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1996-97 SUPREME COURT PREVIEW: MOCK ARGUMENTS IN *CLINTON v. JONES**

Michael J. Gerhardt**

Rodney A. Smolla***

INTRODUCTION

On October 25, 1996, the Institute of Bill of Rights Law at the College of William & Mary School of Law held its ninth annual Supreme Court Preview. Each year, legal scholars and journalists from around the country gather to survey the upcoming Supreme Court Term. This year's Preview began with a moot court argument of *Clinton v. Jones*,¹ President Clinton's appeal to the United States Supreme Court which was heard by the Court on January 13, 1997.

Paula Corbin Jones, a former Arkansas state employee, filed a civil action for damages in 1994 against President William Jefferson Clinton for conduct in which he allegedly engaged while serving as Governor of Arkansas in 1991.² Jones's complaint alleged sexual harassment and discrimination as well as defamation resulting from Clinton's press aides' and attorneys' public denials of Jones's allegations.

The issue before the Supreme Court is whether a civil action may be asserted against the President of the United States while he is in office when the underlying alleged facts in the complaint arose before his election and assumption of office. President Clinton asserted absolute presidential immunity. The Federal District Court for the Eastern District of Arkansas denied the President's motion³ and held that although the trial should be postponed until the President leaves office, discovery and the deposition process should proceed as to all persons, including the President.⁴ On appeal, the Court of Appeals for the Eighth Circuit held that the President was not entitled, as a matter of law, to a postponement or a stay of all proceedings in the suit for

* Special thanks to April Artesian, whose assistance as court reporter made this transcript possible.

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¹ 116 S. Ct. 2545 (1996), *granting cert. to* 72 F.3d 1354 (8th Cir.).

² *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994), *aff'd in part, rev'd in part*, 72 F.3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996).

³ *Id.* at 699.

⁴ *Id.* at 699-700.

the duration of his presidency.⁵ The court found that such a postponement effectively would operate as a grant of official immunity for acts beyond the “‘outer perimeter’ of [the President’s] official responsibility,”⁶ as set forth by the Supreme Court in *Nixon v. Fitzgerald*.⁷ Additionally, the Eighth Circuit reversed the district court’s grant to President Clinton of what that court had termed a “temporary or limited immunity from trial” for acts beyond the outer perimeter of his official responsibility.⁸

On appeal, the Supreme Court is considering whether presidential immunity requires dismissal of a civil suit against the President without prejudice, to be refiled after he leaves the White House, or if immunity requires a stay of such proceedings until he leaves office.

In the mock argument, Professor Rodney Smolla represented President Clinton, the petitioner. Dean Michael Gerhardt represented Ms. Jones, the respondent. A panel of two law professors and seven legal journalists adopted the roles of the Justices of the United States Supreme Court.⁹

The legal arguments presented are not necessarily representative of the beliefs or opinions held by Professors Smolla and Gerhardt. The advocates were assigned their roles by coin toss.

* * *

WILLIAM JEFFERSON CLINTON,
Petitioner,

—vs.—

No. 95-1853

PAULA CORBIN JONES,
Respondent.

Williamsburg, Virginia
Friday, October 25, 1996

Oral Argument in the above-entitled matter:

⁵ *Jones v. Clinton*, 72 F.3d 1354 (8th Cir.), cert. granted, 116 S. Ct. 2545 (1996).

⁶ *Id.* at 1359 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982)).

⁷ 475 U.S. 731 (1982).

⁸ *Jones*, 869 F. Supp. at 699.

⁹ The following participants comprised the nine-Justice panel: Joan Biskupic, Washington Post (Chief Justice); Richard Carelli, Associated Press; Aaron Epstein, Knight-Ridder Newspapers; Linda Greenhouse, New York Times; Tony Mauro, *USA Today*; Harry G. Prince, Professor of Law, University of California-Hastings College of the Law; David Savage, *Los Angeles Times*; The Honorable Margaret P. Spencer, Judge, General District Court of the City of Richmond, Virginia; and Kathryn Urbonya, Professor of Law, Georgia State University School of Law.

BEFORE:

JOAN BISKUPIC, *Chief Justice*

RICHARD CARELLI, *Associate Justice*

AARON EPSTEIN, *Associate Justice*

LINDA GREENHOUSE, *Associate Justice*

TONY MAURO, *Associate Justice*

HARRY G. PRINCE, *Associate Justice*

DAVID SAVAGE, *Associate Justice*

THE HONORABLE MARGARET P. SPENCER, *Associate Justice*

KATHRYN URBONYA, *Associate Justice*

APPEARANCES:

PROFESSOR RODNEY A. SMOLLA, *William & Mary School of Law, on behalf of Petitioner.*

DEAN MICHAEL J. GERHARDT, *Case Western Reserve University School of Law, on behalf of Respondent.*

PROCEEDINGS

**ORAL ARGUMENT OF
PROFESSOR RODNEY A. SMOLLA
ON BEHALF OF PETITIONER**

MR. SMOLLA: Chief Justice, and may it please the Court, I am Rodney Smolla, and I represent the President of the United States. I'd like to reserve one minute of time for rebuttal.

Your Honors, William Jefferson Clinton was elected President of the United States in 1992. This lawsuit was filed in 1994.¹⁰ It was precipitated by events that allegedly occurred in 1991¹¹ while Mr. Clinton was Governor of Arkansas. In the court below, the President sought, alternatively, a dismissal of the suit without prejudice, or that it be reinstated when he finished his term of office (requesting a stay of the proceedings until such time as he is no longer President).

