

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: WILLIAM JEFFERSON CLINTON, Petitioner v. PAULA  
CORBIN JONES

CASE NO: No. 95-1853

PLACE: Washington, D.C.

DATE: Monday, January 13, 1997

PAGES: 1-57

**REVISED**

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**Supreme Court U.S.**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   WILLIAM JEFFERSON CLINTON,         :  
4                    Petitioner                 :  
5            v.                                 :   No. 95-1853  
6   PAULA CORBIN JONES                         :

7   -----X  
8   Washington, D.C.

9   Monday, January 13, 1997

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:03 a.m.

13   APPEARANCES:

14   ROBERT S. BENNETT, ESQ., Washington, D.C., on behalf of  
15            the Petitioner.

16   WALTER DELLINGER, ESQ., Acting Solicitor General,  
17            Department of Justice, Washington, D.C.; on behalf of  
18            the United States, as amicus curiae, supporting the  
19            Petitioner.

20   GILBERT K. DAVIS, ESQ., Fairfax, Virginia, on behalf of  
21            the Respondent.

C O N T E N T S

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ROBERT S. BENNETT, ESQ.	
On behalf of the Petitioner	3
WALTER DELLINGER, ESQ.	
On behalf of the United States, as amicus curiae,	
on behalf of the Petitioner	16
GILBERT K. DAVIS, ESQ.	
On behalf of the Respondent	30



1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 95-1853, William Jefferson Clinton v. Paula  
5 Corbin Jones.

6 Mr. Bennett.

7 ORAL ARGUMENT OF ROBERT S. BENNETT

8 ON BEHALF OF THE PETITIONER

9 MR. BENNETT: Mr. Chief Justice and may it  
10 please the Court:

11 I am here this morning on behalf of the of the  
12 President of the United States, who has asked this Court  
13 to defer a private civil damage suit for money damages  
14 against him until he leaves office.

15 QUESTION: Is the request to totally dismiss the  
16 suit or to permit delay of the trial and any court  
17 appearance -- in-court appearance or that position or that  
18 sort of thing?

19 MR. BENNETT: It is to delay the trial of the  
20 case and to --

21 QUESTION: How about discovery?

22 MR. BENNETT: And the discovery of the case.  
23 There is --

24 QUESTION: How about discovery of people who are  
25 not the President, other witnesses and things like that?

1 MR. BENNETT: That is correct, Your Honor. We  
2 -- as --

3 QUESTION: You -- you want to delay that as  
4 well?

5 MR. BENNETT: I want to delay that as well.  
6 However --

7 QUESTION: Should that be a general rule if  
8 preservation of evidence becomes crucial in a case?

9 MR. BENNETT: As we discussed in the District  
10 Court below, Justice O'Connor, we have agreed, and the  
11 District Court noted, that if there's a danger of the loss  
12 of any evidence, that we would cooperate to preserve it  
13 and make use of the Federal Rules of Civil Procedure.

14 QUESTION: Well, what if you wouldn't go up and  
15 what if the District Court -- what if the court below  
16 disagreed with you?

17 MR. BENNETT: Well, that's --

18 QUESTION: I mean, what -- I'm trying to figure  
19 out what the rule of law you're urging upon us here.

20 MR. BENNETT: The rule of law that we are urging  
21 upon you, Justice Scalia, is unless there are exceptional  
22 circumstances in a case, the President of the United  
23 States should not be subject to litigation, either at  
24 trial or in discovery. Unless there is some compelling  
25 necessity, he should not be taken away from his

1 constitutional duties.

2 QUESTION: Is that issue a Federal -- is it a  
3 Federal -- suppose the suit were in State court, and the  
4 State court decided that the testimony of someone who was  
5 not the President is important to be preserved. Does that  
6 become a Federal question?

7 MR. BENNETT: Yes, it's a Federal question,  
8 because --

9 QUESTION: So if that State court's jurisdiction  
10 would be appealable here, or would the whole case be  
11 removable to Federal court, or --

12 MR. BENNETT: Well, I don't know how you would  
13 move a case from State court unless there is diversity.  
14 And that's why this Court must issue a constitutional  
15 ruling in this case. Because, otherwise, this -- this  
16 complaint, and other complaints, could be brought into any  
17 State court in the country and command the President's  
18 time.

19 QUESTION: But the constitutional ruling you're  
20 asking of us is not that the suit cannot be brought.

21 MR. BENNETT: Well, we're asking --

22 QUESTION: So you're saying that the suit can be  
23 brought. And presumably it can be brought in State court?

24 MR. BENNETT: We are saying the suit against the  
25 President of the United States can be brought. It can be

1 brought in a State court.

2 QUESTION: Right.

3 MR. BENNETT: It can be brought in a Federal  
4 court. But --

5 QUESTION: Right. Now, these -- these questions  
6 of whether you have to preserve the witnesses' testimony  
7 -- it's important to the case or not -- do they render the  
8 case removable to Federal court?

9 MR. BENNETT: Yes, Your Honor, I believe that  
10 they do.

11 QUESTION: They do.

12 QUESTION: And I take it, just fading memories  
13 of witnesses, over a period of, say, 4 or 5 years, would  
14 not be sufficient to invoke the exception provision that  
15 you're talking about?

16 MR. BENNETT: I believe that's correct, Your  
17 Honor, particularly in this case, where the plaintiff had  
18 almost 20 months when Mr. Clinton was -- was the governor.

19 QUESTION: Mr. Bennett --

20 QUESTION: And I take it that -- I take it that  
21 since you say -- and I think you're correct that this must  
22 be a privilege that's applicable in State courts,  
23 otherwise it would be a loser and it wouldn't give the  
24 protection you think the President needs -- I take it that  
25 means you cannot rely on separation of powers as the



1 constitutional theory, as the constitutional premise, for  
2 your argument; you have to rely on some other  
3 constitutional doctrine?

4 MR. BENNETT: I don't agree with that, with all  
5 due respect, Your Honor. I think this is a separation of  
6 powers case. Because if this -- if this Court permits  
7 this litigation or other litigation like it to go forward,  
8 any State judge in the country or any county court judge  
9 in the country could command the President's time.

10 QUESTION: Right. But separation of powers  
11 isn't a doctrine that we impose on the State. Separation  
12 of powers is designed to confine each branch of the  
13 Federal Government to its appropriate constitutional  
14 scope.

15 MR. BENNETT: Well, but I -- I would find it  
16 hard to believe that this Court would say that separation  
17 of powers would apply in a Federal court proceeding, but  
18 that any county or State judge could virtually destroy the  
19 power of the President under the Constitution in his  
20 Article II duties.

21 QUESTION: Well, I -- I understand there's a  
22 Federal interest. But it seems to me what you're saying  
23 is that the inherent nature of the President's office  
24 requires that the States be constrained in this way. But  
25 that's not separation of powers.

