No. 95-1853

In the
Supreme Court of the United States

October Term, 1996

WILLIAM JEFFERSON CLINTON, Petitioner,

v.

PAULA CORBIN JONES, Respondent.

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

Brief *Amicus Curiae of the American Civil Liberties Union in Support of Respondent*

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Since its founding in 1920, the ACLU has sought to ensure that people whose constitutional or statutory rights have been denied have an effective means of redress. The ACLU has participated directly or as amicus curiae in many of this Court's cases concerning immunity of public officials, including the President. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982).

The ACLU takes no position on the truth or falsity of the allegations of the Complaint. Amicus does assert that a President, sued for civil damages for actions taken outside the scope of his official responsibilities, is not entitled to an automatic (or nearly automatic) stay of the entire case until he leaves the presidency.[2]

STATEMENT OF THE CASE

Respondent alleges that while President Clinton was Governor of Arkansas he made unwanted sexual advances toward her and that, when she rejected these advances, she suffered in her employment with the Arkansas state government. Respondent also asserts that her initial intention was not to sue. However, when an article appeared in the press, which she believed implied that she had had a consensual sexual relationship with the President while he was Governor, she "saw herself as held up falsely to public scorn," Prime Time Live (ABC television broadcast, June 16, 1994) (transcript attached to Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity), and, given the discrepancy between this account of the incident and the account she had given to her friends, believed her friends might believe she had been untruthful. In addition, she alleges that the President denied her account of the incident, further casting doubt on her truthfulness.

The President asserts numerous defenses to these allegations, not the least of which is to deny respondent's account of the facts. However, prior to raising those defenses (and with the court's permission), the President filed a motion to "dismiss on the basis of Presidential immunity." Jones v. Clinton, 869 F.Supp. 690, 692 (E.D.Ark. 1994).

The district court denied the motion. Id. at 698. After reviewing the historical record and relevant case law, the court found that the Constitution itself was "silent on all of this" and that there was no dispositive case law. The court then summarized its holding with the following observation:

> [T]his Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writing of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Id.

After rejecting the broad assertion of immunity, the court next considered a "limited or temporary immunity from trial." Id. The court first acknowledged "the necessity to avoid litigation, which might also blossom through other unrelated civil actions and which could conceivably hamper the President in conducting the duties of this office . . . [and] could have harmful effects in connection not only with the President but also with the nation in general." Id. The court then discussed the specific facts of this case, finding that respondent's claims did not seem to be "of an urgent nature." Id. at 699. Relying on the "equity powers of the Court" and Fed.R.Civ.P. 40, the court ruled that it would "put the case on hold, as far as trial is concerned." 869 F. Supp. at 699. Finally, the court held that there was "no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Id.

The President appealed and the court of appeals generally affirmed, one judge dissenting. Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996). Judge Bowman, on behalf of the majority, held that the burden was on the President to establish the necessity for delay, either in the form of a rule of law, or in the specific circumstances of the individual case. Finding no dispositive decision of this Court, the court of appeals proceeded to balance the interests involved. It did so "`guided by the Constitution, federal statutes, and history' and . . . informed by public policy." Id. at 1358, citing Nixon v. Fitzgerald, 457 U.S. 731, 747 (1982). More specifically, the decision below closely followed the analytic structure used by this Court in Fitzgerald, another case involving presidential immunity. Based on this informed balancing of interests, the court then concluded that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts." 72 F.3d at 1363.

This Court granted the President's petition for a writ of certiorari and the President, joined by the United States and an amicus group of distinguished law professors argues that the district court and the court of appeals were in error. Each

proposes a rule of law that would make it completely or virtually impossible for any person to pursue a civil suit for damages for actions taken by a President outside the scope of his official duties while the President holds office.

SUMMARY OF ARGUMENT

Under Nixon v. Fitzgerald, 457 U.S. at 756, a President's entitlement to absolute immunity does not apply to actions taken beyond "`the outer perimeter' of his official responsibility." The question presented here is whether a claim for damages that would otherwise be permissible under Fitzgerald should automatically, and in every case, be "deferred" until the expiration of the President's term in office.[3]

We respectfully suggest that the answer to that question is no for two fundamental reasons. First, the notion of deferring any litigation activity involving the President for up to eight years in all damage cases is inconsistent with our nation's deeply held view that no person is above the law.

