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

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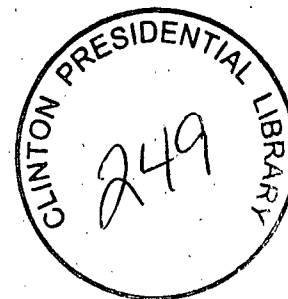
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- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information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

[001]



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

REPLY BRIEF FOR THE PETITIONER

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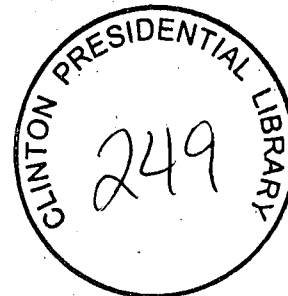
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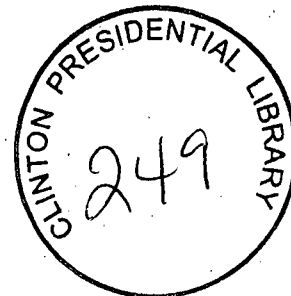
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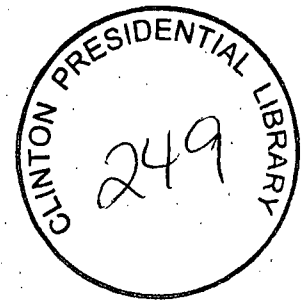


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WILLIAM JEFFERSON CLINTON,

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REPLY BRIEF FOR THE PETITIONER

The active litigation of a personal damages action against an incumbent President is unknown in our constitutional tradition. ~~If such litigation is allowed to proceed, it would divert a President's energy and attention from his official duties, and would spawn a series of constitutional confrontations between the courts and the President. Therefore, we submit,~~ The litigation of such an action should be deferred, in all but the most exceptional cases, until the President leaves office.

Such litigation

therefore

~~In response,~~ Respondent and her amici offer a number of unfounded arguments. They assert that such litigation should not be viewed as an extraordinary event, even though history clearly shows that it is. They insist, in the face of overwhelming evidence to the contrary, that the burdens of the Presidency are not so great that litigation of this kind would impede a President's ability to discharge his responsibilities. And, they contend, deferral of such actions would place a

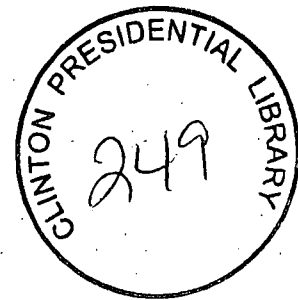
against a sitting President

in opposition to deferral.

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President "above the law" -- even though the President would remain amenable to liability when he leaves office.

Ultimately, however, respondent and her amici concede that such litigation would jeopardize a President's ability to discharge his constitutional responsibilities, and that some means must be found to protect the proper functioning of government. ¹ But respondent's proposed solution to this problem -- ad hoc "case management" by state and federal trial judges -- is no solution at all. It would multiply the litigation burdens on the Presidency and invite the use of civil litigation as a political weapon. Most troubling, it would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President should attend to private litigation at the expense of his official duties -- rulings that inevitably would enmesh the trial court in Executive Branch management.

Deferral, by contrast, eliminates these problems. This limited form of protection accommodates both a plaintiff's right to seek legal redress and the public interest in having a President available to perform the unique and demanding duties of his office. Deferral also preserves the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or The Separation Of Powers.

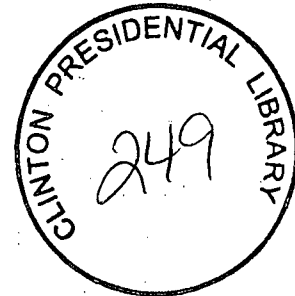
Perhaps the most striking feature of the briefs of respondent and her amici is the contrast between their abstract complaint that deferral would place the President "above the law,"¹ and their energetic assertions that trial courts should

¹ Brief for Respondent ("Resp. Br.") 16. See also Brief of Amicus Curiae of Law Professors in Support of Respondent ("Resp. Prof. Br.") 3; Brief for Amicus Curiae Coalition of American Veterans ("CAV Br.") 10-11.

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conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than . . . other defendants." *Id.* at 36. Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (*id.* at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." *Id.* at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should "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." *Id.* at 35, 36 (~~quoting Pet. App. 25~~) (emphases added by respondent).

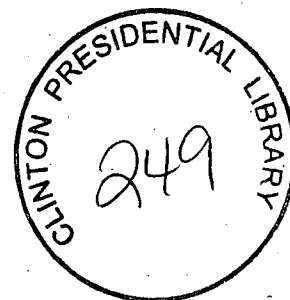
Respondent's amici further advocate special procedural rules in cases where the President is a defendant, such as holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Prof. Br. 21-22; see also Pet. App. 23 (Beam, J., concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant."¹

As this chorus of accommodation and deference illustrates, this case is not about whether the President is "above the law." Rather, this case is about identifying the proper means of protecting the compelling interests that are impli-

Beam, J.,

¹ Brief of *Amicus Curiae* American Civil Liberties Union ("ACLU Br.") 6.

(quoting Pet. App. 25 (Beam, J., concurring))

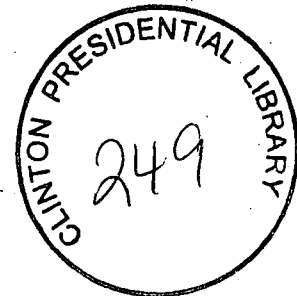


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cated when a private civil damages suit is filed against a sitting President. Respondent's "scheme of deference," ^{deference," however,} actually endangers these interests; that is why deferral is the proper approach.

To begin with, in the real world of litigation, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. But she does not repudiate the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." Pet. App. 16. The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it necessarily gives capacious discretion to trial judges.

Moreover, it is inevitable that whenever the President seeks to postpone some scheduled aspect of the litigation, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections in all likelihood will include, as they have here, claims that the President is abusing his office to obtain some undeserved litigation advantage, or that he seeks delay for political purposes. The trial judge will then have to decide, in a highly adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this function, the trial judge will have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries -- likely to occur repeatedly throughout the litigation -- present a serious threat to separation of powers, as well as to the integrity of sensitive information about matters of national concern. See Brief for the Petitioner ("Pet. Br.") 29-34. And it should be evident that these problems are far more intracta-



ble when the President is a defendant, than they are when he is asked merely to give third-party testimony. See *id.* 26-29.

also cannot protect a President who

~~It is also impractical to rely, as respondent does, on ad hoc case management by an individual trial court to protect the Presidency if the President is faced with an increasing number of civil damages actions. See Resp. Br. 7 (quoting Pet. App. 15). If more and more such suits are filed for purposes of publicity or partisan gain -- and in today's "no holds barred" political arena, there is every reason to believe that they will be -- a single judge issuing piecemeal rulings in a single case cannot manage the threat or provide a coordinated response to the burgeoning obligations such litigation would impose on the President. Only a generally applicable prophylactic will adequately prevent over-burdening the Presidency.~~

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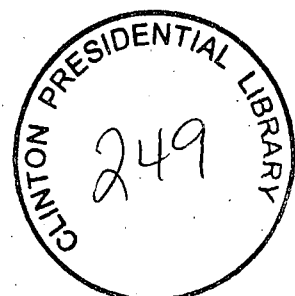
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In short, the disadvantages of respondent's scheme are great when compared to a simple rule of deferral. Respondent's scheme necessarily creates serious separation of powers problems; deferral averts those problems. Respondent's scheme augments the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, it would not justify the substantial costs that it would inflict on our system of government.

It will be impossible for individual judges issuing piecemeal rulings in individual cases to manage the threat. However ~~well-intentioned~~ well-intentioned and deferential they may be, they will simply be unable to

R. Respondent's Scheme Cannot Be Reconciled With *Fitzgerald* And This Court's Other Immunity Decisions.

Contrary to respondent's contention, the deferral the President seeks here is not an expansion of the absolute immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). It is a considerably narrower remedy, because it does



not insulate a President from liability. Deferral is, moreover, strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's other immunity decisions.

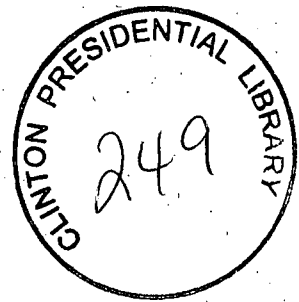
stated that
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fact of
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could interfere
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performance of
official duties.
The Court said

Respondent spends a great deal of energy arguing that *Fitzgerald* does not mean what it says. For example, respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making. Resp. Br. at 11-16. The Court, however, was quite explicit in saying that diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government. *Fitzgerald*, 457 U.S. at 751. And the Court explained that the President's exceptional immunity is necessary because "[t]he President occupies a unique position in the Constitutional scheme" (*id.* at 749) and performs "singular[ly] importan[t] . . . duties." *Id.* at 751. The Court went out of its way to note that the President is "an easily identifiable target for suits for civil damages," and found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Each of these rationales for absolute immunity in *Fitzgerald* also dictates the more modest remedy of deferral in this case.³

The Court said.

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³ See also *id.* at 763 (Burger, C.J., concurring): "The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . .". Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. Resp. Br. 11 (quoting *Fitzgerald*, 457 U.S. at 761 n.4 (Burger, C.J., concurring)). We of course, do not disagree with this statement, which addresses absolute immunity, in a case involving a former President. The Chief Justice's language quoted at the beginning of



The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).⁴ A denial of immunity, qualified or absolute, is also immediately appealable, precisely because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870 (1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

These doctrines would make no sense if, as respondent supposes, damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction . . . from . . . duty]" (*Forsyth*, 472 U.S. at 526), however good a public official's "lawyers and assistants" may be. This is so even

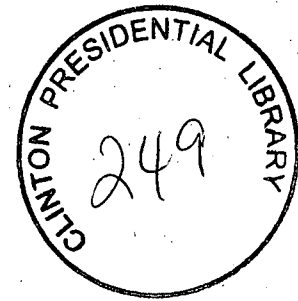
this note, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation could go forward against a sitting President. In fact, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed. Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

of any kind

⁴ In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

(*Harlow*, 457 U.S. at 816),

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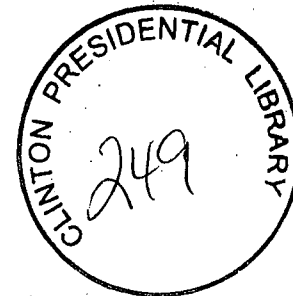
when, as is typical in immunity cases, the defendant official is represented by government lawyers. Here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal conduct by the President. The complaint unjustifiably attacks the President's integrity, alleges serious wrongdoing, and seeks to hold him personally liable for hundreds of thousands of dollars in damages. In this context, respondent's notion that a President can largely disregard the litigation -- or that he would choose to do so -- and rely instead on his lawyers, is simply implausible. See Pet. Br. 22-23.

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule that is a much greater imposition on potential plaintiffs than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is one of "manifest simplicity" (Resp. Br. 9), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily,⁵ and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery.⁶ Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

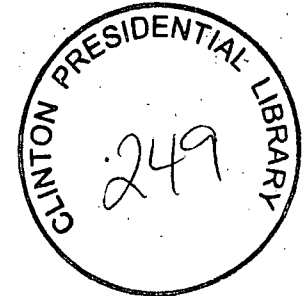
⁵ Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13.

⁶ Resp. Br. 27; Resp. Prof. Br. 6; ACLU Br. 4.



Every one of these arguments could be said to militate against absolute Presidential immunity as well. Yet the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did not attempt to differentiate "simple" suits from others -- for the obvious reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.⁷ The Court in *Fitzgerald* also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. 457 U.S. at 752 n.32 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). Nor did *Fitzgerald* rely on ad hoc trial court determinations, based on particularized showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.

⁷ The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a simple case (Resp. Br. 9, 27, 28, 40), respondent's counsel fail to credit their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 117-18, 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses (C.A. App. 117-18); and that they may seek to compel an unprecedented physical examination of the President. *Id.* As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBaton, *Sexual Harassment Suit Should Not Be Tried While Clinton Is President*, *Judge Rules*, N.Y. TIMES, Dec. 29, 1994, at B6.



C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Duties Of His Office.

Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. Resp. Br. 29 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d)). President Jefferson refuted this assertion at the time it was made.¹ Since then, of course, the burdens on the Presidency have increased exponentially.

There simply is no basis for respondent's bald assertion that "Presidents have always had time to fulfill personal commitments." Resp. Br. 29. To the contrary, as documented in the Solicitor General's brief, almost every President has remarked on the incessant demands of the office.² This is not surprising, in view of the fact that the Constitution vests the entire power of the Executive Branch in a single individual. ~~Art. II, § 1.~~ As David McCullough, a pre-eminent biographer

U.S. CONST. art. II, § 1.

¹ President Jefferson responded:

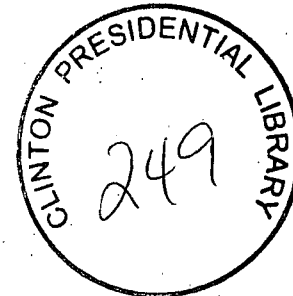
The Judge [Marshall] says, "*it is apparent that the President's duties as chief magistrate do not demand his whole time*" If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on as unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing. . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

Letter from Thomas Jefferson to George Hay, (June 20, 1807), 11 *The Writings of Thomas Jefferson* 239, 242 (Andrew A. Lipscomb ed., 1904).

² Brief of *Amicus Curiae* United States, 10-12.

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of Presidents, recently observed, to be the Chief Executive is to experience "unrelenting responsibility."

It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.¹⁰

The Presidency, he concluded, is "the hardest job in the world." *Id.* ^{no italics}

¹⁰ Mr. McCullough further observed:

[W]e're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit [H]e is the only person, the only individual who represents all the people.

. . . . It's beyond anyone's previous experience or natural ability. . . . I don't think anybody — no historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

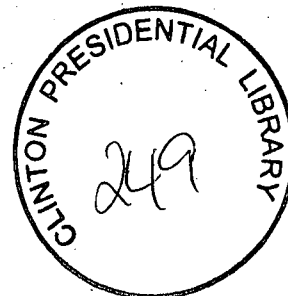
Comments of David McCullough, *Riding The Tiger* (CNN television broadcast) Sept. 8, 1996 (Tr. # 934-2, available on LEXIS, Nexis Library, Script File). Mr. McCullough is the author of *Truman* (Simon & Schuster 1992), and *Mornings On Horseback*, a biography of Theodore Roosevelt (Simon & Schuster 1981), and is currently working on a history of the Presidencies of John Adams and Thomas Jefferson. 17

¹¹ Respondent also states incorrectly that the lawsuit against President Truman was "actively litigated during his term in office." Resp. Br. 32 n.13. That suit was dismissed by the trial court on April 11, 1945, the day before President Roosevelt died and Harry Truman became President. Notice of Appeal, *DeVault v. Truman*, No. 498465, (Jackson County Cir. Ct., Mo.) filed April 18, 1945. As stated in our opening brief, the only activity in the case after President Truman took office was the appeal of the dismissal, which was sustained on purely legal grounds. *DeVault v.*

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Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. See Pet. Br. 13 n.9. In the litigation setting, however, the President would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a number of analogous contexts in which litigation is stayed -- often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; see also Resp. Prof. Br. 2. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privilege" of the President than any other incident of his office, or than any immunity or similar protection is for any other public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It

Truman, 194 S.W.2d 29 (Mo. 1946). Accordingly, President Truman was not involved in ~~active litigation~~ while in office.

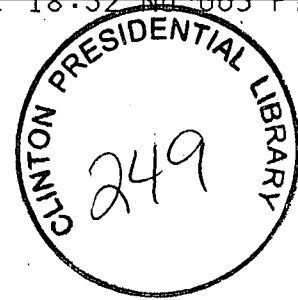
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attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.

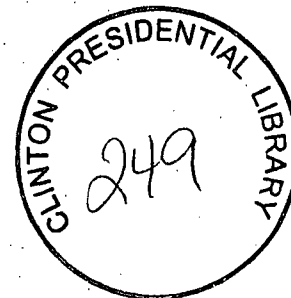
Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. 34-37.¹² Respondent simply cannot explain why the compelling interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do."

¹² In this regard, respondent incorrectly asserts that pursuant to the automatic stay in bankruptcy, a plaintiff's tort claims are simply transferred to bankruptcy court and "immediately addressed" there. Resp. Br. 25. This is not so. The litigation cannot proceed in any forum without leave from the bankruptcy court, which typically is not granted until the court approves a plan for the debtor's estate, a complicated process that can take months or years. *See, e.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 847-48 (5th Cir. 1990); *In re Washington Mfg. Co.*, 118 B.R. 555, 559-60 (Bankr. M.D. Tenn. 1990). The reality is that most claimants must wait long periods before their claims are addressed, if ever. *See, e.g., Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 907 (6th Cir. 1993).

See, e.g.,

added comma

¹³ On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. Resp. Br. 26; Resp. Prof. Br. 19 n.14; CVA Br., *passim*. In *Fitzgerald*, however, the Court recognized that certain privileges and immunities 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" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and immunities. *Id.* at 750 n.31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court

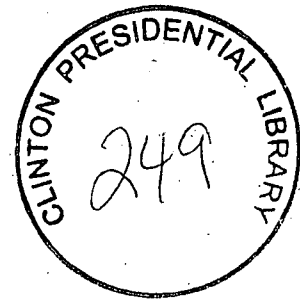


E. Deferral Will Not Lead To Abuse Of Office.

Respondent raises the specter that deferral would shelter a variety of Presidential wrongdoing, from defaulting on a debt to committing battery. Resp. Br. 24. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. See Pet. Br. 37; *Fitzgerald*, 457 U.S. at 757. These deterrents -- coupled with the knowledge that a plaintiff could vigorously pursue a civil claim and subject a President to damages following his tenure in office -- are sufficient to discourage misconduct in his private affairs. Realistically, with respect to deterrence and accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent.

declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in Section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

u.c.
Section
III



15

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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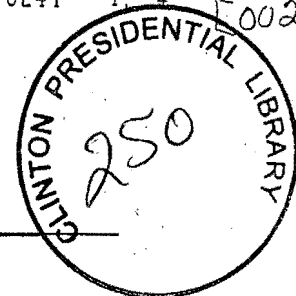
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Attorneys for the Petitioner
President William Jefferson Clinton

October 9, 1996



No. 95-1853

a/fm

In The
Supreme Court Of The United States
October Term, 1995

WILLIAM JEFFERSON CLINTON,
Petitioner

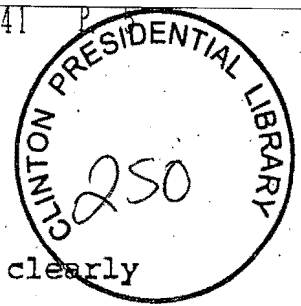
vs.

PAULA CORBIN JONES,
Respondent.