1           QUESTION: Then it's Federal sovereignty. But  
2 I -- I agree with the concerns expressed in the question  
3 by Justice Kennedy that it's if it were a suit in State  
4 court. It is very difficult to shoehorn it into some kind  
5 of separation of powers notion.

6           MR. BENNETT: I -- I understand.

7           QUESTION: The supremacy clause -- I don't know  
8 whether that bears on it -- but certainly not separation  
9 of powers.

10          MR. BENNETT: I -- I understand that, Your  
11 Honor, but --

12          QUESTION: Mr. Bennett, is there any experience  
13 in States with the temporal immunity with respect to a  
14 governor that you are asserting here with respect to the  
15 chief officer --

16          MR. BENNETT: We have found none, Your Honor.

17          QUESTION: And is it necessary -- you said we  
18 must decide this as a constitutional matter because of the  
19 State court situation -- this could be dealt with in the  
20 Federal courts as a matter of Federal common law. Isn't  
21 that where the immunities come from of executive offices?  
22 And who knows if it would come up in a State court. A  
23 State court might have such a similar -- recognize such a  
24 similar immunity as a matter of their common law.

25          So why must we now assume that the State courts

1 will not have such a -- such an immunity and reach out for  
2 a constitutional question instead of saying here's a suit  
3 in Federal court and we can deal with it as a matter of  
4 Federal common law?

5 MR. BENNETT: I'm not quite sure I understand  
6 the question, Your Honor, but I think I do. I am  
7 certainly saying that this Court could decide this case  
8 without deciding the constitutional issue. I think that  
9 this Court could say that when the District Court judge  
10 stayed the trial, she had an inherent power, under the  
11 Landis case -- the Supreme -- this Court's decision in  
12 Landis -- to stay the trial. And I don't think you would  
13 have to get to the constitutional considerations.

14 QUESTION: Well, I -- I find it difficult to  
15 adopt such a Federal common law rule if it were -- if it  
16 were so easily frustratable. I mean to say that there is  
17 a Federal common law rule that you can interfere with the  
18 President's duties by -- by subjecting him to civil suit  
19 would be silly if any State could subject him to silly --  
20 to civil suit. I mean, don't you have to -- have to tell  
21 me that this Federal common law rule you're asking me to  
22 adopt is one that will have some effect? And it will have  
23 no effect if the States can do the same thing?

24 MR. BENNETT: Yes, I agree it would be very  
25 silly for any county judge or any State judge to start

1 deciding on the priorities of the President of -- of the  
2 United States.

3 QUESTION: So I have to get to State courts  
4 somehow. Any general rule we adopt surely has to be one  
5 that we can enforce upon State courts as well as Federal.

6 MR. BENNETT: Oh, that's of most importance to  
7 this Court, particularly since the fact that you now have  
8 long-arm statutes which were not common in the days of our  
9 founders, and you could drag the President into any court.  
10 You know, what's unprecedented here -- what is  
11 unprecedented here is the notion of taking the President  
12 of the United States of America, in whom the full  
13 executive power resides, and subjecting that President to  
14 any State court or any local court in the country.

15 Is this Court --

16 QUESTION: Or even worse, any Federal court.  
17 Because there you have, in addition, separation of powers.

18 MR. BENNETT: Or any -- or in any Federal court.  
19 And I think, interestingly, Your Honors, if you -- if you  
20 just transpose the facts of this case to the Federal  
21 system -- let's say that Miss Jones were a Federal  
22 employee and let's say that Mr. Clinton were the  
23 President, and let's say that instead of State troopers,  
24 we're talking about Secret Service people -- it would be  
25 my view that your very far-reaching decision in the



1 Fitzgerald case, which -- which gave the President  
2 absolute immunity for -- for acts within the outer  
3 perimeters, would probably -- would probably prevent this  
4 case from -- from going forward.

5 QUESTION: Well, the record in Fitzgerald was  
6 based on a fear that unless you gave the President  
7 absolute immunity, as I understand the opinion, you -- you  
8 -- he would not vigorously exercise his official powers as  
9 President. I don't see how that element is involved here.

10 MR. BENNETT: I agree with you, Mr. Justice --  
11 Mr. Chief Justice, that -- that element is not present  
12 here. But in the Fitzgerald opinion, in which you joined  
13 with Justice Powell, the rationale for that decision goes  
14 way beyond the chilling effect. You talked about  
15 intrusion on the President's time.

16 QUESTION: But, Mr. Bennett, that sentence that  
17 you feature was followed up by -- by these words, "as in  
18 the case of prosecutors and judges." And prosecutors and  
19 judges also enjoy absolute immunity for their acts in the  
20 course of their office. But do they enjoy any kind of  
21 immunity for -- for conduct unrelated to their office?

22 MR. BENNETT: No. No, Justice Ginsburg. But --  
23 but you went much further. I don't mean you personally.  
24 But you went much further in the Fitzgerald case. This  
25 was the core of the dissent of Mr. Justice White. He said

1 that you are not giving absolute immunity simply to core  
2 functions. You are giving absolute immunity to the outer  
3 perimeters of the office.

4 QUESTION: But I think we're mixing up two  
5 things. We're mixing up, one, the total immunity, because  
6 you want the decisionmaking to be unfettered, and then the  
7 immunity that's, as you say, temporary, temporal, just not  
8 whether but when.

9 MR. BENNETT: Right. We're not asking for --

10 QUESTION: And there are different  
11 considerations involved in the two, are there not?

12 MR. BENNETT: Yes. Yes, Justice Ginsburg. That  
13 -- that is correct. But you must remember, the  
14 fundamental difference between the Fitzgerald case -- or  
15 one of the fundamental differences is this Court  
16 extinguished Mr. Fitzgerald's rights for all time,  
17 involving a case where you didn't even have a sitting  
18 President. Mr. Nixon hadn't been in office, to the best  
19 of my recollection, for 4 years. Here you have a sitting  
20 President. And all we're saying is we'll give Miss Jones  
21 her day in court, but let's not do it now.

22 QUESTION: But, in effect, I -- I assume you're  
23 arguing that it is interference or the risk of  
24 interference with the actual presidential duties during  
25 the 4-year term that is the source of whatever privilege

1 you request; isn't that right?

2 MR. BENNETT: That's correct.

3 QUESTION: Right. Now, how does that take you  
4 from interference with the President himself, as -- as a  
5 deponent or as a witness or simply as a party attending a  
6 trial, and -- and go to the further extent of -- of giving  
7 you some kind of a privilege to preclude discovery, which  
8 does not personally involve the President? How -- how is  
9 the interference there enough for you?

10 MR. BENNETT: Well, Mr. Justice Souter, it's the  
11 realities of real-world litigation. Mr. -- my brother at  
12 the bar, Mr. Davis --

13 QUESTION: Well, it's going to keep you busy.  
14 But the President presumably --

15 (Laughter.)