Second, the argument in favor of an automatic stay in all cases, regardless of circumstances, undervalues the very real prejudice that such a delay may create to aggrieved litigants. Among other things, memories fade and evidence becomes stale. The odds of prevailing on even nonfrivolous claims thus inevitably decline.

In some cases, that price may be inescapable. In others, it surely is not. Trial judges can and should be trusted to balance these competing interests with due deference to the special burdens faced by the President in fulfilling his duties. In particular, a trial court may fully utilize its authority over the pace and procedures of litigation to minimize the demands on the President. An automatic deferral of all litigation would, on the other hand, strip trial judges of their traditional case management responsibilities and effectively expand a President's absolute immunity from damages well beyond the carefully defined limits set forth in Fitzgerald.

The law disfavors immunities. Accordingly, the burden is upon the party seeking an immunity to establish its need. Neither the President nor his amici acknowledge this well-established rule,[4] nor do they seek to satisfy it except in the most general way -- by emphasizing the importance of allowing the President to conduct the nation's business without undue distraction. We agree with the importance of that interest, as did both courts below. The duties of the President of the United States, particularly with respect to foreign policy, are uniquely demanding. Presidents are called upon, often at all hours, to respond to national crises. But, as both courts below also held, it simply does not follow that no litigation can ever take place against a sitting President.

One of the major fears seems to be a threatened avalanche of frivolous lawsuits motivated by partisan political considerations. In our view, that fear is overstated. Nothing in the historical record supports it. Trial judges already have an arsenal of weapons at their disposal to deal with frivolous lawsuits if they occur. Finally, if not deterred by the prospect of sanctions, such lawsuits will be routinely dismissed with little or no demands on the President's time.

The difficult issue arises in nonfrivolous cases where the stakes are undeniably higher, both for the President and the opposing litigant. Even in this context, however, the demands on a President's time necessarily vary at different stages of the litigation, and from case to case. The absolute rule proposed by the President in this case does not take account of these differences. Instead, it effectively obliterates the line between official and unofficial conduct that this Court carefully established in Fitzgerald as the basis for a President's absolute immunity.

The President is not like any other litigant. But, like any other litigant, the President should still be required to justify a requested delay in the proceedings by showing that, given the particular phase of the case (e.g., motion to dismiss, deposition, interrogatory), the suit will significantly interfere with his ability to carry out the specific duties of his office then commanding his attention, and that his ability to carry out those duties cannot be preserved by a less drastic alternative than a potential eight-year stay. The decision below is consistent with that approach and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT THAT THE PRESIDENT HAS THE BURDEN OF ESTABLISHING THAT, AFTER THE RESPECTIVE INTERESTS ARE BALANCED, IMMUNITY IS WARRANTED

The lower courts found that neither the Constitution nor any decision of this Court provides an authoritative answer to the question presented by this case. Those courts also found that, in determining the scope of any claim for immunity, the court

must balance the respective interests with the burden of establishing the need for immunity on the party seeking immunity. Jones, 869 F.Supp. at 697-98. Those conclusions are correct and should be affirmed.

In United States v. Nixon, 418 U.S. 683 (1974), this Court unanimously held that the President could be compelled to provide evidence in a pending federal criminal case under appropriate circumstances. The Court first held that it was the province of the courts to determine the scope of any privilege, including one asserted by the President. Id. at 703-05. In determining the scope of any privilege, the court must balance the competing interests. Id. at 711-12. Furthermore, a generalized interest asserted by the President (in that case, confidentiality) cannot outweigh the specific interest in providing relevant evidence in a criminal case. Id. at 712-13. The Court also acknowledged the special care that must be taken in light of the unique position of the presidency and was careful to limit its holding to criminal cases. Id. at 712-16.[5]

In Butz v. Economou, 438 U.S. 478 (1978), the Court rejected the argument that federal officials were absolutely immune from damages for actions taken within the scope of their official duties. The Court held that any person seeking an immunity has the burden of establishing "that public policy requires an exemption of that scope." Id. at 506. The Court acknowledged that some officials could meet that burden and would be allowed absolute immunity. 438 U.S. at 503-17.

In Nixon v. Fitzgerald, 457 U.S. 731, the Court held that the President was one of the officials entitled to absolute immunity in some instances. Specifically, the Court held that the President was absolutely immune from damages for actions taken "within the 'outer perimeter' of his official responsibility." Id. at 756.