REPLY BRIEF FOR THE PETITIONER

The active litigation of a personal damages action against an incumbent President is unknown in our constitutional tradition. If such litigation is allowed to proceed, it would ~~divert~~ ^{significantly} ~~harm the President's ability to carry out~~ ~~a President's energy and attention from~~ his official duties, and would spawn a series of constitutional confrontations between the courts and the President. Therefore, we submit the litigation of such an action should be deferred, in all but the most exceptional cases, until the President leaves office.

In response, respondent and her amici offer a number of unfounded arguments. They assert that such litigation should not



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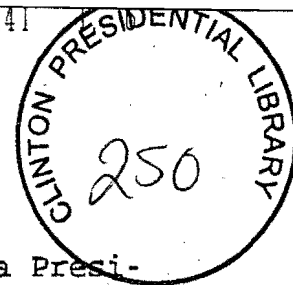
be viewed as an extraordinary event, even though history clearly shows that it is. They insist, in the face of overwhelming evidence to the contrary, that the burdens of the Presidency are not so great that litigation of this kind would impede a President's ability to discharge his responsibilities. And they contend ^{that} deferral of such actions would place a President "above the law" -- even though the President would remain amenable to liability when he leaves office.

Ultimately, however, respondent and her amici concede that such litigation would jeopardize a President's ability to discharge his constitutional responsibilities, and that some means must be found to protect the proper functioning of government. The question thus becomes ^{what} ~~which~~ remedy to adopt. But respondent's proposed solution to this problem -- ad hoc

"case management" by state and federal trial judges -- ^{would only} ~~is no~~ ^{increase} ~~to the harm~~ ^{the danger to the executive branch and to the principle of} ~~solution at all~~ It would multiply the litigation burdens on the ~~supp.~~

Presidency and invite the use of civil litigation as a political weapon. Most troubling, it would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President should attend to private litigation at the expense of his official duties -- rulings that inevitably would enmesh the trial court in Executive Branch management ^{and thereby threaten the} ~~respondent's~~ ^{support} ~~solution would~~ ^{yet further} ~~separate~~ ^{of powers} ~~separation of powers.~~

Deferral, by contrast, eliminates these problems. This limited form of protection accommodates both a plaintiff's right

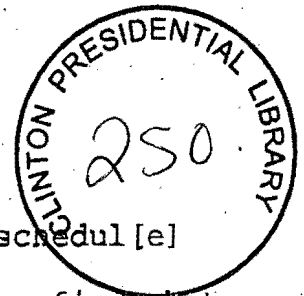


to seek legal redress and the public interest in having a President available to perform the unique and demanding duties of his office. Deferral also preserves the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or The Separation Of Powers.

Perhaps the most striking feature of the briefs of respondent and her amici is the contrast between their abstract complaint that deferral would place the President "above the law,"¹ and their energetic assertions that trial courts should conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than . . . other defendants." *Id.* at 36. Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (*id.* at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." *Id.* at 39. She twice quotes, with emphasis, the concurring opinion below to the effect

¹ Brief for Respondent ("Resp. Br.") 16. See also Brief of Amicus Curiae of Law Professors in Support of Respondent ("Resp. Prof. Br.") 3; Brief for Amicus Curiae Coalition of American Veterans ("CAV Br.") 10-11.

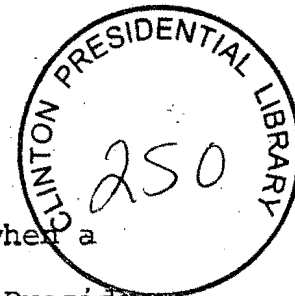


that the trial judge should "'halt[] or delay[] or reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even *slightly imperiled.*" *Id.* at 35, 36 (quoting Pet. App. 25) (emphases added by respondent).

Respondent's amici further advocate special procedural rules in cases where the President is a defendant, such as holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Prof. Br. 21-22; see also Pet. App. 23 (Beam, J. concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant."²

As this chorus of accommodation and deference illustrates, this case is not about whether the President is "above the law." Rather, this case is about identifying the proper means of pro-

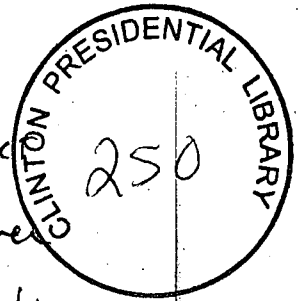
² Brief of Amicus Curiae American Civil Liberties Union ("ACLU Br.") 6.



tecting the compelling interests that are implicated when a private civil damages suit is filed against a sitting President. Respondent's "scheme of deference" actually endangers these interests; that is why deferral is the proper approach.

To begin with, in the real world of litigation, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. But she does not repudiate the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." Pet. App. 16. The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it necessarily gives capacious discretion to trial judges.

Moreover, it is inevitable that whenever the President seeks to postpone some scheduled aspect of the litigation, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections in all likelihood will include, as they have here, claims that the President is abusing his office to obtain some undeserved litigation advantage, or that he seeks delay for political



Ad hoc case management also cannot protect
a President who is faced with an ever
increasing number of civil damage suits.

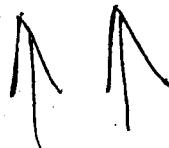
~~If this suit is allowed to go
Once a President
this suit is allowed to proceed~~

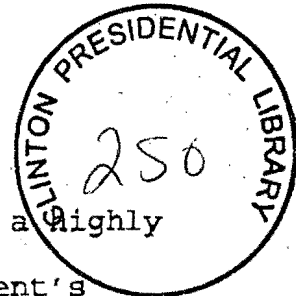
In today's "no hold barred" political arena,
allowing ~~one such~~ ^{this} action to proceed ~~will~~
may well
encourage the filing of other suits for

purpose of publicity or partisan gain.

At that point, ^{it will be impossible for} individual judges issuing
piecemeal rulings in individual cases
to protect the President ~~no~~ ^{no} matter how
well-intentioned these judges might be.

They will be ^{simply} unable to provide a coordinated
and effective
response to the burgeoning obligations such
litigation would impose on the President.





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purposes. The trial judge will then have to decide, in a highly adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this function, the trial judge will have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries -- likely to occur repeatedly throughout the litigation -- present a serious threat to separation of powers, as well as to the integrity of sensitive information about matters of national concern. See Brief for the Petitioner ("Pet. Br.") 29-34. And it should be evident that these problems are far more intractable when the President is a defendant ^{Inc} than they ~~are~~ when he is asked merely to give third-party testimony. See *id.* 26-29.

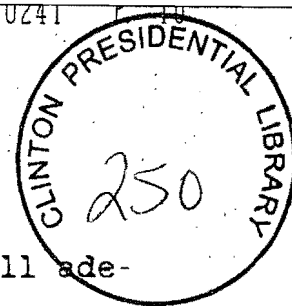
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~~It is also impractical to rely, as respondent does, on ad hoc case management by an individual trial court to protect the Presidency if the President is faced with an increasing number of civil damages actions. See Resp. Br. 7 (quoting Pet. App. 15).~~

If more and more such suits are filed for purposes of publicity or partisan gain -- and in today's "no holds barred" political

arena, there is every reason to believe that they ^{would} be -- ~~a single~~ ^{individual} judge ^{is} issuing piecemeal rulings in a ^{single} case ^{is} cannot will not be able to manage the threat or provide a coordinated response to the burgeoning obligations such litigation would impose on the

to the President.

if the precedent is not here(?)
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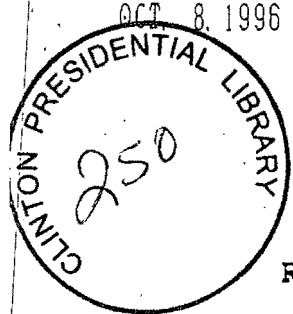
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President. Only a generally applicable prophylactic will adequately prevent over-burdening the Presidency.

In short, the disadvantages of respondent's scheme are great when compared to a simple rule of deferral. Respondent's scheme necessarily creates serious separation of powers problems; deferral averts those problems. Respondent's scheme augments the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, it would not justify the substantial costs that it would inflict on our system of government.

B. Respondent's Scheme Cannot Be Reconciled With *Fitzgerald* And This Court's Other Immunity Decisions.

Contrary to respondent's contention, the deferral the President seeks here is not an expansion of the absolute immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). It is a considerably narrower remedy, because it does not insulate a President from liability. Deferral is, moreover, strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's other immunity decisions.



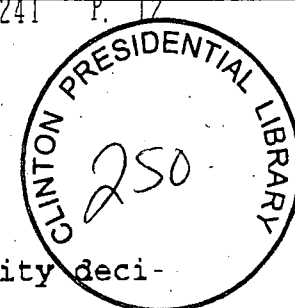
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Respondent spends a great deal of energy arguing that Fitzgerald does not mean what it says. For example, respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making. Resp. Br. at 11-16. The Court, however, was quite explicit in saying that "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. And the Court explained that the President's exceptional immunity is necessary because "[t]he President occupies a unique position in the Constitutional scheme" (*id.* at 749) and performs "singular[ly] importan[t] . . . duties." *Id.* at 751. The Court went out of its way to note that the President is "an easily identifiable target for suits for civil damages," and found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Each of these rationales for absolute immunity in *Fitzgerald* also dictates the more modest remedy of deferral in this case.³

³ See also *id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . ."). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be de-

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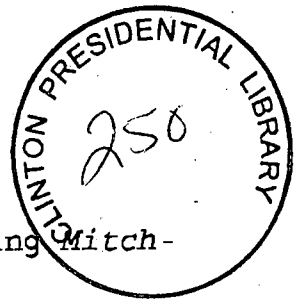


The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).⁴ A denial of immunity, qualified or absolute, is also immediately appealable, precisely because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Digital Equip. Corp.*

³ (...continued)

ferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. Resp. Br. 11 (quoting *Fitzgerald*, 457 U.S. at 761 n.4 (Burger, C.J., concurring)). We of course, do not disagree with this statement, which addresses absolute immunity, in a case involving a former President. The Chief Justice's language quoted at the beginning of this note, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation could go forward against a sitting President. In fact, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed. Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

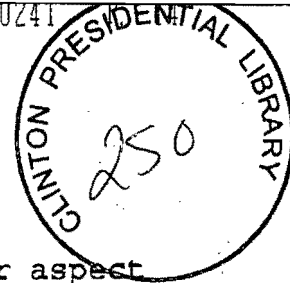
⁴ In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.



v. Desktop Direct, Inc., 511 U.S. 863, 870 (1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

These doctrines would make no sense if, as respondent supposes, damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction . . . from . . . dut[y]" (*Forsyth*, 472 U.S. at 526), however good a public official's "lawyers and assistants" may be. This is so even when, as is typical in immunity cases, the defendant official is represented by government lawyers. Here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal conduct by the President. The complaint unjustifiably attacks the President's integrity, alleges serious wrongdoing, and seeks to hold him personally liable for hundreds of thousands of dollars in damages. In this context, respondent's notion that a President can largely disregard the litigation -- or that he would choose to do so -- and rely instead on his lawyers, is simply implausible. See Pet. Br. 22-23.

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each



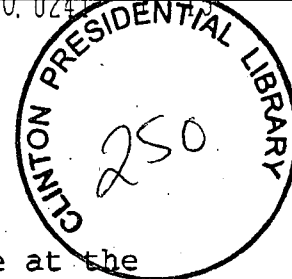
stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule that is a much greater imposition on potential plaintiffs than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is one of "manifest simplicity" (Resp. Br. 9), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily,⁵ and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery.⁶ Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

Every one of these arguments could be said to militate against absolute Presidential immunity as well. Yet the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did not attempt to differentiate "simple" suits from others -- for the obvious

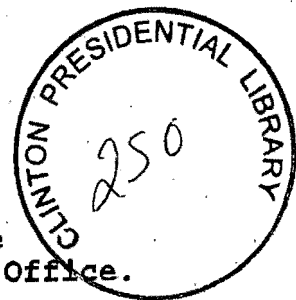
⁵ Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13.

⁶ Resp. Br. 27; Resp. Prof. Br. 6; ACLU Br. 4.



reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.⁷ The Court in *Fitzgerald* also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. 457 U.S. at 752 n.32 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). Nor did *Fitzgerald* rely on ad hoc trial court determinations, based on particularized showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.

⁷ The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a simple case (Resp. Br. 9, 27, 28, 40), respondent's counsel fail to credit their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 117-18, 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses (C.A. App. 117-18); and that they may seek to compel an unprecedented physical examination of the President. *Id.* As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBaton, *Sexual Harassment Suit Should Not Be Tried While Clinton Is President*, *Judge Rules*, N.Y. TIMES, Dec. 29, 1994, at B6.



C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Duties Of His Office.

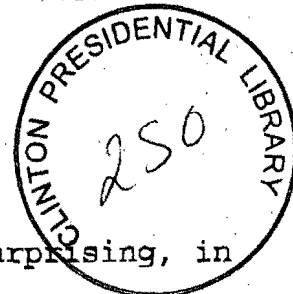
Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. Resp. Br. 29 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d)). President Jefferson refuted this assertion at the time it was made.⁸ Since then, of course, the burdens on the Presidency have increased exponentially.

There simply is no basis for respondent's bald assertion that "Presidents have always had time to fulfill personal commitments." Resp. Br. 29. To the contrary, as documented in the Solicitor General's brief, almost every President has remarked on

⁸ President Jefferson responded:

The Judge [Marshall] says, "it is apparent that the President's duties as chief magistrate do not demand his whole time" If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on as unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

Letter from Thomas Jefferson to George Hay, (June 20, 1807), 11 *The Writings of Thomas Jefferson* 239, 242 (Andrew A. Lipscomb ed., 1904).



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the incessant demands of the office.⁹ This is not surprising, in view of the fact that the Constitution vests the entire power of the Executive Branch in a single individual. Art. II, § 1. As David McCullough, a pre-eminent biographer of Presidents, recently observed, to be the Chief Executive is to experience "unrelenting responsibility."

It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.¹⁰

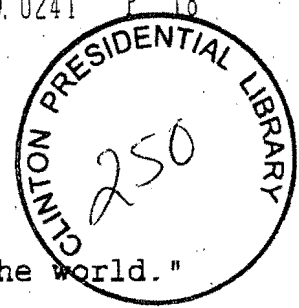
⁹ Brief of *Amicus Curiae* United States, 10-12.

¹⁰ Mr. McCullough further observed:

[W]e're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit [H]e is the only person, the only individual who represents all the people.

. . . . It's beyond anyone's previous experience or natural ability. . . . I don't think anybody -- no historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

Comments of David McCullough, *Riding The Tiger* (CNN television broadcast) Sept. 8, 1996 (Tr. # 934-2, available on LEXIS, Nexis Library, Script File). Mr. McCullough is the author of *Truman* (Simon & Schuster 1992), and *Mornings On Horseback*, a biography of Theodore Roosevelt (Simon & Schuster 1981), and is currently working on a history of the Presidencies of John Adams and Thomas Jefferson.

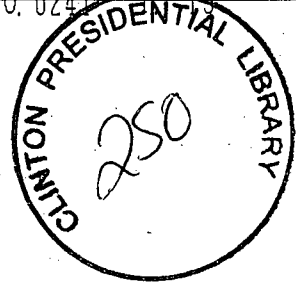


The Presidency, he concluded, is "the hardest job in the world."

Id."

Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. See Pet. Br. 13 n.9. In the litigation setting, however, the President would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

" Respondent also states incorrectly that the lawsuit against President Truman was "actively litigated during his term in office." Resp. Br. 32, n.15. That suit was dismissed by the trial court on April 11, 1945, the day before President Roosevelt died and Harry Truman became President. Notice of Appeal, *DeVault v. Truman*, No. 498465, (Jackson County Cir. Ct., Mo.) filed April 18, 1945. As stated in our opening brief, the only activity in the case after President Truman took office was the appeal of the dismissal, which was sustained on purely legal grounds. *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). Accordingly, President Truman was not involved in "active[] litigation" while in office.

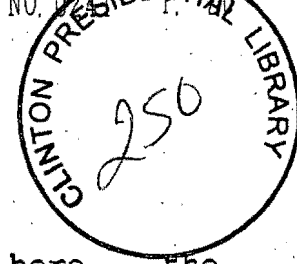


D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a number of analogous contexts in which litigation is stayed -- often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; see also Resp. Prof. Br. 2. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privilege" of the President than any other incident of his office, or than any immunity or similar protection is for any other public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.

Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. 34-37.¹² Respondent simply

¹² In this regard, respondent incorrectly asserts that pursuant to the automatic stay in bankruptcy, a plaintiff's tort claims are simply transferred to bankruptcy court and "immediately addressed" there. Resp. Br. 25. This is not so. The litigation (continued...)

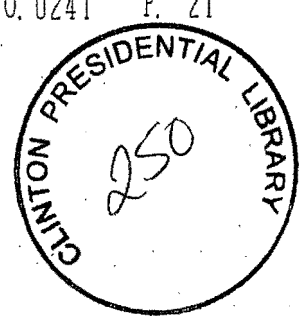


cannot explain why the compelling interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.¹³

¹²(...continued)

cannot proceed in any forum without leave from the bankruptcy court, which typically is not granted until the court approves a plan for the debtor's estate, a complicated process that can take months or years. See, e.g. *Picco v. Global Marine Drilling Co.*, 900 D.2d 846, 847-48 (5th Cir. 1990); *In re Washington Mfg. Co.*, 118 B.R. 555, 559-60 (Bankr. M.D. Tenn. 1990). The reality is that most claimants must wait long periods before their claims are addressed, if ever. See, e.g., *Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 907 (6th Cir. 1993).

¹³ On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. Resp. Br. 26; Resp. Prof. Br. 19 n.14; CVA Br., *passim*. In *Fitzgerald*, however, the Court recognized that certain privileges and immunities 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" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and immunities. *Id.* at 750 n.31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).



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E. Deferral Will Not Lead To Abuse Of Office.

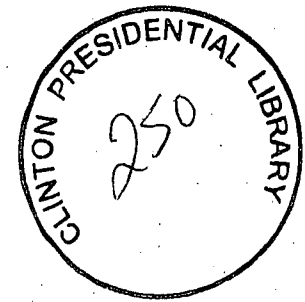
Respondent raises the specter that deferral would shelter a variety of Presidential wrongdoing, from defaulting on a debt to committing battery. Resp. Br. 24. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. See Pet. Br. 37; *Fitzgerald*, 457 U.S. at 757. These deterrents - coupled with the knowledge that a plaintiff could vigorously pursue a civil claim and subject a President to damages following his tenure in office -- are sufficient to discourage misconduct in his private affairs. Realistically, with respect to deterrence and accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent.

