business associates. As discussed above, litigation of this nature is especially likely to be disruptive, because it requires the President's personal time and attention.

Second, this suit concerns alleged pre-Presidential conduct, rather than unofficial conduct that the President engaged in while in office. In a case of this kind, the plaintiff's interest in suing the incumbent President will often be less, because the plaintiff generally will have had an opportunity to sue before the President was elected, and indeed, had the opportunity to do so here. Yet the respondent chose not to file this action until 16 months after the President took office.

Third, and related, this is a case in which the plaintiff's delay in bringing suit after the President was elected is not readily understandable. Respondent claims that deferring the suit will prejudice her interests; but respondent is, in this respect, the author of her own predicament. This is not a case involving, for example, a latent harm that only become known long after the fact; the facts alleged in the complaint were known to respondent at once, and the claims accrued well before the President took office. Yet respondent waited three years to act, filing barely within the limitations period for civil rights

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ence with the functioning of the Executive Branch is even further diminished.

Respondent's interest in vindicating her rights, and the judiciary's interest in providing a forum for vindicating those rights, are, of course, significant. But they are not ~~signifi-cantly~~ greatly impaired by deferring this litigation. When the burden on the Presidency is compared with the very minimal impairment of these interests, it becomes clear that this litigation should be deferred in its entirety until the President leaves office.

B. At A Minimum, The District Court's Decision To Stay Trial Should Have Been Sustained.

1. The Court Of Appeals Lacked Jurisdiction To Review The Respondent's Request To Overturn The District Court's Decision To Stay Trial.

Respondent cross-appealed below to challenge the district court's order to stay trial. A district court's decision to stay proceedings, however, is ordinarily 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). While such orders may in some circumstances be reviewed on an interlocutory basis by way of writ of mandamus (*see* 28 U.S.C. § 651), respondent never sought such a writ.[41]

[41] 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. Hufstedler*, 703 F.2d 732, 735 (3d Cir. 1983). Even assuming that this exception should be allowed, the respondent did not assert this ground as a basis for jurisdiction, perhaps in recognition that it clearly is not (continued...)

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CLINTON PRESIDENTIAL LIBRARY
248

The panel majority reasoned that *Swint* did not apply because respondent's cross-appeal was "inextricably intertwined" with the President's appeal. Pet. App. 5 n.4.[43] Even if the court of appeals properly interpreted *Swint*, however, the respondent's cross-appeal was not "inextricably intertwined" with the President's appeal. That these two appeals raise issues that are distinct is evident from the distinct nature of the inquiries they generate. The issue of whether the President can defer litigation raises a question of law; while the issue of whether a district court can stay litigation is a discretionary determination determined by the facts of a particular case. While a district court's legal decisions are entitled to no special respect,

Too cryptic by half. Explain better what the issues are and how they are different.

[42](...continued) 1995); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Garraghty v. Virginia*, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

[43] The panel majority apparently was referring to the following dicta from *Swint*:

> The parties do not contend that the District Court's decision to deny the . . . summary judgment was inextricably intertwined with that court's decision to deny the . . . qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter.

115 S. Ct. at 1212 (emphasis added). However, the *Swint* Court nowhere indicated that this language was to serve as a new standard for pendent appellate jurisdiction, and disclaimed that it was definitively recognizing such an exemption. *Id.*

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