Noting that "[t]he President occupies a unique position in the constitutional scheme," id. at 749, the Court in Fitzgerald concluded that absolute immunity was warranted for actions taken within the scope of the President's official responsibilities for two reasons.[6] First, "damages liability may render an official unduly cautious in the discharge of his official duties." Id. at 752 & n.32. Second, a suit could "distract a President from his public duties to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve." Id. at 753.

As the President acknowledges, the first rationale does not apply here because the complaint is based on actions that allegedly took place before he assumed office. The concern about distraction is a real one. However, Fitzgerald certainly does not hold that an automatic stay is appropriate in all cases during a President's incumbency. In many cases, perhaps most, the issue will not even arise because absolute immunity will attach. Moreover, United States v. Nixon suggests that all of the concerns about distraction are insufficient if balanced against sufficiently weighty concerns. See also Section II.A.1.

In short, none of these authorities provides a definitive answer to the question raised by this case. In fact, only three clear rules emerge. First, in measuring the need for, and scope of, a claim of immunity, the burden of proof is on the party seeking immunity. Butz, 438 U.S. at 506.[7] Second, as all parties recognize, in determining whether to acknowledge a claim of immunity, the Court must balance the interests of the respective parties and the public interest. Third, the problems created by judicial acts that affect the President's schedule are insufficient, if balanced against other, sufficiently weighty concerns, to cause the courts to grant an absolute immunity from participation in court proceedings. Thus, the structure of analysis utilized by the lower courts was correct.

II. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT THAT THE INTERESTS OF THE PRESIDENT, ALTHOUGH SUBSTANTIAL, WHEN BALANCED WITH THE INTERESTS OF RESPONDENT, DO NOT JUSTIFY AN AUTOMATIC DISMISSAL OR STAY OF THE ENTIRE CASE

A. The Interests Of The President

The President and his amici suggest two major policy interests to support a broad immunity in this case: to prevent the President from being distracted from the duties of his office and to preserve the separation between the executive and judicial branches. As noted, this Court has already held that neither of these considerations, either separately or in conjunction, prevents the courts from requiring the occupant of the presidency from providing evidence in court under appropriate circumstances. Balancing the relevant factors in this case, neither factor, either alone or in conjunction with the other, should require the courts to establish a rule granting an automatic delay of a civil suit for damages for actions taken outside the scope of presidential responsibilities.

1. Distraction

There can be no question that the President, as any defendant, may be called upon to expend time in his defense. It also cannot be seriously denied that there may be occasions when the time required will be substantial and when the time being

spent will divert him from his attention to his duties as President. Finally, this diversion may occur at the discovery phase as well as at trial.

There is a strong national interest in ensuring that the President not be unduly distracted from his responsibilities as President. The President and his amici are correct when they suggest that the presidency is a unique office with uniquely broad responsibility. Particularly in the area of foreign policy, the President often speaks for the nation in a way that no other public official can. Moreover, foreign policy problems, in particular, are apt to occur at all hours and Presidents are awakened in the middle of the night to attend to vital matters affecting the entire nation and even the world. Foreign policy crises can be of singular importance, involving matters of war and peace, life and death. Thus, the first concern raised by the President -- distracting him from his duties -- is an important one.

However, this concern can be overstated. First, the President emphasizes that the executive branch, unlike the legislative or judicial, is headed by a single official. This means, he argues, that he alone must be available to make decisions 24 hours a day. Of course, many "presidential" decisions are made by lower level officials and never even presented to the President. Moreover, the same singularity applies to state governors who, within their sphere of responsibilities, are the lone, final decisionmakers.

The President must be available 24 hours a day, but that does not mean that Presidents actually work 24 hours a day. Of course they do not. All Presidents do, in fact, sleep, vacation, and engage in nonpresidential social and political activity.[8] Depending on their personal management styles, Presidents have worked more or less demanding schedules. Thus, President Carter was famous for working long hours, President Reagan for working at a more relaxed pace.[9]

Moreover, like the concern for confidentiality in United States v. Nixon, the concern for the President's time is generalized, not specific. Although there will be occasions during litigation when the President is called upon to expend significant time on his defense, there will also be occasions and even entire cases when he is not required to spend any substantial time on defense.