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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October 9, 1996

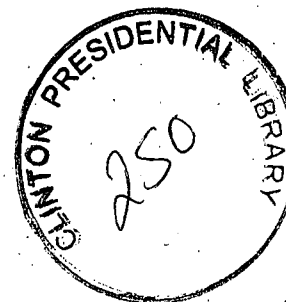


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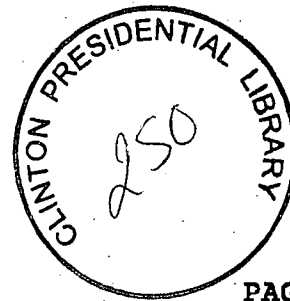


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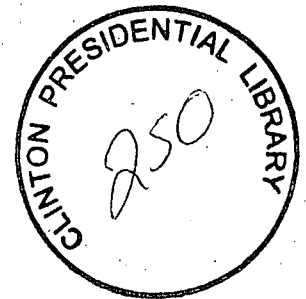
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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Clinton vs. Jones; RE: Reply Brief for the Petitioner (18 pages)	10/07/1996	P5 251
002a. letter	Elena to Amy and David; RE: Clinton vs. Jones Brief (2 pages)	n.d.	P5 252
002b. letter	Elena to Amy and David; RE: Clinton vs. Jones Brief (2 pages)	n.d.	P5 253
003. draft	Clinton vs. Jones; RE: Reply Brief for the Petitioner (18 pages)	10/03/1996	P5 254
004. draft	Clinton vs Jones; RE: Draft Brief (1 page)	10/02/1996	P5 255
005. draft	Clinton vs. Jones; RE: Reply Brief for the Petitioner (19 pages)	10/02/1996	P5 256

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

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

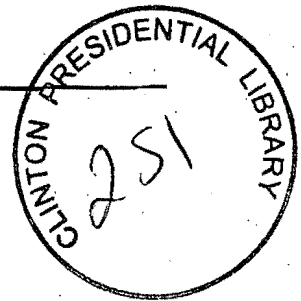
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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

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



In The
Supreme Court Of The United States
October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner

vs.

PAULA CORBIN JONES,

Respondent.

(rounds
initial)

REPLY BRIEF FOR THE PETITIONER

The active litigation of a private civil damages action
against an incumbent President is ^{an event} unknown in our constitutional
tradition. ^{Allowing} ~~if~~ such litigation is ~~allowed~~ to proceed, ~~it will~~ ^{would}
~~significantly impair~~ ^{divert} the President's time and ^{ability to discharge} ~~attention~~ from his official
duties, ^{would} ~~and will~~ spawn a series of constitutional confrontations
between the courts and the President. ^{likely} ~~Therefore, we submit~~ the
litigation of such an action ^{thus} ~~should~~ be deferred, in all but the
most exceptional cases, until the President leaves office.

In response, respondent and her amici offer a number of
unfounded arguments. They assert that such litigation should not

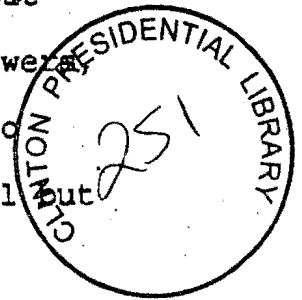
In general,
can we use
a President,
instead of the
President as much
as possible.

be viewed as an extraordinary event, even though history clearly shows that it is. They also insist, in the face of overwhelming evidence to the contrary, that the burdens of the Presidency are not so great that litigation of this kind would impede the President's ability to discharge his responsibilities. And, they contend, deferral of such actions would place ^athe President "above the law" -- even though the President would remain amenable to liability when he leaves office.

Ultimately, though, respondent and her amici concede that such litigation would jeopardize a President's ability to discharge his constitutional responsibilities, and that some means must be found to protect the proper functioning of government. But respondent's proposed solution to this problem -- ad hoc "case management" by state and federal trial judges -- is no solution at all. It would multiply the litigation burdens on the Presidency and invite the use of civil litigation as a political weapon. Most troubling, it would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether ^athe President should attend to private litigation at the expense of his official duties -- rulings that inevitably would enmesh the trial court in Executive Branch management and thereby ~~enmesh~~ contravene important principles of separation of powers.

Deferral, by contrast, eliminates these problems. This limited form of protection accommodates both a plaintiff's right to seek/redress and the public interest in having ^athe President

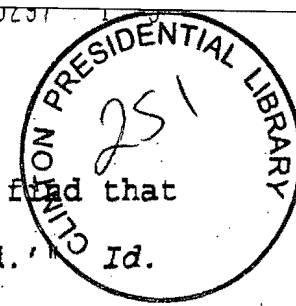
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(sounds trivial)
The ¹¹⁴ responsibilities of his office
available to perform his unique and demanding duties without
distraction. Deferral also preserves the separation of powers
and comports with the historic tradition that courts are to
refrain from asserting jurisdiction over a President in all but
the most compelling circumstances.



A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or The Separation Of Powers.

Perhaps the most striking feature of the briefs of respondent and her amici is the contrast between their abstract complaint that deferral would place the President "above the law,"¹ and their energetic assertions that trial courts should conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than . . . other defendants." *Id.* at 36. Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (*id.* at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." *Id.* at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should "'halt[] or delay[] or reschedul[e]

¹ Brief for Respondent ("Resp. Br.") 16. See also Brief of Amicus Curiae of Law Professors in Support of Respondent ("Resp. Prof. Br.") 3; Brief for Amicus Curiae Coalition of American Veterans ("CAV Br.") 10-11.



any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Id. at 35, 36 (quoting Pet. App. 25) (emphases added by respondent).

Respondent's amici further advocate special procedural rules in cases where the President is a defendant, such as holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Prof. Br. 21-22; see also Pet. App. 23 (Beam, J. concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant."

As this chorus of accommodation and deference illustrates, this case is not about whether the President is "above the law." Rather, this case is about identifying the proper means of protecting the important ^{institutional} interests that are implicated when a private civil damages suit is filed against a sitting President.

We submit that deferral, not piecemeal deference, is the proper approach.
Brief of Amicus Curiae American Civil Liberties Union ("ACLU Br.") at 6.

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And ~~when one considers how~~ respondent's proposed "scheme of
deference" ^{as} ~~would be~~ implemented in the real world of litigation,
~~its inability to provide this protection becomes manifest~~
would fail to protect -- indeed, it ~~itself~~ would endanger
~~this set of~~ interests.

To begin with, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. But she does not repudiate the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." Pet. App. 16. The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it necessarily gives capacious discretion to trial judges.

Moreover, it is inevitable that whenever the President seeks to postpone some scheduled aspect of the litigation, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections in all likelihood will include, as they have here, claims that the President is abusing his office to obtain some undeserved litigation advantage, or that he seeks delay for political purposes. The trial judge will then have to decide, in a ^W ~~highly~~ adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this func-

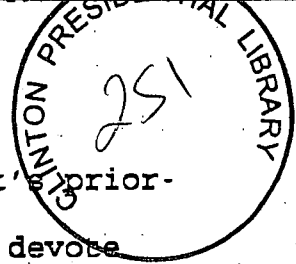
tion, the trial judge will have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries -- likely to occur repeatedly throughout the litigation -- present a serious threat to the constitutional separation of powers, as well as to the integrity of sensitive information about matters of national concern. See Brief for the Petitioner ("Pet. Br.") 29-34. And it should be evident that these problems are far more intractable when the President is a defendant, than they are when he is asked merely to give third-party testimony. See *id.* 26-29.

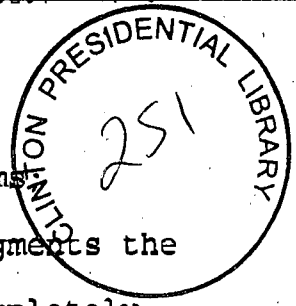
It is also impractical to rely, as respondent does, on ad hoc case management by an individual trial court to protect the Presidency when the President is faced with an increasing number of civil damages actions. See Resp. Br. 7 (quoting Pet. App. 15). If more and more such suits are filed for purposes of publicity or partisan gain -- and in today's "no holds barred" political arena, there is every reason to believe that they will be, if the precedent is set here -- a single judge issuing piecemeal rulings in a single case cannot manage the threat. Only a generally applicable prophylactic will adequately prevent overburdening the Presidency.

In short, the disadvantages of respondent's scheme are great

when compared to a simple rule of deferral. Respondent's scheme

I know I told you to emphasize this point -- and I like recognizing this problem -- but I'm not sure it works here. If a single judge in one case could, then many judges in many cases also could.
No? Am I missing something? I really think we should make this a rule.
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necessarily creates serious separation of powers problems. Deferral averts those problems. Respondent's scheme augments the litigation burdens placed on the President; deferral completely eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even if it could ^(assuming) be said that there is some marginal gain to legitimate claimants from respondent's scheme, it would not justify the substantial costs that would inflict on our system of government.

B. Respondent's Scheme Cannot Be Reconciled With *Fitzgerald* And This Court's Other Immunity Decisions.

Contrary to respondent's contention, the deferral the President seeks here is not an expansion of the absolute immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). It is a considerably narrower remedy, because it does not insulate a President from ~~liability~~ ^{but merely postpones determination of} liability. Deferral is, moreover, strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's other immunity decisions. ^(which we should assume, since the A. ^{arguing} otherwise has been dropped.)

Respondent spends a great deal of energy arguing that *Fitzgerald* does not mean what it says. For example, respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making. Resp. Br. at 11-16. The Court, however, was quite explicit in saying that "diversion of [the President's]

repeatedly noted how the simple fact of litigation could interfere with official action. The Court

energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. And the Court explained that the President's exceptional immunity is necessary because "[t]he President occupies a unique position in the Constitutional scheme" (*id.* at 749) and performs "singular[ly] importan[t] . . . duties." *Id.* at 751. The Court went out of its way to note that the President is "an easily identifiable target for suits for civil damages," and found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Each of these rationales for absolute immunity in *Fitzgerald* also dictates ~~that~~³ more modest remedy of deferral in this case.³

³ See also *id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money"). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. Resp. Br. 11 (quoting *Fitzgerald*, 457 U.S. at 761 n.4) (Burger, C.J., concurring). We of course, do not disagree with this statement, which addresses absolute immunity, in a case involving a former President. The Chief Justice's language quoted at the beginning of this note, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation could go forward against a sitting President. Indeed, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed.

(continued...)

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The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982).⁴ A denial of immunity, qualified or absolute, is also immediately appealable, precisely because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, ____ (1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

These doctrines would make no sense if, as respondent supposes, personal damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court

³(...continued)

Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

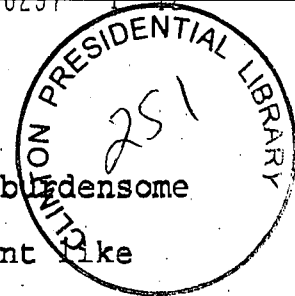
⁴ In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

recognized that litigation can work a "distraction . . . from . . . dut[y]" (Forsyth, 472 U.S. at 526), however good a public official's "lawyers and assistants" may be. This is so even when, as is typical in immunity cases, the defendant official is represented by government lawyers. Here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal conduct by the President. ~~The~~ ^{the} complaint attacks the President's integrity, alleges serious wrongdoing, and seeks to hold him personally liable. In this context, respondent's notion that the President can largely disregard the litigation -- or that he would choose to do so -- and rely instead on his lawyers, is ^{simply} ~~even more~~ implausible. See Pet. Br. 22-23.

however [unjustifiably, or unwisely] ← **VERY IMPORTANT TAKE YOUR PICK**

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule that is a much greater imposition on potential plaintiffs than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is one of "manifest simplicity"



(Resp. Br. 9), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily,⁵ and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery.⁶ Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

Every one of these arguments could be said to militate against absolute Presidential immunity as well. Yet the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did not attempt to differentiate "simple" suits from others -- for the obvious reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.⁷ The Court in *Fitz-*

⁵ Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13.

⁶ Resp. Br. 27; Resp. Prof. Br. 6; ACLU Br. 4.

⁷ The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a simple case (Resp. Br. 9, 27, 28, 40), respondent's counsel fail to credit their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 117-18, 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses (C.A. App. 117-18); and that they may seek to compel an unprecedented physical examination of the President. *Id.* As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBatton, Sexual Harassment Suit Should Not Be Tried While Clinton Is President, Judge Rules, N.Y. TIMES, Dec. 29, 1994, at B6.

gerald also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. 457 U.S. at 752 n.32 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). Nor did *Fitzgerald* rely on ad hoc trial court determinations, based on particularized showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.

C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Duties Of His Office.

Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. Resp. Br. at 29 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d)). President Jefferson refuted this assertion at the time it was made.⁸ Since then, of course, the burdens on the

⁸ President Jefferson responded:

(continued...)

Presidency have increased exponentially. There simply is no basis for respondent's bald assertion that "Presidents have always had time to fulfill personal commitments." Resp. Br. 29. To the contrary, as documented in the Solicitor General's brief, almost every President has remarked on the incessant demands of the office.⁹ David McCullough, a pre-eminent biographer of Presidents, recently observed that to be the Chief Executive is to experience

unrelenting responsibility. It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.¹⁰

⁸(...continued)

The Judge [Marshall] says, "it is apparent that the President's duties as chief magistrate do not demand his whole time" If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on as unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

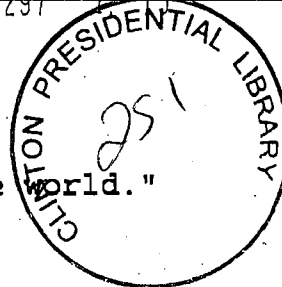
Letter from Thomas Jefferson to George Hay, (June 20, 1807), 11 The Writings of Thomas Jefferson 239, 242 (Andrew A. Lipscomb ed., 1904).

⁹ Brief of Amicus Curiae United States, 10-12.

¹⁰ Mr. McCullough further observed:

[W]e're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political

(continued...)



The Presidency, he concluded, is "the hardest job in the world."
Id."

Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to

¹⁰(...continued)

party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit [H]e is the only person, the only individual who represents all the people.

.

. . . . It's beyond anyone's previous experience or natural ability. . . . I don't think anybody -- no historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

Comments of David McCullough, *Riding The Tiger*, CNN television broadcast, Sept. 8, 1996 (Tr. # 934-2, available on LEXIS, Nexis Library, Script File). Mr. McCullough is the author of Truman (Simon & Schuster 1992), and Mornings On Horseback, a biography of Theodore Roosevelt (Simon & Schuster 1981), and is currently working on a history of the Presidencies of John Adams and Thomas Jefferson.

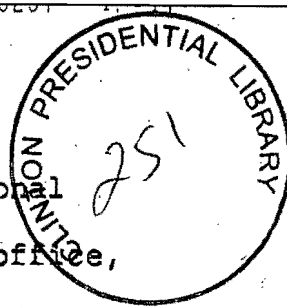
¹¹ Respondent also states incorrectly that the lawsuit against President Truman was "actively litigated during his term in office." Resp. Br. 32, n.15. That suit was dismissed by the trial court on April 11, 1945, the day before President Roosevelt died and Harry Truman became President. Notice of Appeal, *DeVault v. Truman*, No. 498465, (Jackson County Cir. Ct., Mo.) filed April 18, 1945). As we stated in the opening brief, the only activity in the case after President Truman took office was the appeal of the dismissal, which was sustained on purely legal grounds. *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946). Accordingly, President Truman was not involved in "active[] litigation" while in office.

engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. See Pet. Br. 13 n.9. In the litigation setting, however, the President would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a number of analogous contexts in which litigation is stayed -- often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; see also Resp. Prof. Br. 2. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privilege" of the President than any other incident of his office, or than any immunity or similar protection is for any other public official. Deferral is necessary to preserve the functioning of

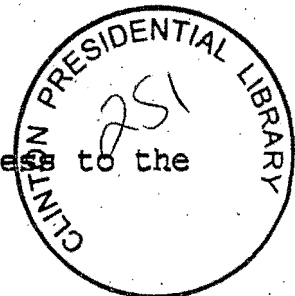
the Presidency, and to protect the compelling institutional interests of the Executive Branch. It attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.



Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. at 34-37.¹² Respondent simply cannot explain why the institutional and constitutional interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would

¹² In this regard, respondent incorrectly asserts that pursuant to the automatic stay in bankruptcy, a plaintiff's tort claims are simply transferred to bankruptcy court and "immediately addressed" there. Resp. Br. 25. This is not so. The litigation cannot proceed in any forum without leave from the bankruptcy court, which typically is not granted until the court approves a plan for the debtor's estate, a complicated process that can take months or years. See, e.g. *Picco v. Global Marine Drilling Co.*, 900 D.2d 846, 847-48 (5th Cir. 1990); *In re Washington Mfg. Co.*, 118 B.R. 555, 559-60 (Br. M.D. Tenn. 1990). The reality is that most claimants must wait long periods before their claims are addressed, if ever. See, e.g., *Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Panzella v. Hills Stores Co.*, 171 B.R. 22, 23 (E.D. Pa. 1994).

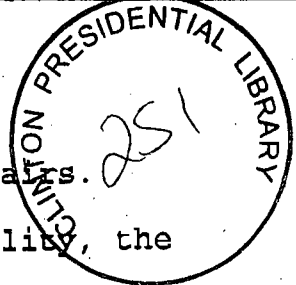
impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.¹³



E. Deferral Will Not Lead To Abuse Of Office.

Respondent raises the specter that deferral would shelter a variety of Presidential wrongdoing, from defaulting on a debt to committing battery. Resp. Br. 24. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. See Pet. Br. 37; *Fitzgerald*, 457 U.S. at 757. These deterrents - along with the knowledge that he could be subject to damages following his tenure in office -- are sufficient to discourage a

¹³ On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. Resp. Br. 26; Resp. Prof. Br. 19 n.14; CVA Br., *passim*. In *Fitzgerald*, however, the Court recognized that certain privileges and immunities 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" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and immunities. *Id.* at 750 n.31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).



President from engaging in misconduct in his private affairs.
Realistically, with respect to deterrence and accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent.

I liked the last sentence because it emphasized once again that "The President remains

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

amenable to liability etc.

Respectfully submitted,

I think you should put it back.

Of Counsel:

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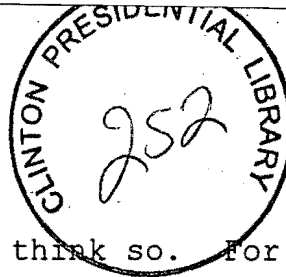
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Attorneys for the Petitioner
President William Jefferson Clinton

October 9, 1996

Amy and David --

This is great, really great. Both Jack and I think so. For whatever that's worth.



We've done very little line-editing -- except for a word here and there, really only in one paragraph. We do, though, have some general comments and suggestions about points to make, points to highlight, etc. They are discussed below. I have indicated on the brief, as well as noted here, the pages that give rise to these comments.