16 QUESTION: -- I mean, the President isn't going  
17 to attend these depositions; you are.

18 MR. BENNETT: But in the real world of  
19 litigation, Mr. Justice Souter, do you think when  
20 Mr. Davis, as he -- as he claims, that he's going to be  
21 deposing all of the troopers; and any time the President  
22 of the United States has come into contact with a member  
23 of the opposite sex, he intends to inquire of that; this  
24 is a conspiracy complaint; they talk about pattern of  
25 conduct --

1 QUESTION: Yes, but, Mr. Bennett --

2 MR. BENNETT: -- don't you think I'm going to  
3 have to talk to the President of United States about all  
4 those events?

5 QUESTION: Well, I assume --

6 QUESTION: Mr. Bennett, do you think all those  
7 events are relevant to this case?

8 MR. BENNETT: I think some trial courts would  
9 say they are not and some trial courts might -- might say  
10 they are. We haven't gotten to that question yet.

11 QUESTION: How long do you think -- how long --  
12 how long do you think it will take to try this case?

13 MR. BENNETT: It's impossible to say. I can  
14 tell you the President has spent -- personally spent a  
15 substantial amount of time on this case already. I mean,  
16 this is a personal -- the very nature of this case is so  
17 personal that it would require his heavy involvement.

18 QUESTION: But -- but there are -- there are two  
19 elements here really -- a concern about some conflict with  
20 a judge deciding how to weigh the interests of the  
21 President in attending a NATO meeting or something versus  
22 a desire to avoid damage control politically. I mean, is  
23 there an element of that in here? And does that enter  
24 into the constitutional balance?

25 MR. BENNETT: I -- I think the President is a



1 political figure and -- and deals in the political --  
2 political marketplace.

3 QUESTION: Yet could be the concern about damage  
4 control, at bottom, would motivate, not necessarily this  
5 President, but any President, in wanting to spend a little  
6 time with the lawyer as these allegations are made. But  
7 is that part of our constitutional balance?

8 MR. BENNETT: Well, Your Honor, I don't think we  
9 can -- I think -- there's no perfect answer to this. But  
10 I certainly don't think that you can permit the courts to  
11 start deciding what presidential priorities are or are  
12 not.

13 QUESTION: Why can't we wait until the President  
14 asserts such a conflict? It's never happened in a couple  
15 of hundred years. Why can't we wait until the court says,  
16 Mr. President, I want you here for this deposition and, if  
17 you don't come, you're going to lose the case; and the  
18 President says, I'm sorry, I have to go to a NATO meeting?  
19 Why don't we wait for that, what seems to me, very  
20 unlikely situation to arise?

21 MR. BENNETT: Well, I'm not so sure, in today's  
22 climate, that it is unlikely to arise. But I suppose you  
23 could wait, as you say. But I have a specific case I have  
24 to deal with now.

25 QUESTION: Thank you, Mr. Bennett.

1 General Dellinger, we'll hear from you.

2 ORAL ARGUMENT OF WALTER DELLINGER

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING PETITIONER

5 MR. DELLINGER: Mr. Chief Justice and may it  
6 please the Court:

7 Let me begin by responding to Justice Scalia's  
8 question about the source of law. It is constitutionally  
9 based. In our view, Justice Scalia, it comes from this  
10 Court's -- the same basis that this Court stated in its  
11 different opinion in Fitzgerald, where they considered the  
12 immunity there, quote, a functionally mandated incident of  
13 the President's unique office. That is, it arises from  
14 Article II. That's --

15 QUESTION: Yeah, but to the extent that Nixon v.  
16 Fitzgerald involved some activity of the President that  
17 relates to his duties in office as President, that is an  
18 element that does not extend to this case.

19 MR. DELLINGER: That is correct, Justice  
20 O'Connor.

21 QUESTION: And there may have been Folsom  
22 language, as there often is, in Court opinions. But we  
23 have to get back to the basic source of what is it in the  
24 Constitution that we look to, to govern this -- this  
25 issue?

1 MR. DELLINGER: You are correct, Justice  
2 O'Connor, that it is a different issue in Fitzgerald. But  
3 what Fitzgerald stands for is the proposition that this  
4 Court can announce rules of law which are binding on State  
5 and Federal courts, as the Fitzgerald immunity surely is  
6 binding in State and Federal courts.

7 QUESTION: Well, what is it in the Constitution  
8 that makes the immunity, let's say, of a Federal judge or  
9 the immunity of any Federal employee for acts of official  
10 duty binding in a State court, where that activity might  
11 itself constitute a tort under State law? What is it in  
12 the Constitution that binds the State courts so that the  
13 State court can't proceed? Is this the supremacy clause?  
14 I mean, I --

15 MR. DELLINGER: Yes. Yes. The -- to the extent  
16 that it's based upon Federal law, it is the supremacy  
17 clause. To the extent that it's --

18 QUESTION: So if there is a separation of powers  
19 doctrine that creates a -- a -- call it a Federal common  
20 law-type immunity, then that immunity for judges or anyone  
21 else is binding upon the State courts because of the  
22 supremacy?

23 MR. DELLINGER: That is absolutely court,  
24 Justice Scalia, in --

25 QUESTION: No, but not if it's based on the

1 separation of powers.

2 MR. DELLINGER: I believe that the Fitzgerald  
3 immunity clearly applies to actions brought in State  
4 court. Surely the Court in Fitzgerald did not announce  
5 that a doctrine of immunity for presidential actions, in  
6 the official capacity --

7 QUESTION: But isn't the reason for that that  
8 the immunity in a Federal court would be meaningless if it  
9 were subject to an end run, and that's how the supremacy  
10 clause translates a separation of powers doctrine into a  
11 State court immunity; isn't that the way it works?

12 MR. DELLINGER: That is exactly correct.

13 QUESTION: But a good -- a good deal of your  
14 Federal official immunity for Federal comes by statute  
15 from Congress, not from the Constitution.

16 MR. DELLINGER: Yes, some of that comes by --

17 QUESTION: And that of course isn't -- we're not  
18 faced with a situation where Congress has passed a law  
19 granting this immunity.

20 MR. DELLINGER: That is correct, Mr. Chief  
21 Justice --

22 QUESTION: Let me -- I don't understand how  
23 Nixon v. Fitzgerald requires you to say that it is  
24 separation of powers that somehow gets to the State  
25 courts. A State -- you could not bring suit in the State

1 court to stay a Federal actor, whether it's the President  
2 or not. It's simply the supremacy clause that says State  
3 courts don't muck around with -- with Federal activities.