The District Court did not dismiss the case but did

¹⁰ *Jones*, 869 F. Supp. at 690.

¹¹ *See id.* at 691.

grant the stay; however, the district court permitted discovery to proceed.¹² The United States Court of Appeals for the Eighth Circuit reversed the district court in part. The two-to-one majority of the court of appeals ruled that the case should proceed in its entirety immediately.¹³ It is from that judgment of the Eighth Circuit that the President has brought this appeal.

THE COURT: Counselor, you're moving back and forth between representing Mr. Clinton and representing the President. Which is it, and is that important?

MR. SMOLLA: It's our submission, Your Honor, that for the purposes of the motion in this litigation the two are inseparable. There is only one President. The Constitution vests the executive power of the United States in the President of the United States.¹⁴ Constitutionally speaking, the President is never off duty. The President never sleeps. So although this is a lawsuit arising from actions outside of the President's official duties, seeing him in his individual capacity, his assertion of privilege in this case—a right to have this lawsuit deferred until he is no longer President—is inextricably intertwined with his constitutional duties.

THE COURT: Though I hear you arguing that the office is entitled to immunity, in all of our decisions dealing with absolute immunity—a form of which you're arguing in this case—we have recognized it as a functional approach, one that doesn't attach to the office but to the function of the particular person performing it.

MR. SMOLLA: Justice Urbonya, in *Nixon v. Fitzgerald*,¹⁵ which is

¹² *Id.* at 699.

¹³ *Jones v. Clinton*, 72 F.3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996).

¹⁴ U.S. CONST. art. II, § 1, cl. 1.

¹⁵ 457 U.S. 731 (1982). In 1968, near the conclusion of the presidency of Lyndon B. Johnson, Fitzgerald, a management analyst with the Department of the Air Force, testified before a congressional subcommittee about cost-overruns and unexpected technical difficulties concerning the development of a particular airplane. *Id.* at 734. In January 1970, during the presidency of Richard M. Nixon, Fitzgerald's job was eliminated as part of a departmental reorganization and reduction in work force. *Id.* at 735. Fitzgerald

the closest precedent from this Court thus far on this issue, Justice Powell actually rejected the idea that when dealing with the presidency we can subdivide it into various kinds of functions.¹⁶ That is why in that case the Court held that any action that is within the outer perimeter of the President's duties would be entitled to absolute immunity.¹⁷ We're not seeking absolute immunity, and concededly, this lawsuit does not involve official actions of the President. But we would say that the gist of Justice Powell's observations for the Court is nevertheless accurate. You cannot subdivide into constituent parts the operation of the presidency. That is one of the essential problems with the Eighth Circuit's reasoning, that we can rely on the district court's discretion in this case to avoid any conflict with the executive branch by accommodating the President's schedule as needed.

THE COURT:

Counsel, aren't you taking a broad extension? In *Nixon*, the Court was talking about the official act. Granted, we really do not have a precedent that controls in this situation, but *Nixon* was about conduct that took place while the President was in office. This case is about conduct allegedly engaged in prior to the President taking office.

MR. SMOLLA:

That would clearly be an extension of the principles in *Nixon*, one that is consistent with the *Nixon* case. But *Nixon* is clearly not dispositive here. The *Nixon* case turned on two rationales. One, the classic rationale that applies to immunities generally in the executive branch, which is that one seeks to free executive officers of inhibition in the exercise of their authority.¹⁸ We don't want executive officers subject

sued for damages against various Department of Defense officials and White House aides allegedly responsible for his dismissal, and an amended complaint later named President Nixon as a defendant. *Id.* at 739-40.

¹⁶ *Id.* at 756 (Powell, J.).

¹⁷ *Id.* ("In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility.").

¹⁸ *Id.* at 744-45 ("In the absence of immunity . . . executive officials would hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action.") (quoting

to suit every time they make a decision that disappoints someone. But a second prominent theme in that case was the idea that we do not want to divert the energies of the President of the United States to contend with litigation.¹⁹

THE COURT: I read that case. It seems to me the first reason was really the basic one in that instance. I think there is one sentence that talks about diverting the President from his normal constitutional duties. Are you relying on that one sentence?

MR. SMOLLA: I think there may be two sentences, Your Honor, but in the *Nixon* case the Court did not have occasion to deal with the question of what kind of immunity, if any, ought to attach when we are not dealing with an official function of the presidency. It isn't so much how many sentences or how prominent the theme of the diversion of energies is in *Nixon*, but rather, what is the right answer. And *Nixon* does talk in sweeping terms about the functional approach to separation of powers, the need to look with a pragmatic sense at the role of the President in our constitutional system, and the debilitating effects of litigation on anybody, particularly a President, in this context. So those themes are fully consistent with the submission that we're making.

THE COURT: You said a moment ago that the President never sleeps. I assume you mean constitutionally?

MR. SMOLLA: Yes, although with this President, Your Honor, there may also be a personal element to that.

THE COURT: I suppose what you're really saying is that the President can get called away from any activity to attend

Spalding v. Vilas, 161 U.S. 483, 499 (1896)).

¹⁹ Writing for the majority, Justice Powell noted:

In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency is designed to serve.

Id.

to a crisis or some other serious form of business. Well, he plays golf. He, as we know, campaigns, and has been campaigning for months. Why can't he be called away from one of those activities—he attends many social events and dinners—to give a deposition or talk to his lawyers about a settlement? Wouldn't that be very easy for him to do?