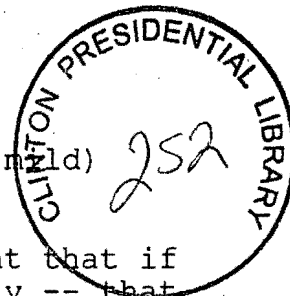
1. We would like the introduction to make the point -- preferably in a paragraph of its own, or at least in some other way that highlights its significance -- that our solution does give the plaintiff her day in court and that therefore the issue in this case is not whether, but only when. (Right now, there's just a fleeting reference to the "plaintiff's right to seek redress" included in a paragraph that's about something else altogether.) This point can get lost in all the rhetoric and it is crucial in convincing the court that our solution is the right accommodation. We think this point could be made before the paragraph discussing the dangers of respondent's argument, but we're open to some different placement within the introductory section.

2. There's clearly a point to be made in the paragraph on pp. 6-7 -- and a good one. At the same time, any reader will be (should be) suspicious of one side arguing that the other doesn't really understand its own best interests. Is there a way to edit this paragraph so that it doesn't lead the reader to roll his eyes so much? Should we suggest that the advantage of the plaintiff's scheme over our scheme is a political -- rather than a litigation -- advantage, and that's why the plaintiff cares so much? (Then, it's not suggesting that the plaintiff doesn't know what's good for her, but instead suggesting that she's using evaluative criteria the court shouldn't respect.) I throw this out only as a suggestion; it may have real downsides. But somehow we should attempt to deal with the fact that judges are skeptical of one side saying that the other doesn't know what's good for it.

3. On pp.8-9, one way to make this argument starker might be to note that Fitzgerald was concerned not only with the way the fear of liability could impinge on official action (by inhibiting risky decisions), but also with the way the simple fact of litigation could impinge on such action (by diverting time and attention).

4. We'd like a couple more sentences on p. 11 (or, if you'd rather, in the preceding page or so) suggesting how preposterous it is to think that a President in this situation -- faced with accusations of serious wrongdoing -- would say "get me a good lawyer" and leave it at that. If there's one place for some

"edge" in this brief -- some amount of mild (or not so mild) ridicule -- we think this is it.



5. (a) Someplace at pp. 13-14, we should make the point that if it was true in Jefferson's time, it's even more so today -- that the burdens and duties of the presidency have increased exponentially. It's nice that we have historical support for eh basic notion that this is a tough job. But that shouldn't prevent us from saying that it's gotten tougher and tougher.

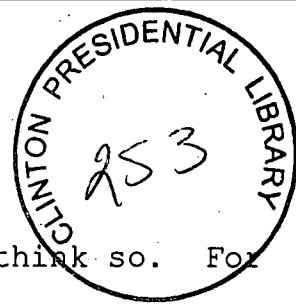
(b) Also, around here (or someplace else if you'd rather), we would like to say something about the Presidency being the only branch of our government committed to a single individual -- about the burdens of this whole branch falling on one man, etc.

6. Maybe most important, we would give more prominent place to the danger that a ruling for respondent will lead to many more lawsuits against the President, often for political reasons. Indeed, we think this point should end the brief -- that the last section should be not only about our solution not leading to abuse by the President, but about their solution leading to abuse against the President. (Don't worry, you don't have to use that formulation.) We make this suggestion for two reasons: (1) Right now, the brief ends on a very defensive note, far weaker than anything else in it; and (2) The future implications of the holding here are very important for the court to consider. Of course the "floodgates" argument is speculative in some sense, but given the litigiousness of our society and the gutter level of our politics -- both of which we think the brief should feel free to mention -- it strikes most people as true, especially if phrased in a non-hysterical manner. And it gets the Court thinking about the potentially quite awesome ramifications of this suit. (In the end, most of these nine Justices are not going to want to be responsible for throwing a new and disgusting element into American political life.) That, we think, is the way to end this brief.

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① Placement of 6
② 56.



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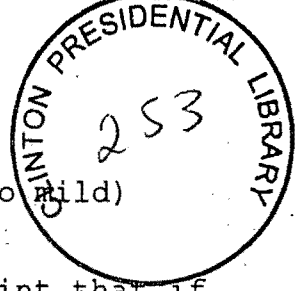
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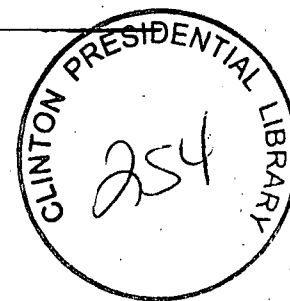
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E/ew

No. 95-1853

In The
 Supreme Court Of The United States
 October Term, 1995



WILLIAM JEFFERSON CLINTON,

Petitioner

vs.

PAULA CORBIN JONES,

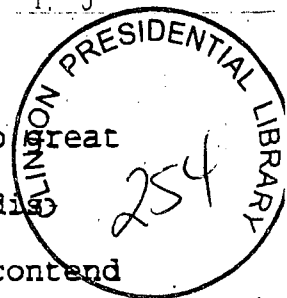
Respondent.

REPLY BRIEF FOR THE PETITIONER

The active litigation of a private civil damages action against the President of the United States is an event unknown in our constitutional tradition. ^{Allowing} ~~Because~~ such litigation ~~can~~ ^{can} to proceed ~~during a President's term of office would~~ significantly impair a President's ability to discharge the duties of his office. ^{his} Such actions should ^{therefore} be deferred, in all but exceptional cases, until the President's period of service has ended.

Respondent and her amici assert that such litigation should not be viewed as the extraordinary event that history shows it to be. They also insist, in the face of overwhelming evidence to

You should put a punchline at the end of this paragraph saying something to the effect that R'spt is wrong on all counts. Or you should delete the ¶ entirely. Right now it seems like free advertising space for the R'spt.



see
comment
last
page

the contrary, that the burdens of the Presidency are not so great that such actions would impede the President's ability to discharge the responsibilities of his office. Finally, they contend that deferral of such litigation would create a "purely personal privilege" that would place the President "above the law."

(Given these comments, you'll obviously have to think about transitions here. Also see comment (1) on attached sheet.)
When respondent and her amici put aside rhetoric and address the concrete institutional problems that are posed by private civil damages actions against a sitting President, they ultimately acknowledge that such litigation would jeopardize the President's ability to discharge his constitutional responsibilities, and that a means must be found to protect the proper functioning of our government. Respondent's solution, however -- ad hoc "case management" by state and federal trial judges -- is not adequate for this important task.

It takes a long time to get into this sentence. Also, it seems too early in the brief on edge.

trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President should attend to private litigation at the expense of his official duties, and inevitably would entangle the President and the courts in a series of constitutional confrontations, disputes over the workings of the Presidency and create a perennial risk -- indeed, a likelihood -- of constitutional confrontation.

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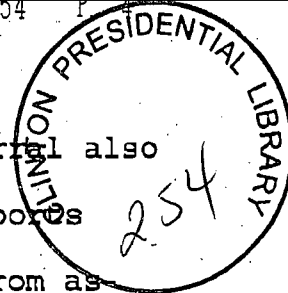
Deferral, by contrast, is the approach most protective of the compelling public and institutional interests at stake in this setting. This limited form of protection reasonably accommodates both a plaintiff's right to seek redress and the public interest in having the Chief Executive available to perform the

→ To the contrary, it exacerbates the threat to principles of separation of powers that Respondent's solution should prosecution of this case presents.

private litigation at the expense of his official duties, and inevitably would entangle the President and the courts in a series of constitutional confrontations, disputes over the workings of the Presidency and create a perennial risk -- indeed, a likelihood -- of constitutional confrontation.

Deferral, by contrast, is the approach most protective of the compelling public and institutional interests at stake in this setting. This limited form of protection reasonably accommodates both a plaintiff's right to seek redress and the public interest in having the Chief Executive available to perform the

that cannot easily fit within or accommodate a litigation schedule.



uniquely demanding responsibilities of his office. Deference also preserves and respects the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

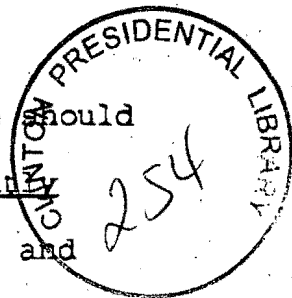
A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or Respect Separation Of Powers.

Respondent and her amici concede that the unique demands of the Presidency require unique accommodation. Indeed, perhaps the most striking feature of their briefs is the contrast between their abstract complaint that deferral would place the President "above the law,"¹ and their energetic assertions that trial courts should conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than ... other defendants." (Id. at 36). Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (Id. at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." Id. at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should "'halt[] or delay[] or

Do you want this repetition?

¹ Brief for Respondent ("Resp. Br.") 16, Brief for Amicus Curiae Coalition of American Veterans ("CAV Br.") 10-11.

reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Id. at 35, (quoting Pet. App. 25) (emphasis and brackets by respondent); See also id. at 36.

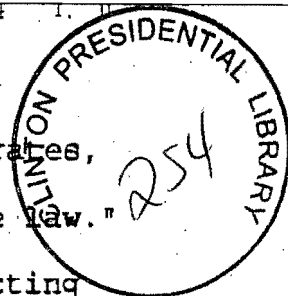


Respondent's amici ~~who irresponsibly accuse the President of attempting to "hide" behind his office "to evade equal justice under law,"~~ ^{also} nevertheless advocate special procedural rules in cases where the President is a defendant. These include holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Law Prof. Br. 21-22; see also Pet. App. 23 (Beam, J. concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant."³

² Br. Amicus Curiae of Law Professors in Support of Respondent ("Resp. Law Prof. Br.") 3.

³ Br. of Amicus Curiae American Civil Litigation Union ("ACLU Br.") at 6.

Do we really need this? We've already made the point about the emphasis. This just reiterates their strongest rhetorical point.



As this [chorus of accommodation and deference] illustrates, this case is not about whether the President is "above the law." Rather, it is about identifying the proper means of protecting the important interests that are implicated when a private civil damages suit is filed against a sitting President. We submit that deferral, not piecemeal deference, is the proper approach.

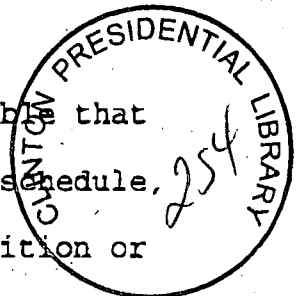
Notwithstanding respondent's [soothing] pronouncements about the high degree of "deference" that must be shown to the President, the realities of implementing such a "scheme of deference" in litigation are another matter altogether. First, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. (Resp. Br. at 35, 36). But she pointedly disregards the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties" (Pet. App. 16), and which struck down an exercise of discretion by the trial court here. (Pet. App. 13 n.9). The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it gives capacious discretion to trial judges.

I've bracketed a couple of things above which I think are fine — indeed, quite good — but are also illustrative of a real edge to this brief. I print this out only in case you've read it so often that you don't realize it's there. It is, and you should decide whether you want it.

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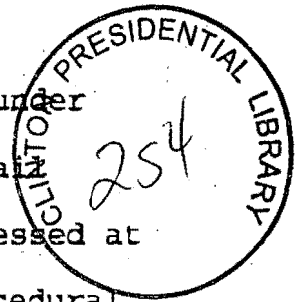


Second, in ^{the} real world of litigation, it is inevitable that whenever the President seeks to postpone or modify the schedule, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections will likely include, as they have here, claims that the President is abusing his office to obtain some undeserved advantage in the litigation, or that he seeks to delay the litigation for political purposes. The trial judge will then have to decide, in a ⁱⁿ highly adversarial and politicized setting, whether the President's claim warrants the deference he requests.

Finally, to fulfill this function, the trial judge will have to examine the President's priorities and decide whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries by a trial court, likely to be repeated throughout the litigation, present a serious threat to the constitutional separation of powers, as discussed in our opening brief. See Pet. Br. 29-34. And it should be evident that these problems are far more intractable in this context than they are when a President is asked merely to give third-party testimony. See Pet. Br. 26-29.

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Respondent not only understates the difficulties of implementing this "scheme of deference," she also overstates the



benefits to plaintiffs of going forward with litigation under this regime. The proceedings she contemplates would entail substantial expense and delay before the merits are addressed at trial. They would involve recurrent litigation over procedural matters, some of which surely will involve complicated issues of a constitutional magnitude, in both the trial court and ^{then} possibly in mandamus proceedings in a court of appeals. Additionally, as respondent's amici envision this scheme, plaintiffs could be required to forego certain procedures available to other litigants, such as the opportunity to cross-examine the defendant in person before the jury. See *supra*, p. X. As a practical matter, then, respondent's "deference" scheme is not clearly more beneficial to plaintiffs than simply deferring the litigation.

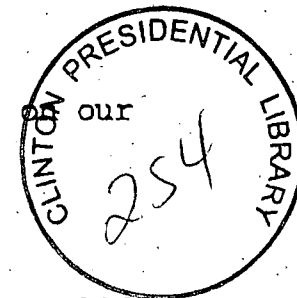
At the same time, the disadvantages of respondent's scheme, compared to a simple rule of deferral, are great. Respondent's scheme necessarily creates serious separation of powers problems, as we have discussed (Pet. Br. 29-34); deferral averts those problems. Respondent's scheme multiplies the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, it

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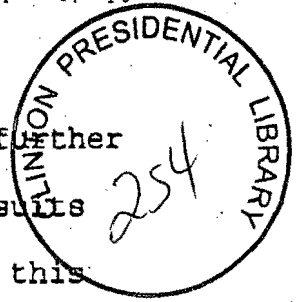
would not justify the substantial costs it would inflict on our system of government.

B. *Fitzgerald* And This Court's Other Immunity Decisions Solidly Support The Remedy of Deferral.

Respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making, and urges the Court not to extend *Fitzgerald* beyond the line of official conduct. (Rep. Br. at 11-16). The deferral the President seeks here, however, is not an expansion of the absolute immunity recognized in *Fitzgerald*; it is more accurately characterized as a lesser included remedy, necessary in private civil damages litigation because the defendant is a sitting President. Deferral is strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's immunity decisions.

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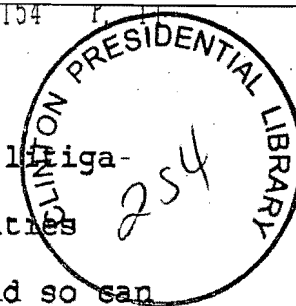
Respondent and her amici spend a great deal of energy arguing that *Fitzgerald* does not mean what it says: that a President's absolute immunity for official acts is required not only because of the danger that his official decisions will be affected by the threat of litigation, but also because "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. The Court explained that this extraordinary immunity is necessary because "[t]he President occupies a unique position in our Constitutional scheme" (*id.* at 749) and performs "sing-



lar[ly] importan[t] ... duties." *Id.* at 751. Observing further that the President is "an easily identifiable target for suits for civil damages," the Court found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office, but also the Nation that the Presidency was designed to serve." *Id.* at 753. Thus, as the Court stated, the fear of inhibiting official decision-making was "among the most persuasive reasons" for immunity; it was not the only such reason. *Id.* at 752 n.32 (emphasis added).⁴

The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal argu-

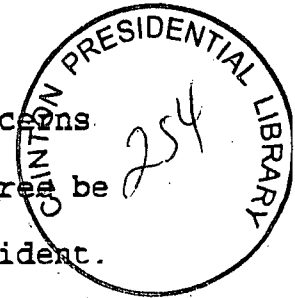
⁴ See also *id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money."). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. (Resp. Br. 11) (quoting *Fitzgerald*, 457 U.S. at 756) (Burger, C.J., concurring). We of course, do not disagree with this statement, which addresses absolute immunity in a case involving a former President. The Chief Justice's language quoted above, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation could go forward against a sitting President. Indeed, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed. Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.



ments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow*, 457 U.S. at 813.⁵ A denial of immunity, qualified or absolute, is immediately appealable for the same reason: "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 452 U.S. at 817).

These doctrines would make no sense if, as respondent supposes, personal damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction ... from ... duty," (*Forsyth*, 472 U.S. at 526), however good a public official's "lawyers and assistants" may be. This is so even when, as is typical in immunity cases, the defendant official is

⁵ In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.



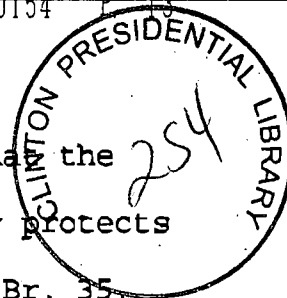
represented by government lawyers. But here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal actions by the President.

In this context, respondent's notion that the President can largely disregard the litigation, and rely instead on his law-

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yers, is even more implausible. See Pet. Br. at 22-23.

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule, we might add, that is a much greater imposition on potential plaintiffs than mere deferral.

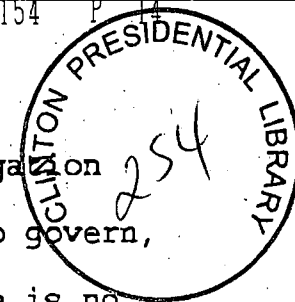
Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is "very simple" (Resp. Br. 27), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily (Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13), and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery. Resp. Br. 27; Resp.



Law Prof. Br. 6; ACLU Br. 4. Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

Every one of these arguments without exception could have been made against absolute Presidential immunity as well. But the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did not attempt to differentiate "simple" suits from others -- for the obvious reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.⁶ The Court in *Fitzgerald* also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. 457 U.S. at 752 n.32 (quoting *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). *Fitzgerald* did not rely on ad hoc trial court determinations, based on specific showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized

⁶ The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a simple case, respondent's counsel fail to credit their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses (C.A. App. 117-18); and that they may seek to compel an unprecedented physical examination of the President. *Id.* As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBaton, Sexual Harassment Suit Should Not Be Tried While Clinton Is President, Judge Rules, N.Y. Times, Dec. 29, 1994, at B6.



that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.⁷

C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Duties Of His Office.

Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. (Resp. Br. at 29) (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807)). President Jefferson refuted this assertion at the time it was made.⁸) There

And since that time, The burdens of The Presidency have increased exponentially.

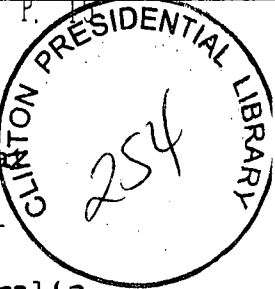
⁷ The Court's immunity decisions also undercut the related contention that the President here seeks improperly to shift the burden to the plaintiff to show that the case can go forward without impairing the President's ability to function. See Resp. Br. 40; ACLU Br. 5; Resp. Law Prof. Br. 2. In those cases, the burden is on the public official to show not that a particular aspect of the litigation would impair his ability to function, as respondent and her amici assert; rather, the burden is on the public official to show that the type of protection he seeks "is justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 224 (1988). The President has met that burden here.

⁸ President Jefferson responded:

The Judge [Marshall] says, "it is apparent that the President's duties as chief magistrate do not demand his whole time.... If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on

(continued...)