4 MR. DELLINGER: Well, Justice --

5 QUESTION: You don't need separation of powers  
6 to get there.

7 MR. DELLINGER: No. You need -- what you need  
8 is Article II, as informed by the separation of powers.

9 QUESTION: Right, right.

10 MR. DELLINGER: Nixon v. --

11 QUESTION: So that keeps the State courts out.  
12 And then you have the doctrine of separation of powers,  
13 which keeps the Federal courts out.

14 MR. DELLINGER: Yes, that is correct.

15 QUESTION: Okay. Well, that's quite different  
16 from saying we've extended -- somehow we make a ruling on  
17 separation of powers for the Federal courts and that  
18 automatically slops over to the State courts.

19 MR. DELLINGER: No.

20 QUESTION: On the other hand, the case such as  
21 Toddles case, which says that a State -- or a State court  
22 -- cannot enjoin a Federal official, have to do with a  
23 Federal official in the course of his duties.

24 MR. DELLINGER: That is correct, Justice  
25 Kennedy. The -- in both instances, however, the public



1 interest in the President's unimpaired performance of his  
2 duties must take precedence over a private litigant's  
3 interest in redress.

4 QUESTION: Mr. Dellinger, can I ask you about  
5 that?

6 MR. DELLINGER: Yes.

7 QUESTION: Your brief and the brief of the  
8 Petitioner both make a lot about the fact that the  
9 President is -- you know, it's a full-time job and he --  
10 he's very -- and any intrusion upon his time is intruding.  
11 I must say, I don't find that terribly persuasive. The  
12 fact is that -- that that's a better reason why the Chief  
13 Justice or any of the Justices of this Court should have  
14 the kind of immunity you're talking about, or the Speaker  
15 of the House, or a member of Congress, none of whom can  
16 delegate any of their responsibilities.

17 The President is the one Federal officer at the  
18 highest level who is able to delegate.

19 MR. DELLINGER: Justice Scalia, the singularity  
20 and unitariness of the executive are what makes it  
21 distinguishable from every other official, and it's not  
22 possible --

23 QUESTION: But we see Presidents riding  
24 horseback, chopping firewood, fishing for stick fish --

25 (Laughter.)

1           QUESTION: -- playing golf and so forth and so  
2 on. Why can't we leave it to the point where, if and when  
3 a court tells a President to be there or he's going to  
4 lose his case, and if and when a President has the  
5 intestinal fortitude to say, I am absolutely too busy --  
6 so that he'll never be seen playing golf for the rest of  
7 his administration --

8           (Laughter.)

9           QUESTION: -- if and when that happens, we can  
10 -- we can resolve the problem.

11          MR. DELLINGER: Justice Scalia --

12          QUESTION: But, really, the notion that he  
13 doesn't have a minute to spare is -- is just not -- not  
14 credible.

15          MR. DELLINGER: Justice Scalia, President Reagan  
16 said quite aptly, Presidents don't have vacations; they  
17 have a change of scenery. Every party to this litigation  
18 and every judge below agrees that a President cannot be  
19 subjected to litigation in the same manner as someone who  
20 is not at that time serving as President. What -- what is  
21 at issue is not whether an action against the President  
22 has to be treated differently, but how that difference  
23 should be.

24                 And the approach suggested by the court below of  
25 -- of sensitive judicial case management would wholly fail

1 both to protect the President and would enmesh the State  
2 and Federal courts in a politically charged task, lacking  
3 manageable judicial standards.

4 QUESTION: Perhaps you can help me with this  
5 aspect of that argument. And it's been troubling to me.  
6 When we talk about privileges and immunities, we're  
7 talking about balances of interests, the rights of the  
8 litigant, the necessities of the President. Here, it  
9 seems to me, that the President, during the course of the  
10 stay that this proceeding produces, is free with his staff  
11 and his resources to really, to continue to argue his  
12 case, to ruin the reputation of the plaintiff, to poison  
13 the well any way he can, just as the -- as the other  
14 parties might try to do against him. But he's in a very  
15 dominant position.

16 There's really nothing we have that could stay  
17 the President's activity in this regard. That certainly  
18 is beyond the control of the Court. So it seems to me  
19 that the imbalance here is very substantial. And I know  
20 of no compensating balance mechanism to protect the  
21 plaintiff.

22 MR. DELLINGER: Well, I think that certainly  
23 political pressures would cut against that. But we have  
24 -- we have acknowledged that delay could well have adverse  
25 consequences for a plaintiff suing any President. But

1 that has never been treated dispositive. There is nothing  
2 anomalous about the proposition that individual civil  
3 damage remedies are precluded by public policy  
4 considerations.

5 Chief Justice Burger noted in Fitzgerald that  
6 there are at least 75,000 public officials that have  
7 absolute immunity, a different kind of immunity, but one  
8 which nonetheless precludes plaintiffs from being able to  
9 --

10 QUESTION: Well, Mr. Dellinger, suppose it's a  
11 child custody matter. Sometime in the future, we have  
12 some President who doesn't get along with a spouse, and  
13 there's a child custody problem. There's no right to go  
14 into a State court and get temporary relief, so that the  
15 child knows where the child is going to be for the next 8  
16 years or whatever it is?

17 MR. DELLINGER: Justice O'Connor, I believe that  
18 that would be -- that's the most appealing case for an  
19 exception I've heard. Now, we're not suggesting -- and I  
20 have to be concerned about --

21 QUESTION: Well, so there's no automatic rule  
22 that the Court has to dismiss the minute the thing is  
23 filed; you acknowledge that?

24 MR. DELLINGER: Well --

25 QUESTION: Or suppose a President in the future

1 owns some part -- great parcel of land somewhere and it's  
2 bubbling up with poisons. And all the neighbors are upset  
3 because of the environmental damage. No temporary  
4 injunction possibility?

5 MR. DELLINGER: I am not suggesting that there's  
6 a balancing test or a case-by-case determination. We're  
7 suggesting that there ought to be a rule -- and we have to  
8 be concerned not just with civil damage actions like this  
9 one, but with actions against all future Presidents -- a  
10 rule -- an operative rule that courts should postpone  
11 civil litigation until the President's term. But the  
12 existence of that does not mean we can assume, arguendo,  
13 that an extraordinary case like child custody you could  
14 make an exception.

15 Now, as to the President's --

16 QUESTION: Well, once you assume that, arguendo,  
17 you don't have a firm rule, and you begin to lose me.

18 MR. DELLINGER: No --

19 QUESTION: Because I don't like cases -- I do  
20 not like courts engaging in case-by-case balancing and  
21 saying, This intrudes on the presidency too much, this  
22 doesn't intrude.

23 MR. DELLINGER: This is not a matter --

24 QUESTION: You give me a clear line, and I might  
25 buy it.



1           MR. DELLINGER: The fact that you have a rule,  
2 and an operative rule, and it tells courts what to do does  
3 not mean that you can never make an exception. That's  
4 true of prior restraints.