Many suits against an incumbent President are likely to be frivolous.[10] Courts have ample tools at their disposal for quickly dispensing with frivolous litigation, and it is fair to presume that those tools will be quickly employed when the President is a defendant. See Fed.R.Civ.P. 12, 12(f), 56. Furthermore, courts have broad authority to impose sanctions on parties and lawyers who file lawsuits "for any improper purpose, such as to harass"; lawsuits that lack evidentiary support"; and lawsuits that are lacking in legal basis. Fed.R.Civ.P. 11. Courts also have the power to award attorneys' fees, cite parties for contempt, and impose sanctions under their inherent powers. Id. (committee comments); Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

The President suggests that these devices will be ineffective in preventing frivolous litigation against a President because those bringing the suit are often more interested in the publicity than in the result of the action. However, the attention paid to those bringing allegations against a President comes not from the court proceedings, but from the factual allegations themselves and the media attention surrounding them.[11] Even if the President is given the kind of immunity he seeks -- a stay of proceedings until the end of his presidency -- a complainant is free to do what has already been done in this case: make public charges and file a complaint. The complainant is free to outline the evidence he will put forth at trial. And he will have the added advantage that he can rightly say that the President has chosen to hide behind presidential immunity rather than honestly confront the charges.[12] The only practical method for dealing with frivolous allegations is swift action under the Federal Rules to dismiss such cases.

It is in nonfrivolous cases that the plaintiff's interest in redress and the drain on the President's time are both likely to be maximized. The President's solution to that dilemma is to favor a rule in every case granting the President an automatic stay during the duration of his presidency. That solution entirely discounts the plaintiff's interest, however; and although it might be the right answer in some cases, it should not be the automatic answer in all cases.

The concern about the President's time applies equally in the case of injunctive relief sought against the President, whether that injunctive relief is based on actions taken outside or within the scope of his official responsibilities. Even with regard to actions taken within the President's responsibilities, where damages may not be obtained, this Court has implicitly held that injunctive actions may go forward. In the immunity cases, the Court repeatedly cites Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), for the proposition that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President . . . ." Nixon v. Fitzgerald, 457 U.S. at 753-54; United States v. Nixon, 418 U.S. at 707. But see Franklin v. Massachusetts, 505 U.S. 788, 827 (1992)(Scalia, J., concurring).

The continued viability of Youngstown cannot be explained by the notion that a civil case seeking injunctive relief will invariably require less of the President's time than a civil case seeking damages. There will be cases in which that is so and cases in which it is not. Thus, the danger of diversion of the President's attention from matters of state is insufficient, standing alone, to justify an automatic stay or dismissal of litigation.

Similarly, United States v. Nixon stands for the proposition that despite the distraction that will inevitably flow, the President can be compelled to provide evidence, including testimony, in a criminal case. In this case, the President and his amici argue that the case against defendant Ferguson should also be dismissed or stayed because the demands on the President's time as a potential witness would be so great. In other words, they argue that in a civil case, the rule of law should be the opposite from that in Nixon. Were this distinction to have value, it could not be as a result of any suggestion that being a witness in a civil case will inevitably involve more of a demand on the President's time than being a witness in a criminal case.

Thus, both Youngstown and Nixon must stand for the proposition that distraction to the President, while relevant, is insufficient, standing alone, to justify any immunity or stay. Where the distraction to the President is the principal factor supporting immunity, the critical issues are how great the distraction is likely to be, whether that distraction can be mitigated through less drastic alternatives than a stay, and what impact a stay will have on plaintiff's competing interests. By definition, those judgments can only be made on a case-by-case basis. Indeed, those judgments should be made at each phase of each case. See Section III.

Finally, the President suggests that if this Court were to affirm, it would signal a change in law and would invite a torrent of litigation, some abusive, against sitting Presidents. All parties agree that there have so far been few such suits filed. Significantly, however, the fact that there have been some suits in the past suggests that, contrary to the President's assertion, the common understanding of history has been that such suits were possible. Moreover, the small number of prior cases suggests that the President's fears of an explosion of nonfrivolous litigation are misplaced. Jones v. Clinton, 72 F.3d at 1362.[13]

There is an additional reason suggested by the court of appeals for rejecting the President's speculative fear of an avalanche of litigation. A President only interacts with a limited number of people in his unofficial capacity. "Thus, the universe of potential plaintiffs who might seek to hold the President accountable for his alleged private wrongs via a civil lawsuit is considerably smaller than the universe of potential plaintiffs who might seek to hold the President accountable for his official conduct." Id.