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simply is no basis in history for respondent's assertion that "Presidents have always had time to fulfill personal commitments." Resp. Br. 29. As documented in the Solicitor General's brief, almost every President has remarked on the incessant burdens of the office. Brief of *Amicus curiae* United States, 10-12. David McCullough, a pre-eminent biographer of Presidents, recently observed that to be President is to experience

unrelenting responsibility. It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.

The Presidency, he added, is "the hardest job in the world."⁹

⁸(...continued)

unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing. . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

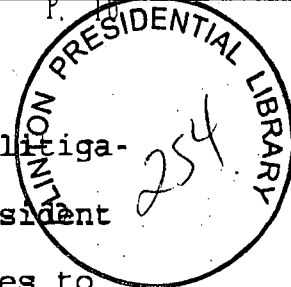
Letter from Thomason Jefferson to George Hay, (June 20, 1807), 11 The Writings of Thomas Jefferson 239 (Andrew A. Lipscomb ed., 1905).

⁹ Comments of David McCullough, "Riding The Tiger," CNN, Sept. 8, 1996 (Tr. # 934-2). Mr. McCullough further observed:

We're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit. . . . [H]e is the only person, the only individual who represents all the people. . . .

It's beyond anyone's previous experience or natural ability. . . . I don't think anybody -- no

(continued...)



Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. See Pet. Br. 13 n.9. In the litigation setting, however, the Chief Executive would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

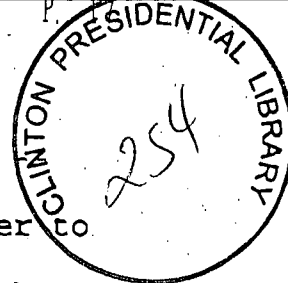
D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a

⁹(...continued)

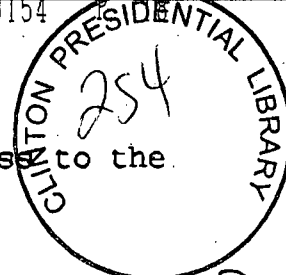
historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

Id. Mr. McCullough is the author of Truman ([publisher] 19__), and Mornings On Horseback, a biography of Theodore Roosevelt, ([publisher] 19__). He is currently working on a history of the Presidencies of John Adams and Thomas Jefferson.



number of analogous contexts in which litigation is stayed often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; see *id.* xx; Law Prof. Br. xx. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privilege" of the President than any other incident of his office, or than any immunity or similar protection is for any other public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.

PRET | Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. at 34-37. Respondent simply cannot explain why the institutional and constitutional interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would



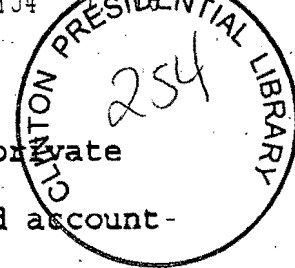
impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.¹⁰

See comment
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E. Deferral Will Not Lead To Abuse Of Office.

Respondent and her supporting amici raise the specter that deferral would shelter a variety of Presidential wrongdoing, from defaulting on a mortgage to failing to pay child support. Resp. Br. ___; Resp. Law Prof. Br. ___. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. See Pet. Br. at 37; *Fitzgerald*, 457 U.S. at 757. These deterrents, along with the knowledge that he could be subject to damages following his tenure in office, are sufficient to dis-

¹⁰ On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. (Resp. Br. at 26; CVA Br., *passim*). In *Fitzgerald*, however, the Court recognized that certain privileges and immunities 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" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and immunities. *Id.* at 750 n. 31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley*, 509 U.S. at 268 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). See, e.g., CITES.



courage a President from engaging in misconduct in his private affairs.¹¹ Realistically, with respect to deterrence and accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent. Because the President remains amenable to liability upon leaving office, deferral cannot reasonably be thought to be a license to private misconduct.

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

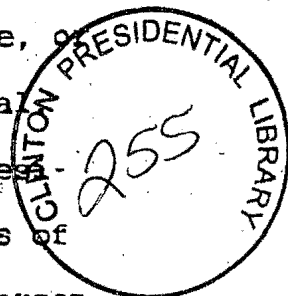
¹¹ We note that the deterrent effect of publicity, in particular, has been proven historically. It was sufficient to induce Presidents Harding and Cleveland to pay child support for illegitimate children they were accused of fathering prior to assuming office. CITES. Likewise, following President Lincoln's death, Mary Todd Lincoln struggled to repay substantial debts accrued by the First Family without being threatened with litigation during her husband's term in office. CITE. Today, publicity regarding Presidential debts is virtually assured, inasmuch as Presidents are required to disclose outstanding debts of over \$10,000 on their public financial disclosure forms. 5 C.F.R. § 2634.305(a).

To Elena - by fax → My only comment

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lege" of the President than any other incident of his office, or any immunity or similar protection is for any public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.



Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. at XX. Respondent simply cannot explain why the institutional and constitutional interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.

Are there other statutory immunities besides Soldiers?
just we rely on -- e.g., did we rely on the Bush-nifty Code -- i.e., with this reference or other references to statutory immunities to mean Soldiers & Sailors?

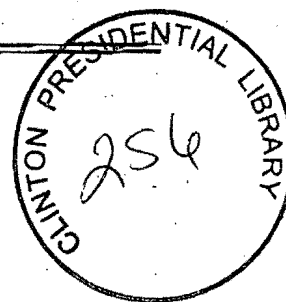
On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. (Resp. Br. at 26; Vet's Br., passim). In *Fitzgerald*, however, the Court recognized that certain privileges and immunities are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and

(continued...)

[005]

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MESSAGE: Attached please find a draft of the reply brief. We are providing it to you under the same conditions as the draft of the previous brief; including, in particular, that it not be shared with anyone outside the Counsel's office or the client without notifying us first.

Please note that while Bob has commented generally on this draft, I was unable to get specific comments from him because as he was in transit from California. We wanted to go ahead and send you this nonetheless, in order to give you ample opportunity to review it.

No. 95-1853

In The
Supreme Court Of The United States
October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner

vs.

PAULA CORBIN JONES,

Respondent.

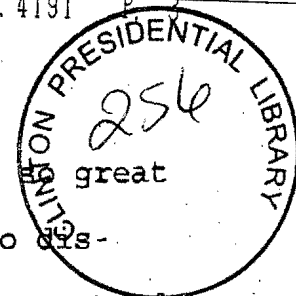
REPLY BRIEF FOR THE PETITIONER

The active litigation of a private civil damages action against the President of the United States is an event unknown in our constitutional tradition. Because such litigation can significantly impair a President's ability to discharge the duties of his office, such actions should be deferred, in all but exceptional cases, until the President's period of service has ended.

Respondent and her amici assert that such litigation should not be viewed as the extraordinary event that history shows it to be. They also insist, in the face of overwhelming evidence to



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like to proceed
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would be similar
impair his ability
to discharge
Such actions
should therefore
be deferred*



the contrary, that the burdens of the Presidency are not great that such actions would impede the President's ability to discharge the responsibilities of his office. Finally, they contend that deferral of such litigation would create a "purely personal privilege" that would place the President "above the law."

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When respondent [and her amici put aside rhetoric and address the concrete institutional problems that are posed by private civil damages actions against a sitting President,] they ultimately acknowledge that such litigation would significantly threaten the President's ability to discharge his constitutional responsibilities, and that a means must be found to protect the proper functioning of our government. Respondent's solution, however -- ad hoc "case management" by state and federal trial judges -- is not adequate for this important task. It would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President must attend to private litigation at the expense of his official duties, and inevitably would entangle the President and the courts in a series of constitutional confrontations.

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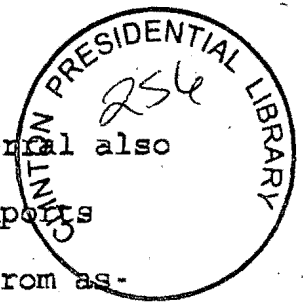
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Deferral, by contrast, is the approach most protective of the compelling public and institutional interests at stake in this setting. This limited form of protection reasonably accommodates both a plaintiff's right to seek redress and the public interest in having the Chief Executive available to perform the

list have avoided

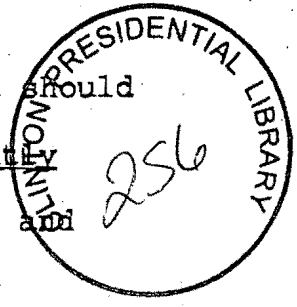


uniquely demanding responsibilities of his office. Deferral also preserves and respects the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

A. Respondent's "Scheme Of Deferral" Would Not Adequately Safeguard The Presidency Or Separation Of Powers.

Respondent and her amici ultimately concede that the unique demands of the Presidency require unique accommodation. Indeed, perhaps the most striking feature of their briefs is the contrast between their abstract complaint that deferral would place the President "above the law,"¹ and their energetic assertions that trial courts should conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than ... other defendants." (Id. at 36). Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (Id. at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." Id. at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should "'halt[] or delay[] or

¹ Brief for Respondent ("Resp. Br.") 17 (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882)).



reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." *Id.* at 35, (quoting Pet. App. 25) (emphasis and brackets by respondent); See also *id.* at 36.

fn?

Respondent's amici, whose rhetoric accusing the President of using his office "to evade equal justice under law" is equally robust,² advocate imposing a series of uncommon burdens on civil plaintiffs who sue an incumbent President. These include holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; and excusing the President from attending trial, or having him testify on videotape instead of in person. Resp. Law Prof. Br. 21-22; see also Resp. Br. XX; Pet. App. 23 (Beam, J. concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant." Br. of Amicus Curiae American Civil Litigation Union ("ACLU Br.") at 6.

² Br. Amicus Curiae of Law Professors in Support of Respondent ("Resp. Law Prof. Br.") 3.

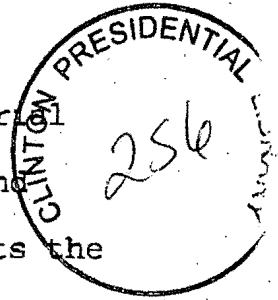
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As this chorus of accommodation and deference illustrates, this case is not about whether the President is "above the law." Rather, it is about identifying the proper means of protecting the compelling interests that are implicated when a private civil damages suit is filed against a sitting President. We submit that deferral, not piecemeal deference, is the proper approach.

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Notwithstanding respondent's soothing pronouncements about the high degree of "deference" that must be shown to the President, the realities of implementing such a "scheme of deference" in litigation are another matter altogether. First, there simply is no assurance that a trial court will be as deferential as respondent now suggests. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. (Resp. Br. at 35, 36). But she pointedly disregards the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." (Pet. App. 16). The inescapable fact is that the contours of any "deference" standard, however formulated, can never be precise or predictable because it leaves a wide swath of discretion in the hands of the trial judge.

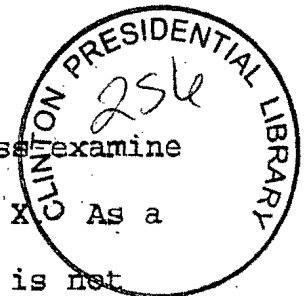
Second, it is inevitable that whenever the President seeks to postpone or modify some aspect of the litigation, or asserts that he is not required to submit to a deposition or some other



procedural requirement, the plaintiff will object. The trial judge will then have to decide, in a highly adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this function, the trial judge would have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries by a trial court, likely to be repeated throughout the litigation, present a serious threat to the constitutional separation of powers, as discussed in our opening brief. See Pet. Br. 29-34. And it should be evident that these problems are far more intractable than the already delicate balancing act that a court must perform when a President is asked merely to give third-party testimony. See Pet. Br. 26-29.

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Respondent not only understates the difficulties of implementing this "scheme of deference," she also overstates the benefits to a plaintiff of going forward with litigation under the regime she proposes. The proceedings contemplated by respondent would entail substantial expense and delay before the merits are addressed at trial. They would involve recurrent litigation over procedural matters, some of which surely will involve complicated issues of a constitutional magnitude, in both the trial court and possibly in mandamus proceedings in a court of appeals. Moreover, as respondent's amici envision this scheme, a plaintiff could be required to forego certain procedures avail-



able to other litigants, such as the opportunity to cross-examine the defendant in person before the jury. See *supra*, p. X. As a practical matter, then, respondent's "deference" scheme is not clearly more beneficial to a plaintiff in this situation than simply deferring the litigation.

At the same time, the disadvantages of respondent's scheme, compared to a simple rule of deferral, are great. Respondent's scheme necessarily creates serious separation of powers problems, as we have discussed (Pet. Br. 29-34); deferral averts those problems. Respondent's scheme multiplies the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, those limited gains do not justify the substantial costs it would inflict on our system of government.

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B. Fitzgerald And This Court's Other Immunity Decisions Solidly Reinforce The Deferral Asserted Here.

Respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making, and urges the Court not to extend *Fitzgerald* beyond the line of official conduct. (Rep. Br. at 11-16). The deferral the President seeks here, however, is

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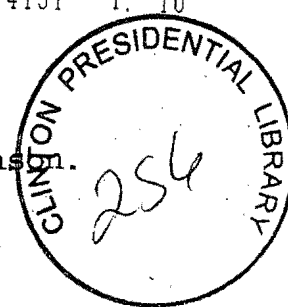
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not an expansion of the absolute immunity recognized in *Fitzgerald*; it is more accurately thought of as a lesser included remedy, necessary even in private civil damages litigation because the defendant is a sitting President. Deferral is strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's immunity decisions.

Respondent and her amici spend a great deal of energy arguing that *Fitzgerald* does not mean what it says: that a President's absolute immunity for official acts is required not only because of the danger that his official decisions will be affected by the threat of litigation, but also because "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. The Court explained that this extraordinary immunity was necessary because "[t]he President occupies a unique position in our Constitutional scheme" (*id.* at 749), and performs "singular[ly] importan[t] ... duties." *Id.* at 751. Observing further that the President is "an easily identifiable target for suits for civil damages," the Court found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office, but also the Nation that the Presidency was designed to serve." *Id.* at 753. Thus, as the Court stated, the fear of inhibiting official decision-making was only "among the most

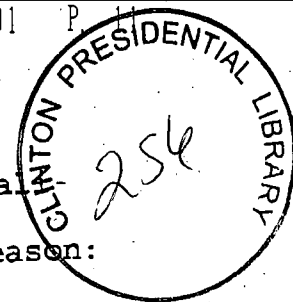
persuasive reasons" for immunity; it was not the only reason.

Id. at 752 n.32 (emphasis added).³



The logic of *Fitzgerald* and the Court's other immunity decisions further demolishes two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. (Resp. Br. 36). But the Court's immunity cases have emphasized repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public is-

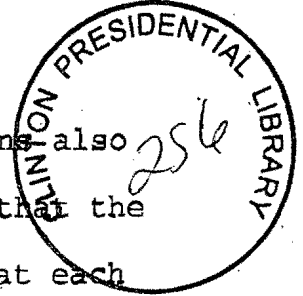
See also *id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money."). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. (Resp. Br. 11) (quoting *Fitzgerald*, 457 U.S. at 756) (Burger, C.J., concurring). We of course, do not disagree with Chief Justice Burger's statement, which addresses absolute immunity in a case involving a former President. The Chief Justice's statement quoted above, however, demonstrates that he also was concerned that civil litigation would distract the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation could go forward against a sitting President. Indeed, Mr. *Fitzgerald's* counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President should be stayed. CITE.



sues." *Harlow*, 457 U.S. at 813.⁴ A denial of immunity, qualified or absolute, is immediately appealable for the same reason: "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 452 U.S. at 817).

These doctrines would make no sense if, as respondent supposes, personal damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction ... from ... duty," (*Forsyth*, 472 U.S. at 526), however good a public official's "lawyers and assistants" may be. This is so even when, as is typical in immunity cases, the defendant official is represented by government lawyers. But here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal actions by the President. In this context, respondent's notion that the President can largely disregard the litigation and rely instead on his lawyers, is even more implausible. (See Pet. Br. at 22-23).

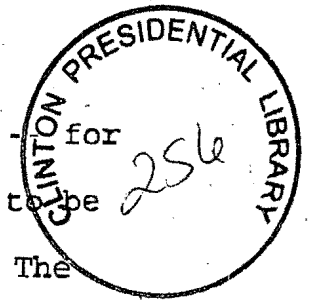
⁴ In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.



Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. See Resp. Br. xx; xx Am. Br. xx. Instead of such a piecemeal approach, however, the Court's immunity decisions adopt a general rule of immunity -- a rule, we might add, that is a much greater imposition on the plaintiff than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is "very simple" (Resp. Br. 27), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily (CITES), and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery. (CITES). Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. (CITES).

Every one of these arguments without exception could have been made against absolute Presidential immunity as well. But the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did



not attempt to differentiate "simple" suits from others - for the obvious reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.⁵ The Court in *Fitzgerald* also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. (CITES). *Fitzgerald* did not rely on *ad hoc* trial court determinations, based on specific showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.⁶

⁵ The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a "simple case" (Resp. Br. at XX, XX, XX, XX, XX, XX), respondent's counsel studiously ignore their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses; and that they may seek to compel an unprecedented physical examination of the President. (C.A. App. 117-18). As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBaton, Sexual Harassment Suit Should Not Be Tried While Clinton Is President, Judge Rules, N.Y. Times, Dec. 29, 1994, at B6.

⁶ The Court's immunity decisions also undercut respondent's related contention that the President here seeks improperly to shift the burden to the plaintiff to show that the case can go forward without impairing the President's ability to function. (See Resp. Br. XX; Resp. Law Prof. Br. XX). In those cases, (continued...)

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C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Unrelenting Duties of His Office.

Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. (Resp. Br. at 29) (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807)). President Jefferson refuted this assertion at the time it was made.⁷ And like President Jefferson and all others who have occupied the office, President Clinton continues to carry out official business whether he is on vacation or campaigning.

*24 hrs a day
365 days
whether he was
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was in a
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⁶(...continued)

the burden is on the public official to show not that a particular aspect of the litigation of that claim would impair his ability to function, as they assert; rather, the burden is on the public official to show that the protection he seeks "is justified by overriding considerations of public policy." *Forrester v. White*, ___ U.S. ___, ___ (19___). The President has met that burden here.

⁷The Judge [Marshall] says, "it is apparent that the President's duties as chief magistrate do not demand his whole time.... If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing. . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

Letter from Thomason Jefferson to George Hay, (June 20, 1807), 11 *The Writings of Thomas Jefferson* 239 (Andrew A. Lipscomb ed., 1905).

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There simply is no basis in history for respondent's assertion that "Presidents have always had time to fulfill personal commitments." (Resp. Br. at 29). As documented in the Solicitor General's brief, almost every President has remarked on the incessant burdens of the office. (Sol. Gen. Br. at XX). David McCullough, a pre-eminent biographer of Presidents, recently observed that to be President is to experience

unrelenting responsibility. It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.