5           QUESTION: Is that right?

6           MR. DELLINGER: That's true of prior restraints.  
7 The --

8           QUESTION: General Dellinger, there was a list  
9 in many of the briefs. And it went: nuisance abatement,  
10 mortgage foreclosure, divorce, child custody. And those  
11 were presented as categorical exceptions. Are you saying  
12 that it would be a case-by-case thing or that there are  
13 certain kinds of cases that would be excluded from this  
14 temporal immunity?

15          MR. DELLINGER: We believe that there should be  
16 a rule that any civil litigation against a President  
17 should be postponed. Now, the President's attorney need  
18 worry only about civil damage actions. And it is hard, I  
19 think, given the way our legal culture treats civil damage  
20 actions, to make the case for an exception in that  
21 instance. But when you consider the demands on the  
22 presidency, we think, given the --

23          QUESTION: What are those demands in respect to  
24 a deposition, say, kept under seal, of non-White House  
25 witnesses? How does proceeding with discovery for

1 non-White House witnesses -- even, let's say, kept it  
2 under seal so it wasn't in the press, et cetera -- how  
3 would that interfere with the daily workings of the  
4 presidency?

5 MR. DELLINGER: I think it could interfere with  
6 the workings of the presidency, and therefore would urge  
7 that discovery be postponed, except for lost evidence that  
8 Mr. Bennett has acknowledged that he would accommodate.  
9 Because I think litigation can be all-consuming and  
10 all-absorbing. I think there is -- one has to have a  
11 sense of the extent to which someone who is involved in  
12 personal litigation can be totally absorbed by it.  
13 Advising on what questions should be asked of witnesses --

14 QUESTION: But surely the range of matters --

15 QUESTION: Surely that may be true of an  
16 individual with an ordinary job, but with all the pressing  
17 concerns that the President has, one would think it would  
18 be less true of him.

19 MR. DELLINGER: Mr. Chief Justice, the -- when  
20 this country adopted the 25th amendment, it was a  
21 recognition by Congress and the courts that the  
22 President's office was singular, as Chairman Emmanuel  
23 Cellars said when he proposed the amendment to Congress,  
24 the Nation cannot permit the office of the President to be  
25 vacant even for a moment.

1           QUESTION: But let's say it is singular. Now,  
2 it seems to me you're talking about intrusion of the  
3 judiciary upon the executive's time. You also have,  
4 sometimes, intrusion by the legislature upon the  
5 executive's time. Now, the way we've chosen to handle  
6 that with respect in particular to claims of presidential  
7 privilege -- not to testify, not turn over documents, not  
8 to give information to Congress -- is we haven't adopted  
9 an absolute rule that, because it would be so intrusive  
10 upon the President, you can't make any such demands. We  
11 wait for the case to arise.

12           And if and when the President has the intestinal  
13 fortitude to say, as, for instance, Dwight Eisenhower did  
14 with respect to the Army McCarthy hearings, I am not going  
15 to give any testimony; I am not going to allow any of my  
16 people to give testimony. If and when that comes up, I'm  
17 willing to allow a total executive privilege at that  
18 point. Why can't we adopt the same rule here? If and  
19 when the President says, I just don't have the time to  
20 come when you subpoena me, I'll give him an absolute  
21 immunity in that situation.

22           MR. DELLINGER: Justice Scalia --

23           QUESTION: Why isn't that enough to protect the  
24 President from all that we're worried about?

25           MR. DELLINGER: Because I think that risks both,

1 failing to protect the President and risks undercutting  
2 the role of the courts. To put the President to the task  
3 with regard to each phase of a lawsuit --

4 QUESTION: The beautiful thing about it is it  
5 takes the courts out of the scene. They don't have to  
6 decide, is it too important, is it unimportant, blah,  
7 blah, blah, blah, which gets the courts involved.

8 MR. DELLINGER: It totally undercuts --

9 QUESTION: This way it's absolute. All the  
10 President has to do is stand up and say, I'm too busy to  
11 come to this hearing, and I will not come, and you have no  
12 power to enter judgment against me simply because of my  
13 refusal.

14 MR. DELLINGER: Justice Scalia, that would --  
15 the approach that would have litigation go on -- and  
16 perhaps no President could responsibly agree to attend,  
17 which is why putting the President to a task at every step  
18 and putting the courts at that task of making a decision  
19 about which of the President's duties. The President's  
20 work makes it impossible --

21 QUESTION: But under that rule, the court  
22 wouldn't have to make any decision. Under the rule  
23 proposed by the question you were answering, the minute  
24 that is asserted, the court says, Hands off, I'm out of  
25 here.

1                   MR. DELLINGER: You would put the President to  
2 the burden of being concerned with litigation constantly  
3 and having to raise at each point a refusal to participate  
4 or to cut off his testimony. You would put -- you would  
5 put a --

6                   QUESTION: General Dellinger -- General, but  
7 you're not just talking about when the President is called  
8 to testify; you are talking about all the other people in  
9 the litigation --

10                  MR. DELLINGER: That is correct.

11                  QUESTION: -- that's what makes it unlike the  
12 legislative hearing?

13                  MR. DELLINGER: The -- the absorption of the  
14 President with the rest of the trial and the hearing  
15 places the Article III judiciary in a very difficult  
16 position. The petitioners in this case give a list of  
17 activities -- I'm sorry, the Respondents -- in their brief  
18 that they think would not have justified delay, including  
19 vacation activities where important work may have been  
20 done, including a good example of what would happen to the  
21 courts is a 4-day train trip they note that a President --  
22 this particular President took en route to a political  
23 convention.

24                  Now, if you debate that example, half the people  
25 will say that's clearly nonofficial and shouldn't give



1 way. They're absolutely right; it's not even paid for by  
2 the government. Others will say it's an important  
3 governmental function for a President to communicate  
4 during his reelection campaign.

5 QUESTION: Thank you, General Dellinger.

6 Mr. Davis, we'll hear from you.

7 ORAL ARGUMENT OF GILBERT K. DAVIS

8 ON BEHALF OF THE RESPONDENT

9 MR. DAVIS: Mr. Chief Justice, and may it please  
10 the Court:

11 William Jefferson Clinton, the citizen, who  
12 holds the office of the presidency of the United States,  
13 advances the novel claim of immunity from the progress of  
14 litigation while he is President. This immunity he  
15 derives, he says, from the separation of powers doctrine  
16 of our Constitution, and he further contends that the  
17 judicial branch of Government must suspend the processing  
18 of Paula Corbin Jones' lawsuit until he is out of office,  
19 potentially for a period of 7 years after the date of her  
20 filing of the suit.

21 This novel proposition has three fundamental  
22 errors. The first error is to confuse the office of the  
23 presidency, which has privileges and immunities which  
24 protect its institutional duties, with the person who  
25 holds that office who, in his private capacity and

1 personal capacity has no such privileges and immunities  
2 and instead has the same rights and responsibilities as  
3 all other citizens.