MR. SMOLLA: Not very easy, Your Honor. As a practical matter, many of those social events are semi-official events. The President may be conducting business or talking to aides. He may be relaxing, which is actually a good, healthy thing that the American people probably want their President to be able to do from time to time, given the enormous stress of the position, unique in the world. But whether at a given moment the President is, in fact, engaged entirely in personal, relaxing activities, it is integral to our position here that it is not, with all respect, for the judiciary to second-guess the President as to how he or she chooses to use personal time. A district court would be placed in the constitutionally embarrassing position of passing on the President's schedule, of taking—

THE COURT: The lower court said they would give a great deal of deference to the President and his schedule, arranging proceedings in accordance with various other demands on his time.²⁰

MR. SMOLLA: It's our view, Your Honor, that the cure suggested by the Eighth Circuit is actually worse than the disease, because although one can say, "Yes, we'll defer to the President," imagine that the President were to play this in a tough manner. Imagine if the President were to say, "I'm sorry, I can't be bothered for the next six months because there are hostilities in the Middle East that I must attend to, and I am just not going to be distracted for an hour a day, two hours a

²⁰ Jones v. Clinton, 72 F.3d 1354, 1367 (8th Cir.) (Beam, J., concurring) ("[N]othing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled."), *cert. granted*, 116 S. Ct. 2545 (1996).

day—whatever it takes—to deal with serious civil litigation.”

THE COURT: Isn't it true that this President has, in fact, given depositions in litigation while he's been sitting, depositions that were arranged for his convenience through good case management by the sitting judges and the parties? We have actual experience that this can be worked out, do we not?

MR. SMOLLA: Justice Greenhouse, this President and several past Presidents have given testimony only in criminal proceedings. No party has been able to point to any past instance in which a sitting President has given evidence in a civil proceeding.

THE COURT: In fact, there have been only three civil suits involving unofficial acts against Presidents.²¹

MR. SMOLLA: All of them were in effect settled before the President's term had even substantially begun. There were two cases disposed of before the President took office,²² and President Kennedy's case was settled very shortly after he took office.²³ But more impor-

²¹ *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. July 5, 1962) & *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. July 5, 1962) (cases consolidated); *DeVault v. Truman*, 194 S.W.2d 29 (Mo. 1946); *New York ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904).

²² In *New York ex rel. Hurley v. Roosevelt*, 71 N.E. 1137 (N.Y. 1904), Theodore Roosevelt was sued in his capacity as Chairman of the New York City Police Department, a position he held in 1895. An intermediate court of appeals affirmed dismissal of the complaint nine months before he became President. *New York ex rel. Hurley v. Roosevelt*, 56 A.D. 626 (N.Y. App. Div. 1900), *aff'd*, 71 N.E. 1137 (N.Y. 1904). The New York Court of Appeals affirmed the dismissal without opinion in 1904 while President Roosevelt was in office. *Hurley*, 71 N.E. at 1137.

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

²³ In *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. July 5, 1962), President Kennedy asserted after his election that he temporarily was protected from suit under the Soldiers' and Sailors' Civil Relief Act of 1940 (42 U.S.C. § 1983 (1994); 50 U.S.C. app. §§ 501-93 (1988 & Supp. V 1993), because of his status as Commander-in-Chief. *See Jennifer L. Long, Note, How to Sue the President: A Proposal for Legislation Es-*

tantly, Justice Greenhouse and Justice Epstein, there is a world of difference between giving *testimony* in a case and being a *party* in a case. And, not only a world of difference in terms of the demands on one's time, but also in terms of the corrosion of the Office of the President.

THE COURT: Are you asking us to place the President above the law?

MR. SMOLLA: It's not a question of placing the President above the law, because this lawsuit can go forward. It's not a question of whether it goes forward, but when it will go forward. In that sense the relief we seek is far more modest than absolute immunities, which are ubiquitous in Section 1983²⁴ litigation,²⁵ and—

THE COURT: But, Mr. Smolla, you are asking for an absolute rule, aren't you? Are you allowing any kind of exception to the President being sued?

MR. SMOLLA: In order to grant President Clinton the relief he seeks in this case, this Court would not have to craft an absolute rule that says, "In all cases, in all civil litigation, automatically the litigation is stayed until the President leaves office." This Court could say, "In cases of compelling need, the plaintiff may attempt to demonstrate that the suit should go forward not-

establishing the Extent of Presidential Immunity, 30 VAL. U.L. REV. 283, 304 n.154 (1995). The court denied Kennedy's motion for a stay, apparently without a written opinion, and the case eventually was settled. In *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. July 5, 1962), Kennedy did not raise the issue of presidential immunity, but the case was ultimately settled out of court. See Long, *supra* at 333 n.20.

²⁴ 42 U.S.C. § 1983 (1994); see *infra* note 36 (quoting the pertinent portion of Section 1983).

²⁵ See, e.g., *Briscoe v. LaHue*, 460 U.S. 325 (1983) (finding absolute immunity for police officers arising out of allegedly false and perjurious testimony); *Supreme Court v. Consumers Union*, 446 U.S. 719 (1980) (finding absolute immunity for a state supreme court when issuing attorney disciplinary rules); *Stump v. Sparkman*, 435 U.S. 349 (1978) (finding absolute immunity for judges acting in their judicial capacity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (finding absolute immunity for prosecutors in exercise of prosecutorial duties); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (finding absolute immunity for legislators for actions within the province of legislative proceedings).

withstanding the presumption that there should be a stay.”