2. Separation of Powers

The President and his amici also argue that presidential immunity is necessary to preserve the separation of powers. In particular, the President argues that if a President moved for a continuance on the ground that he had to attend to an urgent matter of national interest, and the Court denied the motion, "the Court would be not merely reviewing the President's priorities, but conceivably could order the President to rearrange them." Pet.Br. at 30.

We agree that the President should not be treated as an ordinary litigant. Substantial deference should be given to his assertion, in a particular context, that his official duties require additional time or rescheduling of a particular matter. The history discussed by the President, however, convincingly demonstrates that the courts have already been, and presumably will continue to be, sensitive to the President's unique status as a litigant. Id. at 18, n.17, at 28, n.25. See also United States Br. at 25, n.15.

Despite this history, the President suggests that it is improper or at least unseemly for the courts to be involved in executive matters. Thus, both he and his amici challenge the suggestion of the court of appeals that the trial courts would utilize sound principles of case management to prevent abuse of the President's time. More fundamentally, the President argues, any judicial inquiry into the value of the President's time only highlights the separation of powers issue.

It is well-settled, however, that the judiciary has not only the power but the duty to review the actions of the other coordinate branches. This principle was established by the Court almost two centuries ago in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). More recently, in United States v. Nixon, 418 U.S. at 707, this Court applied this principle to President Nixon's attempt to use a claim of executive privilege to insulate his presidential papers and tapes from a subpoena. In rejecting President Nixon's claim, this Court relied on the Constitution's grant of power to the judiciary, as well as its own holding in Marbury, in concluding that such an expansive view of separation of powers principles would "gravely impair the role of the courts under Article III." 418 U.S. at 707.

In this case, the concern about interference with the other branches is less than in Nixon and Marbury. In those cases, this Court upheld its own authority to review actions of the executive and legislative branches taken in their official capacity. In this case, by contrast, the actions at issue arose before Mr. Clinton became President, and the dispute concerns scheduling of the President's time, not review of his official actions. The interference with executive functions and the separation of powers concerns are accordingly less.

B. The Interests Of Plaintiffs

Although the President and his amici do not appear to directly address the question, see, e.g., United States Br. at 21-22, it is clear that, in an appropriate case, immunity would not shield the President from being subjected to injunctive relief, even for acts committed at the center of his responsibilities as President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579. It seems even more clear that the President could be subjected to injunctive relief for acts committed either before his presidency or committed during his presidency but irrelevant to his responsibilities. Thus, for example, a President would not be permitted to rely on any immunity doctrine, were his or her spouse to seek dissolution of the marriage; and a court would have the authority to resolve issues of child custody and support, notwithstanding that they affected the occupant of the presidency. See, e.g., Pet.Br. at 42.

Assuming, therefore, that immunity does not automatically prevent a court from issuing injunctions against the President, whether the underlying issues arise out of his duties or not, the President's argument in this case appears to be that any plaintiff's interest in a damages remedy is always significantly less than any plaintiff's interest in injunctive relief. See id. Although this proposition may often be true, it cannot be said that it is always true. Adoption of the President's absolute view of immunity would thus result in some less important cases, pled to seek injunctive relief, going forward, while other more important cases, pled to seek damages, are long delayed. It is difficult to imagine the justification for such a rule.

In addition, cases seeking damages are often not purely, and sometimes not even primarily, about money. The ACLU takes no position on the motives of respondent in this case. However, she asserts that her interest in this case is not in obtaining damages, but in restoring the damage that has been done to her reputation. Delay in obtaining damages can be overcome by the devices suggested by the President, including an award for past action in present dollars or an award of interest; although to plaintiffs of limited means, that delay may cause irreparable harm. Damage to one's reputation cannot be overcome. If respondent is correct, both in her version of the events and in her assertion of damage to her reputation, that damage will continue for the years of the Clinton Presidency. In this respect, the harm respondent asserts is continuing harm, as is the harm asserted when a plaintiff seeks injunctive relief. Her interest in repairing the damage she believes has been done to her reputation is no less important than the interest of many plaintiffs seeking forms of injunctive relief. It thus merits no greater immunity.