4 QUESTION: Mr. Davis --

5 MR. DAVIS: Yes, sir.

6 QUESTION: -- what do you do when a State court  
7 tells the President, you're going to lose this lawsuit  
8 unless you appear for a hearing on June 2, and the  
9 President says, you know, Your Honor, I have a NATO  
10 meeting I'm supposed to go to, heads of State, and you  
11 know, you have a testy district judge or local State court  
12 judge -- you've encountered some of them -- and they say,  
13 this is my courtroom and, you know, I expect you here on  
14 June 2.

15 MR. DAVIS: Your Honor --

16 QUESTION: And you say there's no remedy for  
17 that.

18 MR. DAVIS: Justice Scalia -- no, I say that  
19 there is a remedy for that. First, the bright line test  
20 that the Court should seek here, I think, is that you look  
21 first to an actual, imminent interference with official  
22 duty.

23 QUESTION: And who judges that, the judge does?  
24 The judge says, well, Mr. President, this NATO meeting,  
25 I've sort of looked up the -- it's not a very important

1 NATO meeting.

2 (Laughter.)

3 QUESTION: You could send your Secretary of  
4 State. In fact, I think he's smarter than you are anyway.

5 (Laughter.)

6 QUESTION: Or the President says, it's top  
7 secret. I can't tell you, judge, why I can't be there.

8 MR. DAVIS: Justice Ginsburg -- I'm not sure who  
9 I should respond to first, but --

10 QUESTION: It's the same question.

11 (Laughter.)

12 MR. DAVIS: Justice Ginsburg, there are ample  
13 traditional powers. We don't have to shift burdens of  
14 proof or any other special mechanism here. There are  
15 traditional powers of the court which must be presumed to  
16 exercise those to protect the President from interference  
17 with his job, ex parte conferences, and the like.

18 Justice Scalia, your question as to what do you  
19 do if a judge does not and is not sensitive to the demands  
20 of the presidency and the time required by the occupant of  
21 that office to perform the functions, I think there are  
22 several potential remedies. I'm not certain that I could  
23 exhaust them all, but mandamus, prohibition. Certainly  
24 all roads lead to this Court.

25 QUESTION: But what law would govern that? Is

1 it just State law, be nice to Presidents? I --

2 MR. DAVIS: No, I think first the President must  
3 make the claim, if he --

4 QUESTION: And what law would control, Federal  
5 or State, when a President says I can't be there because I  
6 have to do something that's connected with my office?

7 MR. DAVIS: I hope I'm not on unsettling ground  
8 here, but I would suggest, as Justice O'Connor I think  
9 first mentioned, that the Supremacy Clause, the  
10 structure -- and here is a separation of powers issue  
11 perhaps, at least where the Constitution parceled out,  
12 structurally, power and gave to the President all  
13 executive power.

14 If a State or Federal court, and I'm not certain  
15 that it makes any difference whatsoever, were to interfere  
16 in such a way or permit an interference --

17 QUESTION: And who decides that? What we're  
18 asking is, who decides? Does this Court decide whether  
19 the President is being interfered with too much, or is the  
20 simple assertion --

21 MR. DAVIS: I think the simple assertion --

22 QUESTION: The simple assertion by the  
23 President, if he's willing to take the political heat and  
24 say, I don't have enough time to come to this hearing --

25 MR. DAVIS: I think --

1 QUESTION: -- would you allow that absolutely to  
2 control?

3 MR. DAVIS: I would allow it to control with  
4 this possible caveat. If it happened 10 times in a row,  
5 and there was a question of good faith, I think the  
6 Court -- I don't think the Court can exercise any  
7 jurisdiction over his person.

8 QUESTION: Can't you leave political pressures  
9 to take care of that? No President's going to do it 10  
10 times. He's going to look very bad.

11 MR. DAVIS: Well, I would agree.

12 QUESTION: What in your view is an interference?  
13 That is, suppose, for example, that the lawyers are  
14 deposing non-White House witnesses and it turns out that  
15 every statement they made is in the newspaper and the  
16 President says, but I have to respond to each of these.  
17 They're saying I was in a certain place at a certain time,  
18 or I said something to somebody only a month ago.

19 And then somebody else says something about what  
20 he didn't say, and then somebody says something about  
21 where there's a paper that somebody wrote it down, and  
22 then it goes into -- we all know how those things work,  
23 and suppose the President says, look, I don't have time to  
24 go into all of these things. I don't have time to  
25 remember every single thing I said to everybody and



1 anything that's tangentially related. It's interfering,  
2 right now.

3 Now, what in your view -- is that an  
4 interference, or is --

5 MR. DAVIS: I think that the rule here, Justice  
6 Breyer, is an actual, imminent interference with his job  
7 and a claim that he makes.

8 QUESTION: I've just given you the example. Is  
9 that an interference, or he's saying this deposition, all  
10 these depositions interfere because I don't have time.

11 MR. DAVIS: Yes, sir.

12 QUESTION: That is an interference?

13 MR. DAVIS: I think that may well be an  
14 interference. It's the same kind of interference that you  
15 would have that's posed, this torrent of litigation that  
16 might occur.

17 QUESTION: Now, he comes and says that, and how  
18 in your view should this be decided? I'm just repeating  
19 now the question, that I want to be clear about.

20 MR. DAVIS: On the torrent of litigation, or  
21 how --

22 QUESTION: No, how -- when the -- when your  
23 side, for example, takes dozens of depositions, and each  
24 one turns up what I call peripheral or satellite issues  
25 about who said what to whom where, and where the paper is

1 and where it isn't and so forth, and he says, I don't have  
2 time to talk to my lawyers about all of these details  
3 because there are so many, and they require so much  
4 thought, and that's his claim of interference. Now, how  
5 in your view is it supposed to work?

6 MR. DAVIS: Justice Breyer, if he relates that  
7 to his official duties so that it is taking his time and  
8 his mental processes away from his official duties, then I  
9 think that is an interference that would justify him  
10 not --

11 QUESTION: Well, so you don't defend the  
12 judgment of the court of appeals below. Did you file a  
13 cross-petition for certiorari then on some ground? The  
14 court below permitted, as I understand it, some  
15 discovery --

16 MR. DAVIS: Oh, no. No, sir --

17 QUESTION: -- to go forward, but you take the  
18 position that that discovery may not go forward if the  
19 President asserts, gee, this is taking my time. You're  
20 deposing witness X out there in the State of Arkansas but  
21 it's consuming my time to look at it. Therefore, you're  
22 off the hook. Is that your position?