THE COURT: Doesn't that in itself raise the same separation of powers problem you mentioned before—that some court is going to have to decide what constitutes compelling circumstances, and the President may always say, “Well, I'm very busy now.”

MR. SMOLLA: I'll concede that, Your Honor, and we'd be delighted with an absolute rule, but to the extent that the Court feels it must balance the interests here—because clearly, the plaintiff has an interest in seeing her suit proceed as expeditiously as possible—we are conceding that something less than an absolute rule would be satisfactory. The idea that one can imagine a case in which the plaintiff's interests would be more acute than they are here would allow this Court to create the safety valve for cases of compelling need. So you'd need not go as far as an absolute rule in order to get the—

THE COURT: But wouldn't you be back here in that case, saying that the President never sleeps, and really he still is immune?

MR. SMOLLA: The President in every case would be permitted to assert the privilege and contest the existence of a compelling need.

THE COURT: Can you envision anything that the President can do during the four years of office for which he would have to stand trial? I know this isn't your case, but if you're saying the President never sleeps, that sort of implies there are no unofficial acts of—

MR. SMOLLA: Justice Mauro, the district court below actually suggested cases that might meet the compelling need or extraordinary circumstance test. A child custody case in which it was in the best interests of the child and imperative that we make a custody decision quickly is one example.²⁶ The abatement of a nuisance is

²⁶ See *Jones v. Clinton*, 869 F. Supp. 690, 698-99 (E.D. Ark. 1994), *aff'd in part*,

another. If the President owned property that was arguably causing a neighbor to have health problems or destroy the property, and there was an urgency in the physical sense to it, then perhaps the plaintiff could meet the compelling need test.

THE COURT: What if Mrs. Clinton sues for divorce in January?

MR. SMOLLA: In that case there would be fundamental rights at stake, and it arguably would meet the compelling interest test, but it's not for the President in this litigation to be required to classify all future possible cases as compelling or not compelling. If the Court thinks the crafting of such a safety valve causes more trouble than it's worth, then an absolute rule is fine. But in answer to the Chief Justice's original question, it is our position that something less than an absolute rule would be constitutionally sufficient here.

THE COURT: If you get a win here, how long would it be then between the time that the alleged event which precipitated this suit occurred and the time that this case is finally allowed to go to trial?

MR. SMOLLA: If the President is not re-elected, approximately five years.

THE COURT: Let's assume—

MR. SMOLLA: If the President is re-elected, nine years.

THE COURT: Nine years. It wouldn't go to trial immediately after—

MR. SMOLLA: Well, the district court judge indicated that the trial would begin within weeks after the President left office, and there would be discovery for some period of time, whatever that would be.²⁷ Perhaps in light of the long delay the district court judge would expedite discovery, but it could be ten years.

rev'd in part, 72 F.3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996).

²⁷ See *id.* at 699-700.

THE COURT: Now assuming that the President is re-elected, what would be wrong in his second term with his devoting attention to some aspects of this case, such as allowing the plaintiff to take depositions from third parties, having the President submit to a deposition himself, or having him discuss a settlement with his lawyers?

MR. SMOLLA: That is, in effect, what the district court decided, Your Honor. And our quarrel with that compromise by the district court is that it underestimates the critical and time-consuming nature of discovery. As a practical matter, in a case such as this, discovery is the whole ball game, and the need of a litigant in a serious case like this one, involving sexual harassment—where the stakes are high—to confer constantly with lawyers, to deal with witnesses and with possible impeachment of the testimony of witnesses, to discuss strategy, and so on, would be a substantial drain on the energies of the President.

THE COURT: Counsel, isn't your discussion of discovery, though, more accurately by defense of qualified immunity, where the Supreme Court has said repeatedly that qualified immunity is not only a defense to liability, but also immunity from suit,²⁸ and lower courts have imposed heightened pleading standard requirements? This Court is taking very seriously the burdens of discovery, and that concern is adequately protected by the qualified immunity defense.

MR. SMOLLA: Well, I guess I would submit, Justice Urbonya, that, if anything, this reinforces the position the President is taking here. If indeed the President is entitled to this stay because of the functional needs of the office, it simply underscores the need for the stay to be complete and include discovery, as well.

I know that my time is short, and there's a theme that I would like to bring to the Court's attention, and that is—

²⁸ See, e.g., *Elder v. Holloway*, 510 U.S. 510, 512 (1994); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

THE COURT: May I just interrupt you for a second? I just wanted to double-check—help me out with this—on the compelling nature of the lawsuit. If we are not going with an absolute rule, how much weight should we accord the fact that there was roughly a three-year time span²⁹ between the alleged incident and the filing of the lawsuit? Should that have great weight in our decision regarding whether there is a compelling need to go ahead with the litigation?

MR. SMOLLA: It has moderate weight. It is probative of the fact that time was not of the essence. The fact that the plaintiff herself chose to wait until two days before the statute of limitations ran—nearly three years—before bringing the suit, certainly underscores, in our view, that it could not have been that urgent. We don't argue for any mechanical tests like that, but simply that it is part of what the Court should take into account. In modern times, this Court well knows that a suit like this, if permitted to go forward, would be an extraordinary spectacle. Imagine the President of the United States on trial for weeks on charges of sexual harassment in front of the American people and the free world. That would not simply be a personal embarrassment to the President. It would be an embarrassment to the office, to the Constitution, and to the standing of the nation. It is true that there is—

THE COURT: Counselor, don't you think it actually cuts the other way? If the President is called to answer for his personal, unofficial conduct, doesn't it say to the world that there is, in fact, no one above the law?