Moreover, as Judge Beam suggested in his concurrence below, delay in obtaining relief is not the only important effect of delay. "Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." 72 F.3d at 1363. The suggestion by the United States that testimony can be preserved, United States Br. at 21, of course applies to only the foreseen calamities, probably a less common category. At least one of respondent's claims might be extinguished if she were to unexpectedly die. 72 F.3d at 1364.

Finally, and perhaps most importantly, the ACLU acknowledges that the nation has an interest in ensuring that the President attend to his awesome responsibilities. However, the nation also has an interest in equal justice under law. Up to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporally. Imbler v. Pachman, 424 U.S. 409 (1976), Stump v. Sparkman, 435 U.S. 349 (1978) (prosecutors and judges subject to suit for acts outside their official responsibilities). The nation has an interest in ensuring that our system of justice, rightly a matter of national pride, is available to all of its people, regardless of whether the party is high-born or low, holds high office or does not. That interest -- that compelling interest -- is far more important than the facts of this case. That interest, combined with the other interests of plaintiffs seeking redress for harms, compels rejection of a rule that automatically immunizes the President from civil suits during the duration of his incumbency.

III. THE GRANTING OF IMMUNITY SHOULD BE DECIDED AT EACH PHASE OF A CASE AND NOT FOR THE CASE AS AN ENTIRETY

The district court concluded that it would delay the trial of this case but would not delay the discovery. The district court was correct in concluding that the question of a stay or delay of this case should be decided at each phase and not for the case as a whole. At the same time, the court of appeals also correctly held that no particular phase of a case should be given an automatic stay and that it was an abuse of discretion for the district court to prejudge the question of delay of trial before that issue is ripe.

The specific facts of this case illustrate the need to look at the circumstances of each case rather than applying an automatic rule. The President asserted in his motion in the district court that, if his immunity claim were denied, he would be likely to move to dismiss on the grounds of statute of limitations, laches, and failure to state a claim. Each of these bases for a motion to dismiss must be established on the face of the complaint, and each presents a pure issue of law. Fed.R.Civ.P. 12. It will require little or none of the President's time for his counsel to file and argue those motions. If any of those motions are meritorious, the case will be dismissed and will have required little or no expenditure of time by the President. Accordingly, a generalized concern over the President's time provides no basis for dismissing or adjourning this case prior to resolution of motions to dismiss.

The President and his amici suggest the need for a broader stay by arguing, correctly, that discovery can be as time consuming, and therefore as distracting, as trial. Of course, as suggested above, cases have more phases than discovery and trial, but even looking solely at the discovery phase, it is certainly true that some forms of discovery, such as the President's deposition, would inevitably require a considerable expenditure of his time. However, other forms of discovery, such as production of documents, are likely to require substantially less attention by the President. The district court has considerable authority to order that discovery proceed in the manner least disruptive of the President's time. For example, as trial courts have in the past, the district court in this case could require that any questioning of the President be done by written interrogatories. Fed. R.Civ.P. 26(c), 31. The lower courts' decisions in this case permit the President to seek such relief at an appropriate stage. Jones v. Clinton, 72 F.3d at 1362-63.

Both lower courts agreed that no automatic stay should be granted at any phase of this case. However, the court of appeals reversed the decision of the district court to delay trial, finding that the trial court had, in effect, granted an automatic stay of that phase of the case and had therefore abused its discretion. Id. at 1361. That decision was correct. The decision concerning trial is premature. If the President's alternative bases for moving to dismiss are meritorious, trial will never occur. If this case does reach a trial stage, a decision concerning timing can be made at that time.

In short, the President's request for an absolute rule of temporal immunity ultimately rests on three flawed propositions: that suits seeking injunctive relief will always require less expenditure of time than suits seeking damages, that plaintiffs seeking damages always have a less compelling need for immediate relief than plaintiffs seeking injunctive relief, and that all phases of all cases are equally distracting for a President. The lower courts properly rejected these propositions and properly held that questions of temporal immunity from civil damages should be decided at each phase of each case.

CONCLUSION

For the reasons stated above, the judgment below denying the President's request for an automatic stay of all phases of this case for the duration of his presidency should be affirmed.