23 MR. DAVIS: No. No, I am defending --

24 QUESTION: But that is precisely what you just  
25 told Justice Breyer is the rule.

1 MR. DAVIS: No, Your Honor.

2 QUESTION: What is the thing you're asserting?

3 I just am totally confused now.

4 MR. DAVIS: All right. Well, let me see if I

5 can clear the confusion. What I am suggesting, and it's

6 in the context of the depositions that Justice Breyer

7 raised this --

8 QUESTION: Depositions of third parties out of

9 State?

10 MR. DAVIS: It's hard to conceive that they

11 would be --

12 QUESTION: But if the President comes in and

13 says, look, I want to keep track of this stuff, I need to

14 meet with my lawyer, and I want to see what's going on

15 here, it's interfering with my duties, what is the lower

16 court to do?

17 MR. DAVIS: Well, I think the lower court has

18 its function and its duty to decide whether that is a good

19 faith claim.

20 QUESTION: That goes beyond my question, you

21 understand.

22 QUESTION: Let him answer Justice O'Connor's

23 question. Go ahead.

24 MR. DAVIS: And if it is not, then you may have

25 a conflict between the person of the President and a

1 judge. He would respond. He would just go to the --

2 QUESTION: So the trial court judge at the State  
3 court level is to determine whether the offer -- the  
4 complaint made by the President's lawyer is made in good  
5 faith or not?

6 MR. DAVIS: I think he must make the claim of  
7 actual interference with his duties, that as another  
8 example, the torrent of litigation has come -- is so much,  
9 that I am only responding now to civil complaints.

10 QUESTION: But don't we know that that's  
11 inevitable in a suit like this? This argument here today  
12 is taking an hour. All the counsel and all participants  
13 in the argument have thought about it for at least the  
14 weekend if not a week.

15 (Laughter.)

16 QUESTION: There's an anxiety component, there's  
17 an intellectual commitment --

18 MR. DAVIS: Yes, sir.

19 QUESTION: -- there's an emotional  
20 commitment --

21 MR. DAVIS: Yes, sir.

22 QUESTION: -- that's far more extensive than  
23 some time chart would indicate.

24 MR. DAVIS: I don't --

25 QUESTION: And I think that's part of what the

1 President is saying, is --

2 MR. DAVIS: Well --

3 QUESTION: -- if he's going to defend this  
4 lawsuit it will absorb substantial energies.

5 MR. DAVIS: I don't believe, Justice Kennedy,  
6 that the Constitution protects him in his personal  
7 capacity.

8 QUESTION: Well, what if the President's  
9 attorney came before the Court at the cert stage and  
10 asserted in the petition for certiorari this is causing  
11 the President to spend too much time on this. You,  
12 Supreme Court, lay off. It's bothering my duties. I'm  
13 very interested in this issue, and it's taking my time.  
14 What is the Supreme Court of the United States to do?

15 MR. DAVIS: I don't think the Supreme Court of  
16 the United States is a fact-finding body on that subject.

17 QUESTION: But the only fact is --

18 QUESTION: But we have an issue of law that is  
19 consuming a great deal of time, effort, and anxiety.

20 MR. DAVIS: Yes, but that issue again is a  
21 matter to be addressed to a trial judge, who is --

22 QUESTION: But I thought the only issue was good  
23 faith. I thought you said a moment ago that if in fact  
24 the particular objection to the particular deposition and  
25 what-not was made in good faith, that it would be



1 appropriate for the court to honor it, period.

2 MR. DAVIS: Well, I think the court -- I  
3 think -- perhaps I should also suggest that a court  
4 suspicious of the good faith of that assertion --

5 QUESTION: No, let's --

6 MR. DAVIS: -- is entitled to require a showing,  
7 just as in the --

8 QUESTION: But all of this showing, all of this  
9 inquiry goes to the good faith of the request.

10 MR. DAVIS: Goes to the interference, whether --

11

12 QUESTION: Goes to -- I thought you were saying  
13 it goes to the good faith of the claim of interference,  
14 and that is a different thing, I think, that you are  
15 allowing thereby from an inquiry into the degree of  
16 interference and whether the interference is serious  
17 enough to warrant the stay or what-not.

18 I think those are two different inquiries, and I  
19 understood you to be saying back when you were responding  
20 to Justice Breyer that it was the good faith inquiry that  
21 would be dispositive.

22 MR. DAVIS: I think as a practical matter, and  
23 I'm not suggesting the good faith as a rule of law, as a  
24 practical matter in --

25 QUESTION: Probably try to take it out of the

1 immunity context with respect to lesser officers -- you  
2 know, the Fitzgerald case has been featured in the briefs  
3 and in this argument, but Harlow came down the same day,  
4 and in that case this Court said that discovery can be  
5 peculiarly disruptive of effective government. That was  
6 in the case of a lesser officer. And so for that reason  
7 the Court said, although immunity is only qualified, we're  
8 going to decide that question at the top of the list  
9 before any discovery is allowed.

10 MR. DAVIS: Justice Ginsburg, I believe that the  
11 immunity question, if it exists, if the concept that has  
12 been suggested to this Court of temporal immunity, if it  
13 exists, bars proceedings whether they're pretrial or  
14 trial. If that arises under the separation of powers,  
15 then it bars it all. If it does not, it does not bar  
16 either the pretrial or the trial subject to an actual  
17 interference.

18 QUESTION: And I asked --

19 QUESTION: I thought you were arguing that -- or  
20 conceding that if there was in fact a good faith assertion  
21 of the privilege in a given instance, that it would be  
22 appropriate to honor it. Is that -- I am wrong?

23 MR. DAVIS: I don't think it's a privilege. I  
24 think what he would be saying is, a procedure has happened  
25 here. I can't --

1 QUESTION: Whatever you call it.

2 MR. DAVIS: Well, I think the best way to call  
3 this is a trial. Let's talk about a trial. He's  
4 anticipating 7 days worth of trial, and I can't be in  
5 court for 7 days, and --

6 QUESTION: No, no. This is third party  
7 depositions we were talking about.

8 QUESTION: May I ask a question in that regard  
9 about third party depositions, and we're concerned about  
10 their impact on the office of the President and so forth.

11 Would it be permissible for the trial judge in  
12 trying to control the litigation and recognize the special  
13 problems of the President to narrow discovery to matters  
14 that relate to the particular incident involved in the  
15 trial and say, no, you can't ask about the history for the  
16 last 10 years, or 45 other police officers and so forth.  
17 Would that be a permissible use of the trial judge's  
18 discretion?

19 MR. DAVIS: I think the trial judge always has  
20 the opportunity and the duty to balance the interests --

21 QUESTION: So it would be permissible to him to  
22 narrow discovery and the scope of inquiry --

23 QUESTION: Mr. Davis, I don't think you're  
24 answering some of the questions quite as frankly as we  
25 might hope you would. To say that the trial judge could

1 consider it isn't to say whether he's bound by it.