MR. SMOLLA: Your Honor, it would to some degree vindicate that value. There is no question about that. But placing the President on trial when he leaves office also—although perhaps not as forcefully and not as dramatically—underscores that value. You have to measure the “no person is above the law” value, which is critical to our American tradition, against the practical realities of the presidency of the United States.

²⁹ See *Jones*, 869 F. Supp. at 691.

THE COURT: Impeachment is no picnic. The public has survived that.

MR. SMOLLA: But impeachment is the constitutional remedy for high crimes and misdemeanors. It is not a tool for allowing any private litigant who can allege in good faith an arguable wrong to create this drama and hold the nation—not just the President, but the nation—breathless for weeks as we try to resolve the status here.

Thomas Jefferson talked about this during the trial of Aaron Burr. He spoke of presidents being dragged “from pillar to post” by judges.³⁰ And remember, if there is no immunity here, there is no immunity from suit in any forum. Presumably, a cause of action could have been brought in state court. So you would not only have acute separation of powers concerns, but also federalism concerns: a state judge presuming to exercise authority over the President of the United States. Although admittedly, as this Court said in *Nixon*, there is a regrettable sacrifice that any plaintiff sustains when an immunity doctrine is invoked or a stay is invoked, this Court must measure that sacrifice to this plaintiff against the severe damage that might very well be visited upon the presidency.

Thank you, Your Honors.

THE COURT: Mr. Gerhardt, we’ll hear from you now.

³⁰ 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford ed., 1905). President Jefferson wrote to George Hay, who was the prosecutor at Aaron Burr’s treason trial: But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, and to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?

Id.

ORAL ARGUMENT OF
DEAN MICHAEL J. GERHARDT
ON BEHALF OF RESPONDENT

MR. GERHARDT: Thank you, Your Honor. May it please the Court, my name is Michael Gerhardt. I represent the respondent, Paula Jones. This case boils down to a very simple question: Is the petitioner entitled to a unique immunity that this Court has never recognized nor allowed for the unofficial acts of any other high-ranking federal official? The answer is simple—the answer is no. Mr. Clinton seeks—

THE COURT: This remedy is not that unique. Every state in the country has a statute which allows state legislators immunity while the legislature is in session. They are immune for crimes other than felonies, and they are immune for civil actions. Why is this so different? This is not unusual.

MR. GERHARDT: This is radically different, Your Honor, for several reasons. First, there is no such statute in this case. Second, Mr. Clinton is asking for a constitutional rule, a rule that is grounded in the Constitution that would provide for at least some degree of temporary immunity from a civil lawsuit.³¹ That degree of immunity is unique in American law because no federal statute or law recognizes it as existing for any other federal official, including Supreme Court Justices, senators, representatives, and cabinet officers. That degree of immunity—

THE COURT: This is not immunity, is it? It's just delay they're asking for.

MR. GERHARDT: The delay itself is a form of immunity. It means no lawsuit can be brought—

THE COURT: How about diplomats? Isn't that diplomatic immunity?

³¹ See *Jones*, 858 F. Supp. at 906 (granting President Clinton permission to file a motion to dismiss on the grounds of presidential immunity).

MR. GERHARDT: Your Honor, if I understand the question, certainly our diplomats would not be entitled to the kind of immunity Mr. Clinton seeks for the presidency here.

THE COURT: But the issue is, aren't there some public interests that are so important that judges have the authority, either by statute or under the Constitution, to delay litigation? There are some interests that are simply that important when you weigh the public interest involved.

MR. GERHARDT: I certainly would agree with Your Honor, except that this case is predicated on acts allegedly committed by a person before he had been elected President of the United States. This case is predicated on an unofficial act of a person who allegedly engaged in the conduct at issue before he was elected President of the United States, but who happens now to be President of the United States.

THE COURT: Counselor, *Nixon v. Fitzgerald*³² stands for the proposition of protecting the presidency, not just looking at the kind of acts that were at issue in the lawsuit, but the fact that the President really needs the protection irrespective of what the lawsuit alleges and the time frame of when the lawsuit—

MR. GERHARDT: Your Honor, insofar as *Nixon v. Fitzgerald* is concerned, I think if one reviews that case closely, it is clear that five votes in that case were for exactly the opposite proposition from the one for which Mr. Smolla contends.³³ In fact, there is a plurality opinion that recognizes only the President's absolute immunity to damages in a civil case for his official acts.

If you read the concurrence in *Nixon v. Fitzgerald* along with the dissent, those opinions together add up to five votes in favor of the proposition that the President is not entitled to any immunity from a civil

³² 457 U.S. 731 (1982).

³³ *Id.* at 744-58. Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices Rehnquist, Stevens, and O'Connor joined.

case based on his unofficial actions.³⁴ That's precisely our position.³⁵

THE COURT:

But, Counsel, isn't the question about accounting for his official actions and alleged abuse of power while he was Governor? We're not talking about presidential status; we're talking about the statute that the Congress passed, under Section 1983,³⁶ which this Court has interpreted to provide immunity.³⁷ So we are speaking of a Congressional act. This Court has applied that section to say that Congress really expressed an intent in granting immunity for such acts of governmental officials. A statute you are saying doesn't exist *does*, in fact, exist.