Respectfully submitted,

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NOTES

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

2. This case arises in the context of allegations of actions, most of which occurred prior to Mr. Clinton being elected President. However, the arguments made by the President would apply equally to actions taken by a sitting President if those actions were outside the official responsibilities of the presidency. Thus, the critical factor is not when the actions occurred, but whether they were within the President's official responsibilities.

3. Although the motion in the trial court was a motion to dismiss on the basis of "Presidential immunity," the President now uses the term "deferral" rather than "immunity" to describe the relief sought. Because the President seeks a per se rule of law to mandate deferral, and relies upon "immunity" cases such as Nixon v. Fitzgerald, this semantic shift is of no significance.

The President's request is for a form of immunity, albeit temporal rather than absolute. This brief uses the terms "delay," "deferral," and "immunity" interchangeably to reflect the relief sought by the President.

4. The President does not explicitly address the burdens in cases such as this. He argues that the entire case should be delayed until he leaves office. Brief for the Petitioner (Pet.Br.) at 10. The United States argues that the entire case should be stayed unless respondent can establish "truly extraordinary circumstances [under which] a stay would not be required." Brief for United States as Amicus Curiae in Support of Petitioner (United States Br.) at 22. The law professors argue that the entire case should be delayed unless respondent establishes an "unusual circumstance [of] compelling need." Brief Amicus Curiae of Law Professors in Support of Petitioner (Law Professors' Br.) at 16. All three briefs argue that, to the extent the rule is less than absolute, this case does not fit the grounds for any exception.

5. In a number of subsequent cases, these principles have been applied and Presidents have been required to give evidence and even testimony in criminal cases. See United States Br. at 25, n.15.

6. In explaining its holding, the Court reviewed the Constitution, history and the common law. The Court held that it must weigh "concerns of public policy, especially as illuminated by our history and structure of our government." 457 U.S. at 747-48. With respect to the President, the Court found that common law provided little guidance and that "the inquiries into history and policy . . . tend to converge." Id. at 748. No fair conclusion concerning the outcome of this case can be drawn from the limited and fragmentary historical evidence.

7. To the extent the President and his amici argue to the contrary, they are simply wrong. See Law Professors' Br. at 16, United States Br. at 22.

8. The President suggests that no standards exist or could be developed to guide the courts in distinguishing "political" from "official" activities. Pet.Br. at 32. That is, of course, incorrect. For example, the President himself makes that judgment every time he travels and decides whether to bill the national committee or the taxpayers for the trip.

9. See e.g. Lou Cannon, President Reagan: The Role of a Lifetime (Simon and Schuster, 1991) at 125 ("Reagan wasn't kidding in the slightest when he told television interviewer Charlie Rose during the 1980 campaign, `Show me an executive who works long, overtime hours and I'll show you a bad executive'"); Hedrick Smith, et al., Reagan the Man, the President (MacMillan Publishing, 1980) at 152.

10. "Nixon Ready to Testify," The National Law Journal, Sept. 29, 1980, at 27:

> According to presidential counsel Lloyd Cutler's office, Mr. Carter hasn't been named in any suits for personal damages except those in which the president is cited along with a number of other defendants and quickly dismissed from the case. Mr. Ford's lawyer, Dean Burch, of Pierson, Ball & Dowd, of Washington, D.C., said the former president has been slapped with a number of suits relating to his pardon of Mr. Nixon, but "[t]o be candid I just refer them to Justice and don't worry about them." None of the suits has survived summary judgment.

11. The President was asked questions about respondent's claims in this suit during a meeting with a prominent world leader. Hentoff, "A Day in Court for Paula Jones," Washington Post, Nov. 12, 1994, at A25. This encounter would likely still have occurred even if there were a rule that suits of this kind be stayed until the end of a President's term of office.

12. If this Court really wanted to guard against the danger of frivolous allegations distracting a President, it would have to prohibit citizens from making public allegations against the President, whether or not they actually file a complaint or proceed to trial. But such a rule would clearly violate the First Amendment.

13. As previously noted, substantial sanctions already exist against the filing of frivolous lawsuits and such lawsuits will rarely, in any event, command much of the President's time. See p.12-13, supra. The fear that sitting Presidents will frequently be subject to nonfrivolous litigation for their private behavior rests on a supposition about the behavior and character of our Presidents that this Court should not indulge, and that history does not support.

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