In his view, the Presidency is "the hardest job in the world."⁸

⁸ Comments of David McCullough, "Riding The Tiger," CNN, Sept. 8, 1996 (Tr. # 934-2). Mr. McCullough further observed:

We're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit. . . . [H]e is the only person, the only individual who represents all the people. . . .

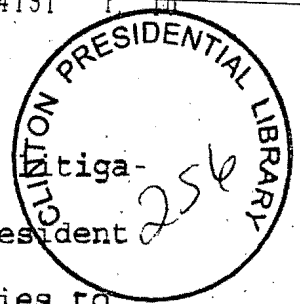
It's beyond anyone's previous experience or natural ability. . . . I don't think anybody -- no historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

Id. [Mr. McCullough has authored biographies of Truman and Theodore Roosevelt (CITE TO FULL TITLES) and is currently working on a history of the Presidencies of John Adams and Thomas Jefferson.]

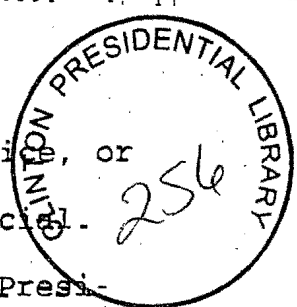
Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. (See Pet. Br. 13 n.9). In the litigation setting, however, the Chief Executive would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a number of analogous contexts in which litigation is stayed -- often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; see *id* xx; Law Prof. Br. xx. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privi-



lege" of the President than any other incident of his office, or any immunity or similar protection is for any public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.



Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. at XX. Respondent simply cannot explain why the institutional and constitutional interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.⁹

⁹ On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. (Resp. Br. at 26; Vet's Br., *passim*). In *Fitzgerald*, however, the Court recognized that certain privileges and immunities 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" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and

(continued...)

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E. Deferral Will Not Lead To Abuse Of The President's Office

Respondent and her supporting amici raise the specter that deferral would shelter a variety of Presidential wrongdoing from defaulting on a mortgage to failing to pay child support. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. See Pet. Br. at 37; *Fitzgerald*, 457 U.S. at 757. These deterrents, along with the knowledge that he could be subject to damages following his tenure in office, are sufficient to discourage a President from engaging in misconduct in his private affairs.¹⁰ Realistically, with respect to deterrence and

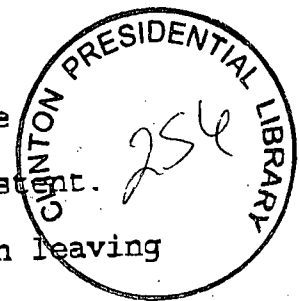
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immunities. *Id.* at 750 n. 31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley*, 509 U.S. at 268 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Finally, we note that courts on many occasions have ordered stays as an exercise of general judicial discretion, even absent express congressional authority to do so in a particular litigation context. See, e.g., CITES.

¹⁰

We note that the deterrent effect of publicity in particular has been proven historically. It was sufficient to induce Presidents Harding and Cleveland to pay child support for illegitimate children they were accused of fathering prior to assuming office. CITES. Likewise, following President
(continued...)

accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent. Because the President remains amenable to liability upon leaving office, deferral cannot reasonably be thought to be a license to private misconduct.



CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

¹⁰ (...continued)

Lincoln's death, Mary Todd Lincoln struggled to repay substantial debts accrued by the First Family without being threatened with litigation during her husband's term in office. CITE. Today, publicity regarding Presidential debts is virtually assured, inasmuch as Presidents are required to disclose outstanding debts of over \$10,000 on their financial disclosure forms. ___ C.F.R. ___.

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002. letter	David Kendall to Donald Smaltz re: Quote, draft (2 pages)	12/20/1994	P6/b(6)
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004. letter	David Kendall to Donald Smaltz re: Quote, draft (2 pages)	12/20/1994	P6/b(6)
005. letter	Judge Mikva to Donald Smaltz re: Joseph Hendrickson, draft (2 pages)	n.d.	P5 257

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- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

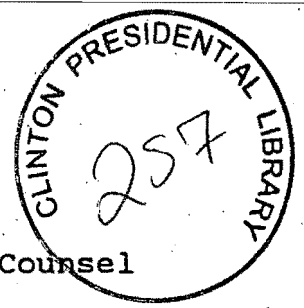
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- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information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



letter from Judge Mikva to Donald Smaltz, Independent Counsel

I recently read press reports quoting statements assertedly made by you about allegations by a former Tyson Foods Inc. employee, Joseph Hendrickson. According to the press reports, ~~Hendrickson claims that he carried sealed envelopes containing large sums of cash, intended for delivery from Tyson to then-Governor Clinton.~~ These reports quote you several times as commenting on ~~these~~ ^{the} allegations and the substance of your interview with Mr. Hendrickson, including a quote in Time Magazine: "Based upon the way [Hendrickson's] story unfolded, it has a ring of truth to it."

I was extremely dismayed to read these quotations from you regarding both the nature and credibility of Mr. Hendrickson's allegations. Government officials can be misquoted, and if these news stories concerning your comments are ~~totally false~~, I would be interested in so learning. Otherwise, I am disturbed that a federal prosecutor would, during the investigatory stages of a criminal matter, make observations to the press about the nature and strength of allegations by potential witnesses. This type of conduct goes directly against what I understand to be the proper behavior of a federal prosecutor; I had thought that federal prosecutors present their evidence to grand juries and try their cases in court, and not through comments to the press about the credibility of particular evidence or allegations.

Indeed, federal policy forbids the types of comments being attributed to you. The Code of Federal Regulations states (28 C.F.R. § 50.2) that Justice Department prosecutors "should refrain from making available * * * [s]tatements concerning the * * * credibility of prospective witnesses [and] [s]tatements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial." The most recent version of the United States Attorneys' Manual in Sec. 1-7.000, addressing release of information in criminal and civil matters, recognizes that in some unusual instances a prosecutor can confirm that an investigation is ongoing. But, again, the Attorney General's policy stated there is that federal prosecutors should refrain from making public statements concerning the credibility of prospective witnesses and evidence in a case.

My understanding is that Independent Counsel are to follow the established policies of the Department of Justice, unless doing so would be inconsistent with the purpose of the Independent Counsel statute. See 28 U.S.C. § 594(f); Morrison v. Olson, 487 U.S. 654, 696 (1988) ("the Act requires that the counsel abide by Justice Department policy unless it is not 'possible' to do so"). I do not see how making comments to the press at this stage describing Mr. Hendrickson's inflammatory

allegations as credible is in any way consistent with the purposes of the Independent Counsel statute. Even if you were not bound by the Attorney General's standards, I would think that you would find them a good guide to your own conduct as a federal prosecutor. See S. Rep. No. 100-123, 100th Cong. 1st Sess., 24 (1987) (emphasizing that "independent counsels should follow the same rules in their investigations as apply to other federal criminal investigations, so that the subjects of the investigations are treated in the same manner as other persons").

would
I hope in the future you will, as a federal prosecutor, refrain from making these types of improper public comments, and will instead follow the recognized code of behavior that is appropriate for such important officials.

Using the press as a filter for your legitimate activities and confine your advocacy to appropriate places.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Handwritten Note (1 page)	n.d.	P5 258

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8287

FOLDER TITLE:

Indian Gaming - McCain Inquiry

Kelly Hendren
2009-1006-F
kh569

RESTRICTION CODES

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

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

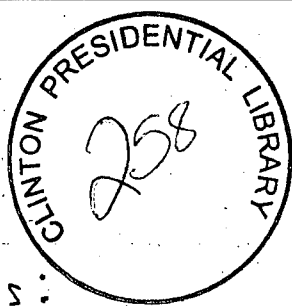
- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4)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

- b(1) National security classified information [(b)(1) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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

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

RR. Document will be reviewed upon request.



Mayhew-chuck article says this

WST says:

(Approached by Fowler)

Asked Doc to look into it -
keep tabs.

Doc spoke to POTUS

+ Lindsey

Lindsey spoke to H1

H1 spoke to POC

Doc - had regular contacts

At least 3 documented.

to (Copies in com)
Hearsh Sibley

H1:

No recollection of calling Bablitt

Bablitt

Dutby?

H1 also doesn't remember any com w/ Fowler -
altho here thinks it's conceivable
perfectly

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Memorandum for Jack Quinn from Elena Kagan. Subject: Massachusetts Indian Gaming Compact. (2 pages)	01/31/1996	P5 259
002. note	Handwritten notes. (4 pages)	n.d.	P5 260

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8287

FOLDER TITLE:

Indian Gaming - Mass. Issue [1]

Van Zbinden
2009-1006-F
vz129

RESTRICTION CODES

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

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

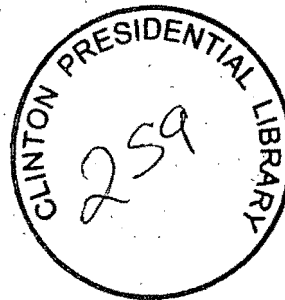
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



January 31, 1996

MEMORANDUM FOR JACK QUINN

FROM: ELENA KAGAN

SUBJECT: MASSACHUSETTS INDIAN GAMING COMPACT

The Department of Interior has raised objections to a compact between Massachusetts and the Wampanoag Indian tribe that would allow the tribe to operate a casino. Barney Frank has urged that Interior approve the compact. We asked for an oral opinion from OLC on whether Interior could approve the compact under the Indian Gaming Regulatory Act (IGRA) and other relevant law. OLC has concluded: (1) that one provision of the compact is unlawful under IGRA, but (2) that Interior can let the Compact go into effect, without either approving or disapproving it, and let the courts take care of the matter.

Background

IGRA generally prohibits a state from making a tribe pay for the privilege of gaming. (To be more precise, IGRA says it "does not authorize" the state to demand payment; courts, however, have held that this failure to authorize amounts to a prohibition, in light of background principles of Indian law.) Interior has interpreted this provision narrowly, to allow states to demand payment from tribes for monopoly gaming privileges or other benefits exceeding a simple gaming license.

The Massachusetts compact at issue here has two essential provisions. The first provision, which I will refer to as the partial monopoly provision, grants the tribe a partial monopoly for six years in return for an annual payment to the state. (The monopoly is partial in the sense that it applies not to the whole state, but to a limited geographical area.) Interior objects to this provision for policy reasons: it wants to force states to grant total monopolies to tribes. The second provision, which I will refer to as the post-expiration provision, stipulates that payments (at a reduced rate) shall continue even after the partial monopoly has expired. Interior objects to this provision on the ground that it violates the provision of IGRA discussed above prohibiting states from taxing tribes for the simple privilege of gaming.

Partial Monopoly Provision

The department concedes that the partial monopoly provision is lawful under its own interpretation of IGRA because the tribe's payment is for a benefit (partial exclusivity) exceeding the mere privilege of gaming.

Under IGRA, Interior can disapprove a compact only if it violates federal law or the trust obligations of the United States to Indians. The partial monopoly provision, as noted above, does not violate federal law. Interior has not so far claimed that it violates the nation's trust obligation, though it wishes to explore this matter further. (Presumably, the provision would violate the trust obligation if it were substantively unconscionable.) Hence, Interior currently has no legal basis for disapproving the Compact on this ground.

Post-Expiration Provision

As written, the post-expiration provision is unlawful under IGRA because it imposes a payment obligation on the Indians after any exclusivity expires, for the mere privilege of gaming. (It is also possible that the provision is so substantively unconscionable as to violate the United States' trust obligation to the Indians, but Interior has not yet made this claim.)

For two reasons, the provision cannot properly be understood as either (1) a deferred payment for the Tribe's six-year term of partial exclusivity, or (2) a payment for the continuing benefits of first entry. First, the post-expiration payments continue indefinitely. Second, the payments are in part pegged to the amount any other casino operator pays to the state. These features make the post-expiration provision seem far more a tax on continuing gaming activity (exactly what IGRA prohibits) than a payment plan for the fair market value of a monopoly position.

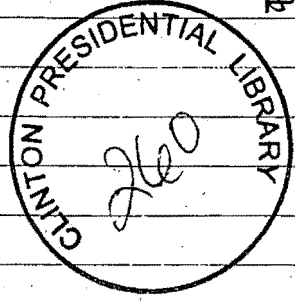
The Secretary, however, need not disapprove the compact on this basis. Under IGRA, an illegal compact provision authorizes but does not mandate secretarial disapproval of a compact. The Secretary, rather than disapproving the compact, can simply do nothing. If he takes this course, the Compact, to the extent consistent with IGRA, automatically goes into effect on the 45th day after the compact was submitted to him. This statutory scheme essentially allows the Secretary to defer to the courts on whether a Compact violates IGRA. The Secretary lets the compact go into effect; a court (assuming someone brings a suit) strikes the provisions of the Compact that are inconsistent with IGRA. (The Compact has a severability provision, so striking a provision would not lead to invalidation of the total compact.)

There is a small possibility that a decision to let the compact go into effect, knowing that it violates IGRA, would subject the department to a tort suit for failing to act in accord with its trust obligations. Such suits, however, have been successful very rarely -- usually when the US is acting in a much more obvious trustee capacity (as when it is holding land in trust for a tribe). In addition, it is hard to argue that the Secretary is breaching trust obligations given that his "nondecision," by the IGRA's terms, brings into effect only the parts of the Compact consistent with IGRA.

This is not all
intent + expect that it will
go into effect -
quite the opposite

But given way statute works - Secy is allowing to go into
effect only what is lawful.

Also, cases re trust remedy - apply where US is
trustee in more liberal sense.



Secy has oblig to
invest subst terms

but on above - for
claim may be more H. ←

to not claim possibility

???

If state seeks to collect fee 1st 7th yr.

- tribe may be entitled to fed rep.

- state may be committing a viol of Johnson Act ??

3. If 27th not in compact -

(partial
minor)

Secy would have to be of opinion that the compact
violated trust oblig.

Not a viol of IGTA in that case.

If minor = op. exp

so too partial minor = op exp.

Telecon w/ Teresa 1/24

1. substantive violation?

- IGRA - "no payment"

9th Circuit - 32 F3d 430 - ^{express} no prohibition
even if no authorization
but does prohibit by implication

Even if IGRA didn't exist - prob. still no good to
tax - fed law - tribes should derive beneficiaries
of activity

Then payments are ~~not~~ in prohib. categ

Clause 2 - ~~over~~ belies any theory -

If ~~not~~ there - even then...

Payments in perpetuity.

Unreas to think

not deferred payment plan for benefit of
monopoly - a tax.

Need a fixed amt - no limit to what st. is

changing - wholly dependent on future activity

(Circ. policies - all end
at certain point)

2. So what?

Inclined - Secy ~~is not~~ authorized to approve if a viol.

But can - neither approve or disap.

Allow it to come into effect.

When would come into effect - all courts w/ IGRA

He could note provision of compact violates
tribe's have to.

(12/4/91)

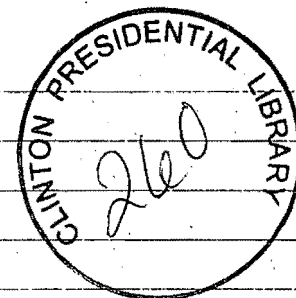
one example - Secy allowed compact to go into
effect - noted he thought 1 provision unlawful.

Cumulative - trust obliqs.

some cases where breach of t.o. gives rise to
trust claim.

Arg - compact violated IGRA - hence a breach of trust
obliq.

Sutherland v. ...



1. The Law

A. Partial Monopoly

This is policy, not law

In fact, they can't ^{do} happen on this basis unless
the provision would be a viol. of trust responsibilities.

B. After-monopoly provisions

1. Substantive violation

Not just structuring payment for monop. given

- ad inhibitions for fixed art - can't be fair value
- pepped to fee from non-Indians

2. But they can allow to go into other.

Can neither app nor disapp.

Then, the comp comes into effect to the extent con-
sistent w/ law.

(could be viol of trust ^{obj}?? subj to suit??)

2. Leahy

We'd have done it if H 7 said

Except for 7th yr.

Frustration; shuffling.

Conv w/ J. Lesby

said

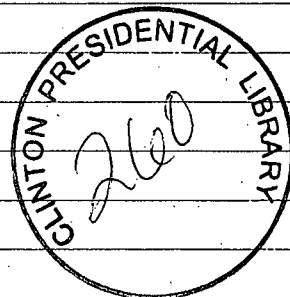
IL HTI had "just do it" - we would have just done it.

Team players.

(But 1590 provision ...)

Except for that - OK. (Even w/ that??)

Frustration - shuffling; when a decision?



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Handwritten notes. (6 pages)	n.d.	P5 261
002. note	Handwritten notes. (2 pages)	n.d.	P5 262
003. memo	Memorandum to Troy Woodward from George T. Skibine. [Subject: Tribal-State Compact] (4 pages)	10/24/1995	P5 263

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8287

FOLDER TITLE:

Indian Gaming - Mass. Issue [2]

Van Zbinden
2009-1006-F
vz130

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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RR. Document will be reviewed upon request.

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

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TERESA

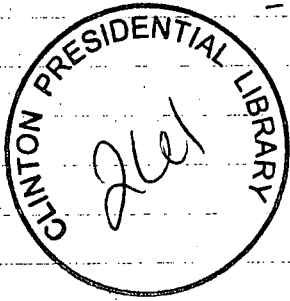
- Can they disapprove for anything other than a viol of law?

- Is there a viol of law here

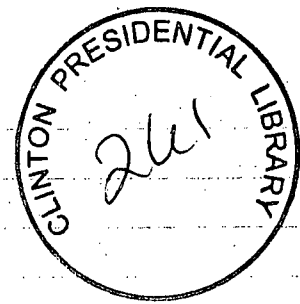
a) partial minor provisions a viol of best efforts??

b) payment after expiration provisions
- consider twice as much w/in 6 yrs.

- just a way of structuring payments



For each provision.



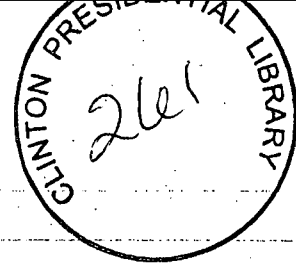
- subpoena

- Mac Lennet

- Indians

- Civil Justice Reform EO

Fair legal questions - en banc
Not to say Interior a/cut down
But some s's.
Approp coming of action -
Interior explanation
Get OCC to review
Then we'll review.



Thursday

ICKES — FRANK →

Legality / basis for Ickes's objections

3 bases -

if just policy reasons...

If we're objecting bec it's illegal

legal

mem — end of day throw

3 key points

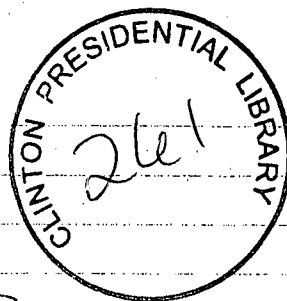
- slot machines
- 100 miles
- MA leg - compact / - if non-exclusivity is broken
- Do Ickes - objecting on # of bases.

Do any of these make compact non-exclusive?