MR. GERHARDT:

With all due respect, I'm not so sure that is an accurate reading of the applicable statute by Your Honor, but I would—

³⁴ Chief Justice Burger filed a concurrence, *id.* at 758-64 (Burger, C.J., concurring), and Justice White filed a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined, *id.* at 764-97 (White, J., dissenting). Justice Blackmun filed a separate dissenting opinion, in which Justices Brennan and Marshall joined, *id.* at 797-99 (Blackmun, J., dissenting).

³⁵ The respondent stated this position in her brief:

[P]residential immunity was limited in *Fitzgerald* to "acts within the outer perimeter of [the President's] official responsibility," and Chief Justice Burger's concurring opinion in that case made clear that Presidents "are not immune for acts outside official duties." The claim that *Fitzgerald* supports presidential protection or immunity for unofficial acts is based upon language taken out of context.

Brief for Respondent at *9, *Clinton v. Jones*, No. 95-1853, 1996 WL 509501 (U.S.) (quoting *Fitzgerald*, 457 U.S. at 756 (majority opinion) and 759 (Burger, J., concurring)).

³⁶

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (1994).

³⁷ See *supra* note 25.

- THE COURT: But it was a suit under Section 1983 in *Nixon v. Fitzgerald*. It is broadly the same, I think, as also applied to the—
- MR. GERHARDT: Your Honor, in this case, the petitioner has failed to meet his burden in two respects. The burden is not just on the petitioner to make his case as to why he should be entitled to this form of immunity. The petitioner must also show that Congress has exercised its power to provide for presidential immunity in the statute under which we have sued. But Congress made no such provision.
- THE COURT: You've made the point that no one is above the law, right?
- MR. GERHARDT: No one is above the law, Your Honor.
- THE COURT: If that's the case, why in your brief do you concede that the President is entitled to some deference here?³⁸
- MR. GERHARDT: Well, Your Honor, to begin with, I think it's important to emphasize that in this case the petitioner is asking to hide behind the presidency, to hide behind that office, to use that office as a shield to avoid this lawsuit. This lawsuit, I would remind the Court, is based on the unofficial actions of the person who happens to be the President—
- THE COURT: I'm waiting to hear about the deference you would give to Presidents.
- THE COURT: We can remind you perhaps that your client had am-

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None of this is to say that the courts do not owe great deference to the presidency in overseeing litigation. What is needed in this case to protect the public's interest in the presidency, however, is exactly what the court of appeals prescribed. [T]he court of appeals directed the district court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule."

Brief for Respondent at *34 (quoting *Jones v. Clinton*, 72 F.3d 1354, 1361 (8th Cir.), cert. granted, 116 S. Ct. 2545 (1996)).

ple opportunity to sue this defendant before he became President.

MR. GERHARDT: Your Honor, as long as this lawsuit was brought at a time that fell within the statute of limitations, I think the timing of the lawsuit is irrelevant.

THE COURT: It does indicate that maybe you're not in such a big hurry.

MR. GERHARDT: Your Honor, with all due respect, I don't know that the Court's making any inferences about my client's motivations would be appropriate here. There would have to be findings of fact. Those might have to go—

THE COURT: Do you think this lawsuit would have been brought had Mr. Clinton, in 1992, left the governorship of Arkansas, run in the democratic primaries, and been defeated? In 1994, would Jones have brought a lawsuit against a Bill Clinton living in Little Rock, Arkansas?

MR. GERHARDT: Your Honor, I'm not in a position to answer that question. I think the critical thing to keep in mind is that a lawsuit has been brought in a timely fashion.

THE COURT: Brought when Bill Clinton was President of the United States.

MR. GERHARDT: But, Your Honor, it was brought on the basis of actions allegedly taken when he was Governor of Arkansas. And the question presently confronting this Court is whether it is appropriate for someone who is President to avoid civil liability for actions allegedly committed prior to his election to that office.

THE COURT: Perhaps he wouldn't have been sued if he had not become President.

MR. GERHARDT: Your Honor, I could answer that question by responding that he would have been sued in any event, but the question is ultimately irrelevant.

THE COURT: I think the point here is that you are complaining of

the delay when your client, in fact, caused much of the delay.

MR. GERHARDT: With all due respect, Your Honor, your question attributes all sorts of motivations to my client. As long as the requirements of the statute of limitations have been met, a plaintiff may choose when to file her claim. As long as the party has complied with the statute of limitations, any inquiry about the legitimacy of the suing party's motivations as to the timing of filing a lawsuit ends there.

THE COURT: So any inference regarding motivation is improper?

MR. GERHARDT: Your Honor, if I understand the Court's questions correctly, such inferences go ultimately to the merits of this lawsuit. Yet we've had no findings of fact, we've had no discovery; therefore, it is inappropriate at this point to speculate about the merits.

THE COURT: Would you be satisfied if we simply affirmed the court of appeals?

MR. GERHARDT: Yes, we would be perfectly happy with that.

THE COURT: So the rule you're asking us to adopt—I just want to make sure—is that it makes no difference whether Mr. Clinton was Governor of Arkansas or President of the United States at the time of the alleged incident? The rule would apply to a sitting President as well as to someone who had acted in a tortious way before becoming President?

MR. GERHARDT: Yes, Your Honor, what I would say is that if, for example, this lawsuit had been filed before Mr. Clinton had been elected President but were still pending at the time he were President, then it would resemble three other lawsuits in American history.³⁹ In none of those lawsuits did the Presidents ever claim *any* privilege or *any* immunity from those lawsuits. Those lawsuits reached final judgments—

³⁹ See *supra* notes 21-23.

THE COURT: But would he have any persuasive arguments to delay at all during the course of the lawsuit? Can you envision any circumstances under which a sitting President would be allowed to—

MR. GERHARDT: Absolutely. Yes, Your Honor. That's the point that the Eighth Circuit was trying to make when it used the phrase "judicial case management."⁴⁰ It seems to me that any defendant in a civil case is entitled to make a showing that he or she should be allowed some delay in the lawsuit because of—

THE COURT: Do you want a state court judge analyzing, determining, and rearranging presidential priorities? Do you want a state court judge holding the President in contempt for not attending a deposition because the state court judge thought the deposition was more important than an NAACP convention?

MR. GERHARDT: Your Honor, the recognition that the President of the United States is not above the law has certain implications. One of those implications is that when the President of the United States is legitimately a party to a civil lawsuit based on his unofficial acts, then like every other high-ranking official in this nation, he will have to tend to that lawsuit.

In *United States v. Nixon*,⁴¹ Your Honor, a subpoena was issued directly against the President. It might have been embarrassing for President Nixon, it might have been a bit of a distraction, but it was the unanimous opinion of this Court based on the circumstances of that case that the President was not immune to being subpoenaed.

THE COURT: Was that action in a criminal action or a civil action?

MR. GERHARDT: That action was associated with a criminal case, Your Honor.

THE COURT: Well, isn't it important that Justice Powell's opinion

⁴⁰ *Jones*, 72 F.3d at 1361.

⁴¹ 418 U.S. 683 (1974).

in *Nixon v. Fitzgerald*⁴² distinguished between a criminal action and a civil action? When all the plaintiff is seeking are damages in a civil action, doesn't Justice Powell state very clearly that the interest in damages yields to the interest in having the President operate unfettered by litigation?⁴³

MR. GERHARDT: Your Honor, it's important to put *Nixon v. Fitzgerald* into context. First, it was a civil case. Moreover, the point of the case was about the degree to which the President could be sued on the basis of his *official* actions. Everything that was said in that case related to its particular circumstances.

With regard to unofficial actions, Your Honor, this Court has never definitively spoken. I would suggest that a close reading of *Nixon v. Fitzgerald* would support the proposition that there were five Justices in that case who would have been sympathetic to the point that the President of the United States is not entitled to any form of immunity from a lawsuit based—

THE COURT: So you read Justice Powell's opinion and draw no distinction between criminal action in which the President might have been involved and the civil action that he might have paid money damages for?

MR. GERHARDT: With all due respect, I'm not sure that distinction has great relevance here, Your Honor. It seems that insofar as a civil case is based on the unofficial actions of a person who happens to be the President of the United States, the logic of the opinions both in the concurrence and in the dissent in *Nixon v. Fitzgerald* lead to the conclusion that this lawsuit could proceed.⁴⁴

⁴² 457 U.S. 731, 733-58 (1982) (Powell, J.).

⁴³ See *supra* note 17.

⁴⁴ "Absolute immunity for a President for acts within the *official* duties of the Chief Executive is either to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity and I agree." *Fitzgerald*, 457 U.S. at 760 (Burger, C.J., concurring) (emphasis added). "Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law." *Id.* at 766

THE COURT: If we were to rule in favor of President Clinton in this case, how would your client be harmed by waiting another four years?

MR. GERHARDT: My client and conceivably the nation would be harmed in a number of different ways.

THE COURT: Your client?

MR. GERHARDT: To begin with, there is a statute⁴⁵ that provides anyone who seeks to take advantage of it the opportunity to litigate a lawsuit and vindicate a claim, and so justice would be delayed and might well be denied if a person who had tried to vindicate his or her interests under that statute could not proceed with his or her lawsuit in a timely fashion. There are all sorts of problems associated with the delaying of a lawsuit—problems with memories and evidence, for example. Moreover, Your Honor, delaying this lawsuit as a matter of law would send a signal that is wholly inappropriate. It would send a signal that a person can use the presidency as a shield against accountability based on actions that were taken when the person was not President of the United States.

THE COURT: It makes no difference whether he was President at the time for the rule you seek?

MR. GERHARDT: Your Honor, the timing of the alleged misconduct is a critical point. In this case, of course, the actions that are alleged are said to have occurred before he took office.

THE COURT: You haven't mentioned fading memories and dying witnesses and things that you mentioned in the briefs.⁴⁶

MR. GERHARDT: I tried to allude to that, but, yes, those are some of the problems resulting from delaying justice.

(White, J., dissenting).

⁴⁵ 42 U.S.C. § 1983 (1994).

⁴⁶ Brief for Respondent at *52, *Clinton v. Jones*, No. 95-1853, 1996 WL 509501 (U.S.).

- THE COURT: And that your client would be delayed in getting any damages.
- MR. GERHARDT: That's correct, Your Honor, but that isn't necessarily what this lawsuit is all about.
- THE COURT: Mr. Gerhardt, how do you address the idea of the spectacle that would be created by forcing the President of the United States to participate in a trial before the nation and the entire world? How would you respond to the idea that the presidency of the United States stands for something that is viewed internationally as something important to protect? And for those of us on the Court who might be concerned about the institution of the presidency, what can you say that could convince us that the institution doesn't need a vote that would overturn the Eighth Circuit?
- MR. GERHARDT: Well, Your Honor, to begin with, the burden is on the President in this case to show a legitimate reason that relates to the particular functions that he has to perform as President in order to—
- THE COURT: But we're talking about the presidency forever, not about this individual man.
- MR. GERHARDT: But, Your Honor, Mr. Smolla's argument ultimately, at least in my opinion, boils down to an absurdity, because he argues that the only federal official who has no private life is the President of the United States. That is simply untrue. Up until the point that a person becomes the President, that person has, for purposes of the constitutional law of the presidency, a private life. Moreover, the President has a private life after becoming President. In all sorts of other kinds of civil lawsuits, various problems would arise if these suits weren't allowed to go forward immediately after the time of filing. Divorce actions, custody suits, and tax suits are examples. Any of those lawsuits would run into problems if they were not allowed to go forward simply because of a generalized assertion that the President has no private life while in office. Every other high-ranking federal official certainly has tremendous obligations, but none of

them can make the claim that they lack the means to commit unofficial acts or that they have no private life. None of them can make the claim that while in office they are not able to engage in unofficial acts.