Is Dept. why this on legal basis, or on policy basis?

this because
if non-exclusive, then
is payment precluded?
(by IR64)

because
a) slot machines
b) 100-mile provision
makes it so, then



Wam lads - want to acquire prop in NBed for casino
why w/ state to get compact

but willing to support compact?

Best position - need exclusivity

Frank position - don't need complete exclu

for — ?

May in Mundy - Germany / Frank

legislation: tribe
Interim: State can't tax for priv of gaming
get around: tribe can vol. make payment to it
if paying for exclu.

law?
policy?

that's where we've approved payment
abt (12) like this (of 150)

Prob. is the payment (90 m)

closer to extracting payment - more law

More vol, then more policy

St doesn't want to grant this exclusivity -

indeed, compact countenances other gaming.

poss
slot machines
in raceback
in east
also other whole
casino in west
non-indian

partial exclusivity - 20 mile area exclusive
for 6 yrs

then - reg'd to make another payment

but 2 w/out anything - less payment (15%)
regardless of what happens.

but has to disapprove "bad deals" - paternalistic role

But of the slope -

payment w/out any benefit to tribe

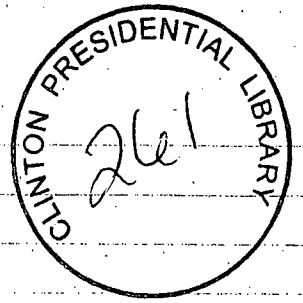
entire other gaming (as part of deal) - helps tracks

If approved -

policy of exclusivity is gone.

All 12 now - wholly exclusive

N. Mex - tribe makes per diem payment - no payment on any
day when slots at tracks operate



Amt of \$ doesn't make diff.

- Not rejected other deals like this.
- One of a kind.

Part of reason - Frank refuses to let folks deal -
he thinks this is the one + only.

Secy made error - October
said partial exch. OK.

Other officials also said this in public (for newspapers)
Frank says no reliance.

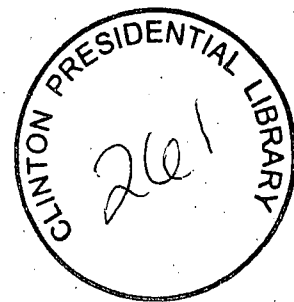
90m per yr.

Handled -

payment for only the six yrs?

Casino - New Bedford

Telecon - Kathy Higgins



Pat / Harold → B Frank

Another mtg w/ Luther today. Issues:

- ^{just} a1 addtional casino ^{could be interpreted} more broadly

- slot machines

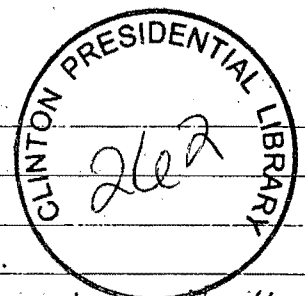
* - payment beyond 6 yrs.

Pat + HI - going to talk to BF again - how he wants to address.

208-4423

208-3401

John Leahy / Bob Anderson



1. one clear legal problem - IGRA.

Payment here - suit is "exclusive"

But - here payment is required even if ^{partial} exclu disappears

clean-cut inconsistency

2. Post-payment only for total

↓
partial

} This is policy

IGRA - says: A about Rediff how total partial

3. Grey - IGRA - consistent w/ Trust resp.

→ compact so long - could pose a legal problem - failure to do trust response.

- not troubled by parties above.

but -

? partly: does tribe ~~get~~ understand when it's sitting into?

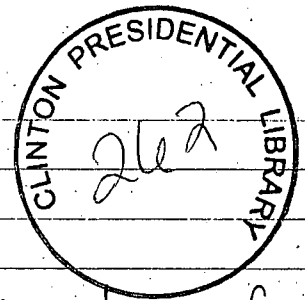
They think - ^{mount} single casino
- 2500 slots (4 tracks)

we need to make sure of this list - that they understand

We think - seems to ^{specific} auth above
+ then provide exclu. in NB area (25 mi)
poss of additional casinos
(Indians don't need in this way)

Then - we have to figure out whether really bad.

John Duffy - 208-5617



Outer limit of law - can't impose a tax or fee
a) any payment - rejected
✓ b) some " OK - if return

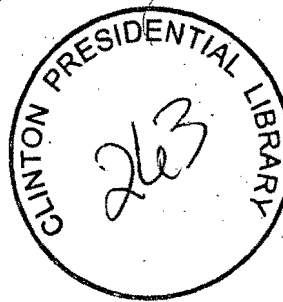
↓

we can't auth payment
where Q in return

Also - can't auth a/mnt
rel. to the value of payment
+ what Payee is getting

↓

[Trust responsibility
Not statute



FILE COPY
SURNAME

Indian Gaming Management
MS 2070-MIB

OCT 24 1995

"ATTORNEY-CLIENT PRIVILEGED"
DO NOT RELEASE WITHOUT PROPER AUTHORIZATION

Memorandum

To: Associate Solicitor, Division of Indian Affairs
Attn: Troy Woodward

From: George T. Skibine *15/ GTS Skibine*
Director, Indian Gaming Management Staff

Subject: Tribal-State Compact between the Wampanoag Tribe of Gay Head (Aquinnah) and the Commonwealth of Massachusetts

Attached for your legal review is the above-referenced Compact, which has been signed by both a representative of the State of Massachusetts and the Tribal Chairperson, Beverly Wright. We have verified that Chairperson Wright is the duly-recognized tribal official and that she is authorized to act on behalf of the Tribe. Although the Compact has been executed by William F. Weld, Governor of the Commonwealth of Massachusetts, Section 35 of the Compact provides that the Compact shall become effective at the later of (1) the Secretary's publication of the Compact in the Federal Register or (2) the enactment of the Compact by the Massachusetts General Court and approval of such enactment by the Governor. We question whether it is appropriate, under the Indian Gaming Regulatory Act (IGRA), for the Secretary to review the Compact before its enactment by the Massachusetts General Court.

In addition, this Compact includes the following notable sections:

Section 2. Purposes and Objectives. Subsection (b) of this Section purports to grant the State authorization to permit Class II gaming in a temporary facility. Is this provision consistent with the requirements of Section 11(b)(1) of IGRA, 25 U.S.C. 2710 (b)(1)?

Section 4. Authorized Class III Gaming. This Section authorizes the following games: banking and non-banking card games, dice games of all types; money-wheel, roulette, let it ride, chuck-a-luck, pan games, keno, over and under, horse race game, acey-ducey, beat the dealer, bouncing ball, any bazaar game not listed above, electronic gaming devices, slot machines, video facsimiles of any game of chance listed above, off-track pari-mutual telephone betting on animal races, raffles, progressive gaming and any game which will

be authorized in the State after the execution of this document. This Section makes it automatic for the Tribe and the State to add games without Interior approval. Is this provision consistent with the requirements of Sections 11(d)(3) and 11(d)(7) of IGRA, 25 U.S.C. 2710(d)(3) and 25 U.S.C. 2710(d)(7)?

Section 5. Gaming Facilities. Subsection (c) of Section authorizes the Wampanoag Tribe to conduct class II and class III gaming, under the terms of this compact, in an off-reservation temporary facility within the bounds of the City of New Bedford, and located on land which is neither held in trust nor otherwise owned by the Tribe. Is this provision consistent with the requirements of Sections 11(d)(3)(B) and 20 of IGRA, 25 U.S.C. 2710(d)(3)(b) and 25 U.S.C. 2719?

Section 9. Enforcement of Compact Provisions. Subsection (e) of this Section authorizes the National Indian Gaming Commission to enforce the provisions of this Compact, in accordance with Section 14 of IGRA, 25 U.S.C. 2713, which governs civil penalties. However, is the breadth of this provision consistent with the requirements of Section 11(d)(7)(A) of IGRA, 25 U.S.C. 2710(d)(7)(A)?

Section 25. Tribal Payment for Facility Related Costs. This Section requires the Tribe to pay to the State and the City of New Bedford actual costs of roadway and infrastructure improvements incurred, up to a maximum amount of \$6,000,000.00. If the State and the City will be reimbursed for any of the actual expenses by another source, the Tribe will be reimbursed only one-half of the amount that it paid out. Is this provision consistent with the requirements of Section 11(d)(4) of IGRA, 25 U.S.C. 2710(d)(4)?

Section 27. Grant of Exclusivity. Subsection (b) of this Section stipulates that the Tribe will make voluntary contributions to the State "in full settlement and satisfaction of outstanding controversies" between the parties. What are the outstanding controversies? Is this provision consistent with the requirements of Section 11(d)(4) of IGRA, 25 U.S.C. 2710(d)(4)?

Subsections (b), (c), and (d) of this Section grant the Tribe, in return for cash payments described in Subsection (e), the following rights: 1) The exclusive right to operate class III games other than slot machines within the Boston Consolidated Metropolitan Statistical Area; 2) the exclusive right to operate slot machines within a 20 mile radius of the Tribal Gaming Facility; and 3) the exclusive right to operate class III games within the New Bedford Metropolitan Statistical Area. The State reserves the right to authorize a single casino in Hampden County, and to authorize not to exceed 700 slot machines at each of the four racetracks licensed by the State. In addition, Subsection (d) provides that games currently or subsequently offered by the Massachusetts State Lottery are not covered by this grant of exclusive rights to the Tribe.

Subsection (e) of this Section provides for a \$90,000,000 payment to be made by the Tribe to the State, plus or minus a small amount depending on the nature and magnitude of the other gaming operations in the State. This payment is made as follows: 12% paid directly by the Tribe to surrounding cities and towns; \$400,000 to the Town of Dartmouth for special impacts; 2% to the non-profit organizations which will be providing services for compulsive gamblers; and the remainder of the \$90,000,000 will be paid to the State.

Subsection (f) of this Section specifies that the tribal payment shall be used for the following purposes: (1) fund operations of local governmental agencies; (2) cover the cost of licensing and regulation of gaming; (3) cover the costs of impacts resulting from gaming; and (4) any other use not specifically set forth in the Compact which is in compliance with law.

Are these provisions consistent with the requirements of Section 11(d)(4) of IGRA, 25 U.S.C. 2710(d)(4)?

Subparagraph (h) of this Section provides that if the Tribe loses the exclusivity described above within six years, the Tribe agrees to continue to pay for the actual costs of regulation, licensing and Compact oversight of the Tribe's facility. If the Tribe loses exclusivity after six years, it agrees to make a cash contribution equal to the greater amount of a) the State's actual costs for regulation, licensing and Compact oversight of the Tribes's Gaming Facility, plus 15% of the amount the Tribe would have paid under this Compact with exclusivity or b) an amount calculated at the lowest rate which is paid to the State by any other casino in the Commonwealth. Are these payments consistent with the requirements of Section 11(d)(4) of IGRA, 25 U.S.C. 2710(d)(4)?

Section 34. Severability. This Section makes all sections of the Compact severable except for the section that requires payments to the State. Is this provision consistent with the "good faith" requirement of Sections 11(d)(3) of IGRA, 25 U.S.C. 2710(d)(3), and with Section 11(d)(4), 25 U.S.C. 2710(d)(4)?

Section 35. Effective Date. As stated in the first paragraph of this memorandum, we question the authority of the Secretary of the Interior to review and publish this Compact in the *Federal Register* pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. 2710(d)(3)(B), before it is enacted by the Massachusetts General Court.

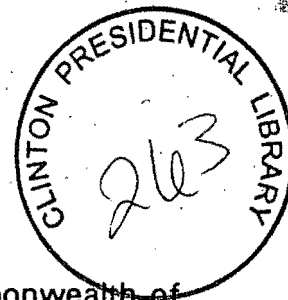
Please contact Paula L. Hart of my staff, at (202) 219-4066, should you have any questions regarding this matter.

Attachments

bcc: Surname, Chron

BIA:GSkibine:trw:10/24/95:219-4068 wp:a:wampano.com

BRIEFING PAPER



ISSUE: The Wampanoag Tribe of Gay Head (Aquinnah) and the Commonwealth of Massachusetts submitted a Tribal-State Compact to the Department of the Interior for review and approval on September 29, 1995. The 45 day deadline will occur on November 15, 1995. The Compact contains some questionable Sections namely Section 27 which allows payments to the State. Although the initial problem is with the signatures on the Compact. A determination is being made by the Solicitor's Office as to whether or not the Compact needs to be approved by the State Legislature before the Department can approve or disapprove. They also have submitted to Eastern Area Office an Off-Reservation land acquisition application. The land acquisition is for a gaming site in New Bedford.

DATE PREPARED: October 26, 1995

BACKGROUND: The Wampanoag Tribe would like the Department to approve their Compact based on it's similarities to the previous Revenue Sharing Agreements that we have approved. The Department has on two other occasions approved Revenue Sharing Agreements. These agreements were in Connecticut and New Mexico. In both of these States the Tribe has purchased exclusivity. The Wampanoag Tribal-State Compact can be distinguished from both Connecticut and the New Mexico Tribal-State Compacts.

TRIBAL CONCERNS/IMPACTS: The Tribe's concerns are that if we do not approve this Revenue Sharing Agreement that the State will not allow the Tribe to conduct Class III Gaming in New Bedford which is the Tribe's proposed site. The Tribe's position is that even though they can game on their reservation, their reservation is not the most suitable in advantageous economically.

STATE CONCERNS/IMPACTS: The State's position is that the Tribe does not have the right to game on any other land outside of their reservation land and that they should pay to game their.

RECOMMENDATIONS FOR RESOLUTION: The Tribal-State Compact is under review in the Solicitor's Office and the application for the land acquisition is under review at the Eastern Area Office. The Office of Indian Gaming Management will be requesting a meeting between the State, the Tribe and the Solicitor's Office, to work on a compromise that can be approved by all parties.

PREPARED BY: George T. Skibine, Director
Indian Gaming Management Staff
(202) 219-4066

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	To Elizabeth Blaug from Kathleen McGinty cc Elena Kagan and Shelly Fidler. Subject: headwaters. (1 page)	04/17/1996	P5 264
002. draft	Draft letter. (4 pages)	04/01/1996	P5 265

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8289

FOLDER TITLE:

Headwaters Forest Complex [1]

Van Zbinden
2009-1006-F
vz131

RESTRICTION CODES

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

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

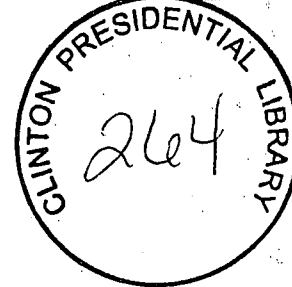
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



EXECUTIVE OFFICE OF THE PRESIDENT

17-Apr-1996 09:50pm

TO: Elisabeth Blaug
FROM: Kathleen A. McGinty
Council on Environmental Quality
CC: Elena Kagan
CC: Shelley N. Fidler
SUBJECT: headwaters

i talked to garamendi today. updates:

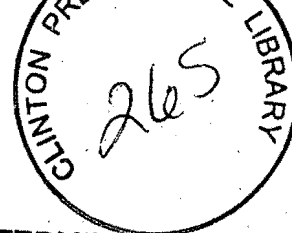
says hurwitz called him yesterday to say that he had signed off on the litigation letter. i hadn't realized we were that far along. are we?

says he will send paper to us on properties he would like to go back to hurwitz with for h to go thru and start narrowing down. g assured me that he understands all of the disclaimers that need to go along with paper like that. nonetheless, i would like to see if there weren't some process we could go thru to make sure that we don't already know that there is some problem with a particular problem (for example, g says he understands that willie brown has his digs into treasure island. g thinks it would be "fun to watch" hurwitz try to take brown on. well i don't know about you, but i don't think we should be setting that kind of match up. why give h great ammo to say we back awya from things just to do favors for our friends.....)

could you pls consult and see if there is a way we could do a political/substantive scrub on these properties? thx

shelley -- i assume you are prepared to reiterate the clear (tho gentle) msg to rominger -- don't call us; we'll call you.....garamendi is our lead.....

thx.



~~CONFIDENTIAL ATTORNEY CLIENT PRIVILEGE~~
~~ATTORNEY WORK PRODUCT~~
~~NOT SUBJECT TO FOIA OR DISCOVERY~~

DRAFT April 1, 1996

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: DB DATE: 11/29/12
2009-1006-F

Honorable John Garamendi
Deputy Secretary
Department of the Interior
1849 C St. N.W.
Washington, D.C. 20240

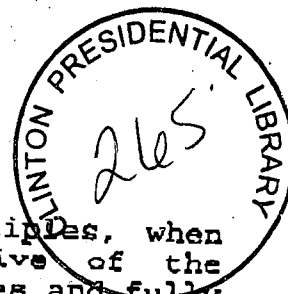
Dear Deputy Secretary:

This letter addresses the manner in which the Department of the Interior, MAXXAM Inc., MAXXAM Group, Inc., Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation will characterize their discussions regarding a possible land exchange with the United States involving certain timberlands owned by Pacific Lumber Company through its subsidiaries Scotia Pacific Holding Company, and Salmon Creek Corporation ("subsidiaries").

As you may know, Pacific Lumber Company, including its subsidiaries, is also a subsidiary of MAXXAM Inc. and MAXXAM Group, Inc. Pacific Lumber Company through its subsidiaries now owns approximately 195,000 acres of timberland in Humboldt, California. Included in this acreage is a tract of about 4,700 acres titled to Salmon Creek Corporation, commonly known as the Headwaters Forest, comprising what some have described as the largest old-growth virgin redwood forest still in private hands.

During a recent meeting with our attorneys to discuss a possible land exchange involving acquisition of the Headwaters Forest by the United States, you expressed on behalf of the Department of the Interior a concern; namely, that statements made during the course of any subsequent discussions might, if those discussions failed to result in a consensual land exchange, be thereafter used in subsequent litigation in a manner that is adverse to the interests of the United States. As I said on prior occasions, it was not and is not my intent that statements made during any land exchange discussions by the parties, including their employees, agents, officers, representatives, experts, consultants, assigns or subsidiaries, would be used in any subsequent litigation between the United States, MAXXAM Inc., MAXXAM Group, Inc., Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation ("parties").

Accordingly, and in consideration of the mutual benefits to all parties of frank and open discussions regarding the possible land exchange, this letter represents our agreement that any statements made during the discussions of the possible land exchange are inadmissible in any future judicial proceeding involving the United



States of America.

I view this letter of agreement and attached principles, when countersigned below by an authorized representative of the Department of the Interior, as binding upon the parties and fully enforceable against any of the parties. My signature below constitutes a representation that I have been duly authorized to execute the letter. I also represent that this agreement by me is binding on behalf of all the corporations identified in this letter, and that this agreement is authorized by appropriate corporate bylaws and resolutions of MAXXAM Inc., MAXXAM Group, Inc. and Pacific Lumber Company and its subsidiaries.

The attached principles set forth in greater detail the agreement between the parties on how oral and written information would be characterized in our discussions, should our efforts prove unsuccessful.