THE COURT: *Nixon v. Fitzgerald* says the President is unique because the President is the head of the executive branch.

MR. GERHARDT: Your Honor, the President is unique in the sense that he does not share power at the apex at which he sits. Ultimately, however, I don't think that makes any difference in this case because he doesn't singularly exercise all the power of his branch. He delegates that power to many other people. Consequently, the person who occupies the office is able to take all sorts of time from the office in order to do things unrelated to the office.

THE COURT: Let's get back to the President sharing his power.

MR. GERHARDT: I mean through delegations, Your Honor, to his subordinates.

THE COURT: Who serve at his whim?

MR. GERHARDT: Yes, Your Honor, who serve at the whim of the presidency. Let me rephrase that: Who serve under the person who happens to be President. But I think ultimately it's important to understand, Your Honor, that those people owe their allegiance by virtue of their duties to serve the government, to the Constitution, to the offices that they occupy and to the office that the President occupies.

THE COURT: What's your response to the separation of powers argument of the other side?

MR. GERHARDT: I disagree with it, Your Honor.

THE COURT: Tell me why the judiciary would not be deciding whether the President has enough time to attend to a particular matter—looking at his schedule, in other words?

MR. GERHARDT: Your Honor, one of the ironies of the Petitioner's argument is that in fact he is really arguing for judicial case management by this Court. Petitioner is simply arguing that this Court should formulate a rule that would allow for a temporary delay of this lawsuit as a constitutional proposition. Presidents are parties to civil lawsuits in all sorts of different ways, Your Honor. Yet, ever since Chief Justice Marshall declared it to be so in *Marbury v. Madison*,⁴⁷ it has been the duty of this Court to say what the law is. That includes declaring the scope of presidential immunity.

THE COURT: What if we were to split the difference and say that it is permissible for the depositions to go forward but not a trial? What would be wrong with that from your client's point of view? In other words, all the depositions would be taken. There would be no problem of memories lost or people dying. Everything would be on the record but we would allow that the President is just too busy to undergo the trial itself. What would be wrong with that?

MR. GERHARDT: I think there would be several things wrong with that. First of all, again, it would be based on the petitioner's generalized assertion regarding how busy the President is. In presidential immunity cases, this Court has made clear that the more particularized the assertion, the stronger the President's claim seems to be. In this case, Mr. Smolla has merely argued that the President is entitled to special treatment because he is potentially the President twenty-four hours a day. I fail to see how that's different from a Supreme Court Justice who also is potentially a Supreme Court Justice twenty-four hours a day.

THE COURT: What does your client lose, though, if the trial is delayed for several years?

MR. GERHARDT: In answer to Justice Epstein's question, there is the possibility of the usual problems with memories

⁴⁷ 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) ("It is emphatically the province and duty of the judicial department to say what the law is.").

fading and evidence disappearing. In addition, Your Honor, we need to keep in mind that this is but one kind of civil suit—there are many types of civil suits.

THE COURT: Thank you, Mr. Gerhardt. Mr. Smolla, you have one minute and thirty seconds remaining.

ORAL ARGUMENT OF
PROFESSOR RODNEY A. SMOLLA
ON BEHALF OF PETITIONER

MR. SMOLLA: May it please the Court. Of course it is true that no one is above the law, but no law is above the Constitution. Judge Learned Hand said that he would “dread a lawsuit beyond anything else short of sickness and death.”⁴⁸ And we’ve witnessed in the last few weeks how the sickness of Boris Yeltsin has held an entire nation captive. His illness has become a nation’s problem. Well, this litigation—if it were to go forward—would not be just a President’s problem, but a nation’s problem. It is not our submission that the President has no private life. It is not that he is attending to the duties of the presidency twenty-four hours a day. It is rather that the civil litigation arising from his private life ought in most instances be subordinated to the compelling Constitutional needs—both functional and symbolic—of the office of the presidency, which is unique in our system and unique in the world.

THE COURT: But, Counselor, why not switch this around? If we begin with the presumption that the lawsuit should go forward unless the President can point to specific factors at a given point in time that compel a delay, what would be wrong with that?

MR. SMOLLA: What would be wrong with that, Your Honor, is that it would give no credit to the fact that this is the President who is the litigant. In the case of an ordi-

⁴⁸ Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 105 (1926).

nary litigant who seeks a stay, who seeks some exception from the ordinary rules of civil procedure, surely the burden is on the person seeking the exception. But the core of our argument here is that the presidency is unique, as this Court has recognized. Thank you, Your Honors.

THE COURT:

Thank you, Mr. Smolla. The case is submitted.

* * *

DECISION

After fifteen minutes of deliberation, the Court ruled five to four to reverse the Eighth Circuit, holding that the litigation should not go forward either in discovery or to trial.