Let me also take this occasion to assure you of our good faith interest in pursuing our discussions with the Department of the Interior. We are prepared to engage in meaningful negotiations over the value of the 4,700 acre Headwaters Forest and any property that may be acquired through an exchange by Pacific Lumber and to be flexible and creative as to the type and mix of compensation to be received by Pacific Lumber.

With every good wish, I am

Sincerely yours,

MAXXAM Inc.
MAXXAM Group, Inc.
Pacific Lumber Company and its
subsidiaries

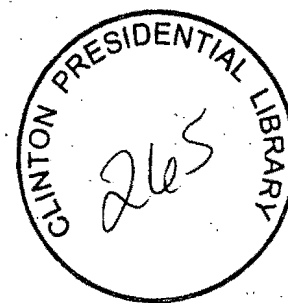
Charles B. Hurwitz
Chairman of the Board &
Chief Executive Officer

Agreed to by the United States
acting through the Department
of the Interior, by:

John Garamendi
Deputy Secretary

Date:

Encl.



PRINCIPLES GOVERNING DISCUSSIONS

For the purposes of this agreement:

The term "discussion" refers collectively to communications, meetings, expert reports, appraisals, telephone communications, correspondence, memoranda, and any and all documents regarding the contemplated land exchange involving the Property, whether written or oral, between the parties. All such discussions between the parties as of July 1, 1996 are considered discussions encompassed by this agreement. 7

The terms "party" or "parties" includes the departments, agencies and offices of the United States government, MAXXAM Inc., MAXXAM Group, Inc., Pacific Lumber Company, Scotia Pacific Holding Company or Salmon Creek Corporation and all their respective employees, agents, officers, representatives, attorneys, experts, consultants, assigns and subsidiaries.

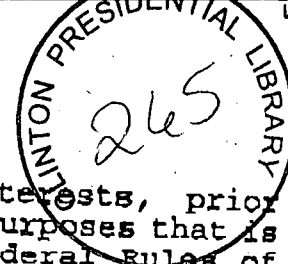
The term "Property" generally denotes an area of timberland owned by Pacific Lumber Company through its subsidiaries Scotia Pacific Holding Company and Salmon Creek Corporation in Humboldt County California consisting of approximately 195,000 acres of timberland, including approximately 4,700 contiguous acres of redwood forest commonly referred to as the "Headwaters Forest."

The promises to abide by the principles contained herein are made in consideration of the benefit to the parties of frank and open discussions.

Any party may terminate the land exchange discussions without consequence and for any reason. Participation in these discussions shall not constitute a waiver of any legal positions, rights or claims of the parties, nor shall participation in these discussions constitute the basis for any legal position, rights or claims of any of the parties.

In the event that no written agreement related to the land exchange involving the Property, including acquisition by the United States of the Headwaters Forest, is deemed possible by any party, or any party declares these discussions to be concluded, the parties agree that all discussions which have occurred shall be considered "compromise negotiations" pursuant to Rule 408 of Federal Rules of Evidence and shall be inadmissible in any future judicial proceeding between the parties, including all agencies of the United States, and that no party will seek to introduce these discussions in any civil discovery requests or motions, nor reference such discussions in any legal proceedings; provided that the parties may agree prior thereto in writing to allow admission of certain otherwise inadmissible discussions. In addition the parties agree that all discussions shall not be discoverable or

*How about
it there is
an ag?*



admissible as evidence of admission against interests, prior inconsistent statements, impeachment, or for other purposes that is "otherwise discoverable" under Rule 408 of the Federal Rules of Evidence.

It is also agreed that throughout the course of any discussions related to the land exchange involving the Property, and in the event that any party declares these discussions to be concluded, (a) the parties will keep confidential between themselves all discussions, to the extent permitted by law, and (b) unless otherwise mutually decided in writing prior thereto, no party will disclose the substance of these discussions to third parties, except as otherwise required by law. However, parties may respond to requests from duly authorized committees of the Congress and may, with mutual prior written agreement, issue generalized informational statements to third parties, including the public, pertaining to the status of the discussions under the foregoing principles, provided that they do not disclose or characterize the parties' respective positions.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Draft letter. (4 pages)	04/10/1996	P5 2666
002. draft	Draft Letter. (6 pages)	03/26/1996	P5 267
003. draft	Draft Letter. Duplicate Copy. (6 pages)	03/26/1996	P5 268 Dup 267

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8289

FOLDER TITLE:

Headwaters Forest Complex [3]

Van Zbinden
2009-1006-F
vz132

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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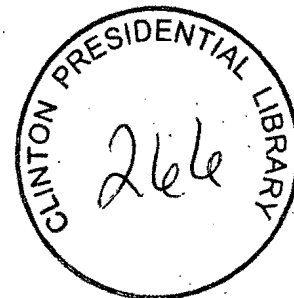
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



~~CONFIDENTIAL ATTORNEY CLIENT PRIVILEGE~~
~~ATTORNEY WORK PRODUCT~~
~~NOT SUBJECT TO FOIA OR DISCOVERY~~

DRAFT April 10, 1996

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: DB DATE: 11/29/12
2009-1006-F

Honorable John Garamendi
Deputy Secretary
Department of the Interior
1849 C St. N.W.
Washington, D.C. 20240

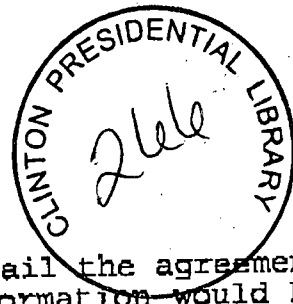
Dear Deputy Secretary:

This letter addresses the manner in which the Department of the Interior, MAXXAM Inc., MAXXAM Group, Inc., Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation will characterize their discussions regarding a possible land exchange with the United States involving certain timberlands in Humboldt County, California owned by Pacific Lumber Company through its subsidiaries Scotia Pacific Holding Company, and Salmon Creek Corporation ("subsidiaries").

During a recent meeting with our attorneys to discuss a possible land exchange with the United States, you expressed on behalf of the Department of the Interior a concern; namely, that statements made during the course of any discussions might be thereafter used in subsequent litigation in a manner that is adverse to the interests of the United States. As I said on prior occasions, it was not and is not my intent that statements made during any land exchange discussions by the parties, including their employees, agents, officers, representatives, experts, consultants, assigns or subsidiaries, would be used in any subsequent litigation between the United States, MAXXAM Inc., MAXXAM Group, Inc., Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation ("parties").

Accordingly, and in consideration of the mutual benefits to all parties of frank and open discussions regarding the possible land exchange, this letter represents our agreement that any statements made during the discussions of the possible land exchange are inadmissible in any future judicial proceeding involving the United States of America.

I view this letter of agreement and attached principles, when countersigned below by an authorized representative of the United States, as binding upon the parties and fully enforceable against any of the parties. My signature below constitutes a representation that I have been duly authorized to execute the letter. I also represent that this agreement by me is binding on behalf of all the corporations identified in this letter, and that this agreement is authorized by appropriate corporate bylaws and resolutions of MAXXAM Inc., MAXXAM Group, Inc. and Pacific Lumber



Company and its subsidiaries.

The attached principles set forth in greater detail the agreement between the parties on how oral and written information would be characterized in our discussions.

Let me also take this occasion to assure you of our good faith interest in pursuing our discussions with the Department of the Interior. We are prepared to engage in meaningful negotiations over the value of any property that may be acquired through an exchange by Pacific Lumber and to be flexible and creative as to the type and mix of compensation to be received by Pacific Lumber.

With every good wish, I am

Sincerely yours,

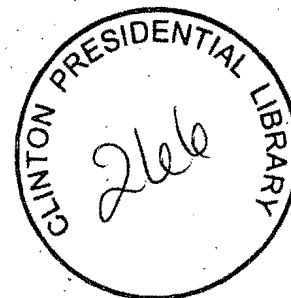
MAXXAM Inc.
MAXXAM Group, Inc.
Pacific Lumber Company and its
subsidiaries

Charles E. Hurwitz
Chairman of the Board &
Chief Executive Officer

Agreed to by the United States
acting through the Department
of Justice, by:

Date:

Encl.



PRINCIPLES GOVERNING DISCUSSIONS

For the purposes of this agreement:

The term "Property" generally denotes an area of timberland in Humboldt County, California owned by Pacific Lumber Company through its subsidiaries Scotia Pacific Holding Company and Salmon Creek Corporation.

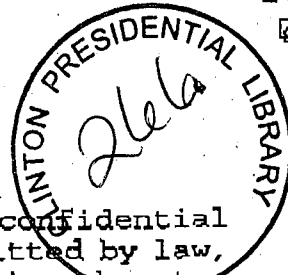
The term "discussion" refers collectively to communications, meetings, expert reports, appraisals, telephone communications, correspondence, memoranda, and any and all documents regarding the contemplated land exchange involving the Property, whether written or oral, between the parties. Discussion includes but is not limited to any commercial or financial information that is confidential or privileged. All such discussions between the parties as of July 1, 1996 are considered discussions encompassed by this agreement.

The terms "party" or "parties" includes the departments, agencies and offices of the United States government, MAXXAM Inc., MAXXAM Group, Inc., Pacific Lumber Company, Scotia Pacific Holding Company or Salmon Creek Corporation and all their respective employees, agents, officers, representatives, attorneys, experts, consultants, assigns and subsidiaries.

The promises to abide by the principles contained herein are made in consideration of the benefit to the parties of frank and open discussions.

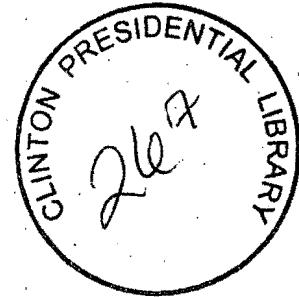
Any party may terminate the land exchange discussions without consequence and for any reason. Participation in these discussions shall not constitute a waiver of any legal positions, rights or claims of the parties, nor shall either participation in these discussions or the discussions themselves constitute the basis for any legal position, rights or claims of any of the parties.

The parties agree that all discussions which occur shall be considered "compromise negotiations" pursuant to Rule 408 of Federal Rules of Evidence and shall be inadmissible in any future judicial proceeding between the parties, including all agencies of the United States, and that no party will seek to introduce these discussions in any civil discovery requests or motions, nor reference such discussions in any legal proceedings; provided that the parties may agree prior thereto in writing to allow admission of certain otherwise inadmissible discussions. In addition the parties agree that all discussions shall not be discoverable or admissible as evidence of admission against interests, prior inconsistent statements, impeachment, or for other purposes that is "otherwise discoverable" under Rule 408 of the Federal Rules of Evidence.



It is also agreed that (a) the parties will keep confidential between themselves all discussions, to the extent permitted by law, and (b) unless otherwise mutually decided in writing prior thereto, no party will disclose the substance of these discussions to third parties, except as otherwise required by law. However, parties may respond to requests from duly authorized committees of the Congress and may, with mutual prior written agreement, issue generalized informational statements to third parties, including the public, pertaining to the status of the discussions under the foregoing principles, provided that they do not disclose or characterize the parties' respective positions.

Should a request be made of the federal party under the Freedom of Information Act for information related to discussions (as defined in these Principles), the federal party will contact the other parties before responding in order to determine whether any of the information requested is commercial or financial information which is confidential or privileged subject to 5 U.S.C. §552(b)(4).

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Honorable John Garamendi
Deputy Secretary
Department of the Interior
1849 C St. N.W.
Washington, D.C. 20240

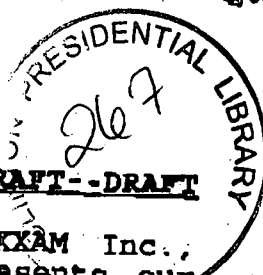
Dear Deputy Secretary:

This letter addresses the manner in which the Department of the Interior, MAXXAM Inc., Pacific Lumber Company, Scotia Pacific Lumber Company, Salmon Creek Corporation and Pacific Lumber, will characterize their discussions regarding the interest of the United States government in the acquisition by the United States of certain timberlands owned by Pacific Lumber Company through its subsidiaries Scotia Pacific Lumber Company, Salmon Creek Corporation and Pacific Lumber ("subsidiaries").

As you may know, Pacific Lumber Company, including its subsidiaries, is also a subsidiary of MAXXAM Inc., and Pacific Lumber Company and its subsidiaries now own approximately 195,000 acres of timberland in Humboldt, California. Included in this acreage is a tract of about 3,000 acres, commonly known as the Headwaters Forest and comprising what some have described as the largest old-growth virgin redwood forest still in private hands. Pacific Lumber's and its subsidiaries timberland, including the 3,000-acre Headwaters Forest, is zoned by the State of California for timber production.

During a recent meeting with our attorneys to discuss this possible acquisition of the Headwaters Forest, you expressed on behalf of the Department of the Interior a concern; namely, that statements made during the course of any subsequent discussions might, if those discussions failed to result in a consensual acquisition, be thereafter used in subsequent litigation in a manner that is adverse to the interests of the United States. As I said on prior occasions, it was not and is not my intent that statements made during any acquisition discussions by any party or its representative would be used in any subsequent litigation between the United States, MAXXAM Inc., Pacific Lumber Company, Scotia Pacific Lumber Company, Pacific Lumber, and Salmon Creek Corporation.

Accordingly, and in consideration of the mutual benefits to both parties of frank and open discussions over the possible acquisition of the Headwaters Forest, this letter, which is authorized by


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appropriate corporate bylaws and resolutions of MAXXAM Inc., Pacific Lumber Company, and their subsidiaries represents our agreement that any statements made during the discussions of the possible acquisition of the Headwaters Forest are inadmissible in any future judicial proceeding involving the United States of America. The attached principles set forth in greater detail the agreement between the parties on how oral and written information would be characterized in our discussions, should our efforts prove unsuccessful.

Let me also take this occasion to assure you of our good faith interest in pursuing our discussions with the Department of the Interior. We are prepared to engage in meaningful negotiations over the value of the 3,000-acre Headwaters Forest and any property that may be acquired by Pacific Lumber and to be flexible and creative as to the type and mix of compensation to be received by Pacific Lumber.

With every good wish, I am

Sincerely yours,

MAXXAM Inc.
Pacific Lumber Company and its
subsidiaries

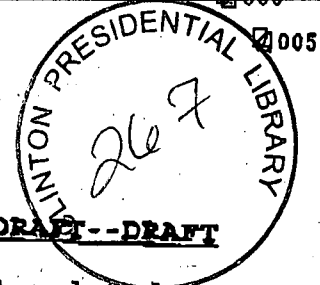
Charles E. Hurwitz
Chairman of the Board &
Chief Executive Officer

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Encl.



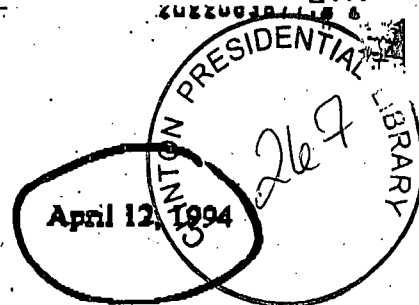
WJC LIBRARY PHOTOCOPY



~~DRAFT--DRAFT--DRAFT~~

It is also agreed that in the event no written agreement related to the Headwater Forest is deemed possible by either party, and any party declares these discussions to be at an end, (a) the parties will keep confidential between themselves, to the extent permitted by law, such information, including appraisal data, as either party accepts from the other with the understanding that such information will be kept confidential, and (b) unless otherwise mutually decided, neither party will disclose the substance of these discussions to third parties, except as otherwise required by law. However, responses to requests from duly authorized committees of the Congress and generalized informational statements to third parties, including the public, pertaining to the status of the discussions shall not be deemed inappropriate under the foregoing principles, as long as they do not disclose or characterize the parties' respective positions.

*Hunter's original
proposal*



PRINCIPLES GOVERNING PACIFIC LUMBER PROPERTY DISCUSSIONS

For the purposes of these discussions, the Pacific Lumber "Property" generally denotes an area of timberland owned by The Pacific Lumber Company in Humboldt County, California, consisting of the approximately 44,000 acres of timberland described in H.R. 2866 including approximately 3,000 contiguous acres of virgin redwood forest commonly referred to as the "Headwaters Forest."

To put participation by Pacific Lumber Company, and its parent MAXXAM, Inc., in these discussions in context, Pacific Lumber states its position as follows: Pacific Lumber's preferred course is continuous timber operations in and around the Property (including the Headwaters Forest) in accordance with lawful timber harvest regulations. Its timberland, including all of the Property, is zoned for timber production. Events beyond Pacific Lumber's control, however, have for the last several years delayed and interfered with its operations and caused it to consider other means by which to realize the value of its assets and support its operations. But for the expense, delays and inconvenience (including harassing litigation) it has suffered in obtaining approvals to conduct timber operations in certain portions of the Property, Pacific Lumber would not have entered these discussions. Any reference in this agreement to the "voluntariness" of these discussions involving Pacific Lumber and MAXXAM, Inc. must be read in the context of this paragraph.

The foregoing statements of Pacific Lumber as to its position and that of MAXXAM, Inc. are statements made solely by Pacific Lumber and are not subscribed to by the United States. Neither shall the presence of any position statement herein by Pacific Lumber be construed to limit the position of the United States.

Discussions regarding a possible public acquisition of the Headwaters Forest and a suitable buffer zone are going forward on a mutually voluntary basis. Any party is and always shall be free to terminate these discussions without consequence and for any reason, without agreement to the contrary. Participation in these discussions shall not constitute a waiver of any legal positions, rights or claims of any party hereto.

In the event that no written agreement related to the Headwaters Forest is deemed possible by either party, and any party declares these discussions to be at an end, the parties agree that all oral communications which have occurred and all offers and responses and discussion related thereto shall be regarded as in the nature of settlement discussions and, as such, shall be inadmissible in any litigation between the parties concerning the Headwaters Forest as the same would be under California Evidence Code

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Sections 1152 and 1154 and Rule 408 of the Federal Rules of Evidence. A party in litigation shall not be precluded from using on its own behalf any otherwise admissible document it prepared or had prepared for it during or for these discussions. Unless introduced by the presenting party, statements made in or documents created for or used in these discussions shall not be used against the presenting party by the receiving party. However, knowledge of the existence of various documents is recognized to be available to the receiver to use in the future in accordance with the customary rules of discovery, evidence and civil procedure.

It is also agreed that in the event no written agreement related to the Headwaters Forest is deemed possible by either party, and any party declares these discussions to be at an end, (a) the parties will keep confidential between themselves, to the extent permitted by law, such information, including appraisal data, as either party accepts from the other with the understanding that such information will be kept confidential, and (b) unless otherwise mutually decided, neither party will disclose the substance of these discussions to third parties, except as otherwise required by law. However, responses to requests from duly authorized committees of the Congress and generalized informational statements to third parties, including the public, pertaining to the status of the discussions shall not be deemed inappropriate under the foregoing principles, as long as they do not disclose or characterize the parties' respective positions.