2 MR. DAVIS: I don't think he is bound --

3 QUESTION: And there is a difference between a  
4 President's claim simply saying, I can't come now. Is  
5 that conclusive on the court? It seems to me -- or does  
6 the court have an obligation, or at least is it  
7 permissible to weigh the court's own evaluation of the  
8 President's claim? I think I would like and I think my  
9 colleagues would like your answers to those questions.

10 MR. DAVIS: I do believe, Chief Justice, that a  
11 court has, if it is suspicious of a President's assertion  
12 of a claim, has a right to inquire into the bona fides of  
13 that claim, and if the court found in its belief that the  
14 President did not make that claim and that there --  
15 properly that there was not an interference with his  
16 duties, I think the court would go -- could -- can't take  
17 any exercise of jurisdiction over his person, but could go  
18 forward with the other kinds of remedies that it might  
19 have.

20 QUESTION: Is that the holding of the Eighth  
21 Circuit that we're reviewing?

22 MR. DAVIS: The Eighth Circuit never considered,  
23 I don't think, the minutiae --

24 QUESTION: It sounds different to me than what  
25 we read in the Sixth --

1 MR. DAVIS: The Eighth Circuit said --

2 QUESTION: -- in the Eighth Circuit opinion.

3 MR. DAVIS: No, the Eighth Circuit said that,  
4 sensitive to proper judicial case management and sensitive  
5 to the interests of the parties, including the President,  
6 this case should proceed, and I --

7 QUESTION: Mr. Davis --

8 MR. DAVIS: -- responding as a sensitivity to  
9 those questions.

10 QUESTION: Mr. Davis, I am unlikely to favor a  
11 disposition that allows any judge, Federal or State, to  
12 sit in judgment of the President's assertion of whether  
13 his executive duties are too important or not.

14 What about an alternative to your proposal that  
15 would draw a distinction between the person of the  
16 President being hauled before a court and depositions of  
17 other people, and say the latter, and the worry about the  
18 trial, and all of that, is just like worry about his  
19 personal health or his financial affairs, or marital  
20 problems at home, or whatever. It's just something you've  
21 got to live with, even when you're President.

22 However, to be hauled personally before a judge  
23 is something else, and so give the President absolute  
24 immunity. If he makes the claim, I'm too busy to come,  
25 you cannot enter judgment against him simply because he



1 refuses to appear, but the rest of the trial can proceed.  
2 Would that be acceptable to you?

3 MR. DAVIS: I would not find it acceptable  
4 because I think the presumption is that this case, which  
5 does not have a risk to it in the likely event that it  
6 goes forward -- if it were to go forward does not have a  
7 risk of interference with the functions of the presidency,  
8 and it's a case of a --

9 QUESTION: Well, what if the President says so?  
10 I'm not saying the rest of the trial. I'm just saying,  
11 when he's subpoenaed to testify he says, I am too busy. I  
12 am President of the United States.

13 MR. DAVIS: Well, Justice Scalia --

14 QUESTION: And he has to make that claim.

15 MR. DAVIS: -- he has given depositions, and he  
16 has arranged his calendar, and the court would -- under  
17 the new Federal rules, as I understand it, would have a  
18 conference with him, what protections do you need, and  
19 would -- could enter an order to that, and he gives  
20 available dates.

21 As a matter of fact, in most of these  
22 circumstances my brother Mr. Bennett I'm sure would be  
23 accommodating to arrange with us, without the involvement  
24 of the court at all, the time and place and date, and the  
25 availability of the President, and if he said, hey, I've

1 got something else to do, I'm sure counsel would do it.  
2 If they didn't do it, then of course you go to the court,  
3 but to say --

4 QUESTION: But you still insist that the court  
5 pass judgment on -- if the President can't come to some  
6 compromise, you think the court will sit in judgment on  
7 whether, indeed, he's too busy?

8 MR. DAVIS: Well, his option is just not to  
9 obey, because I have a --

10 QUESTION: And suffer judgment.

11 MR. DAVIS: -- constitutional and statutory  
12 function to perform.

13 QUESTION: And suffer judgment.

14 MR. DAVIS: He could suffer judgment. There's  
15 the appellate process for that.

16 QUESTION: When you say that the President can  
17 in good faith make an assertion of privilege that would be  
18 honored if it's in good faith, it seems to me that you  
19 give away most of your case.

20 You leave two things for court inquiry, number  
21 1, the existence of good faith, and number 2 whether or  
22 not it's a risk to the presidency. It seems to me that  
23 both of those inquiries are so very, very intrusive that  
24 it argues strongly for the absolute privilege that  
25 petitioners are suggesting.

1 MR. DAVIS: Well, the question came to me  
2 initially and my bright line rule was not the good faith  
3 rule, it was the actual imminent risk to the President  
4 performing his duties, and an assertion of the claim, and  
5 we got to the point of the assertion of the claim, and I  
6 merely suggested that the -- that if the President was not  
7 in good faith 10 times in a row, that the court might make  
8 an inquiry into that.

9 I did not suggest to the Court that the --  
10 necessarily that that was a -- the rule of law that we  
11 would necessarily seek.

12 I think the President would act in good faith.  
13 If he did not act in it, the court may have the right to  
14 inquire.

15 I don't think that is before us. What is before  
16 us is a private action. The President has a private  
17 capacity. He should be -- he should go forward with the  
18 case, and if --

19 QUESTION: Mr. Davis, what is at risk for you  
20 taking into account two things. Mr. Bennett said that it  
21 would be appropriate to take depositions to perpetuate  
22 testimony if there's a danger that the testimony won't be  
23 available later and, should you prevail, you get interest  
24 on any damage award, so what is at stake in a  
25 postponement?

1 MR. DAVIS: Well, what is at stake, and this  
2 is -- these interests I think are substantial to the  
3 plaintiff. She can lose her cause of action if either she  
4 or the President dies. It is extinguished, as the Eighth  
5 Circuit concurring opinion points out.

6 She has her reputation. You talk about how  
7 important this case is. It's a civil rights case  
8 partially and State's claims, but reputation is what we  
9 take to our grave probably more than anything else, and  
10 while she's alive that reputation is sullied.

11 The implicit -- well, the implication of the  
12 article was that she was a compliant female. If that is  
13 the case, we can imagine that she goes for a job and an  
14 employers says, I'm not so sure whether you made a valid  
15 claim here or not. I don't want to be the next employer  
16 that you charge.

17 QUESTION: She hasn't alleged anything like  
18 that, has she?

19 MR. DAVIS: No, no, but you asked me what  
20 interests are involved in the delay.

21 In addition to that, obviously, the course of  
22 human experience, we don't know when witnesses will die.  
23 We certainly can't say, well, there's an emergency because  
24 somebody's going to die tomorrow who's not ill. That is a  
25 common experience, and that's why justice delayed has

1 often --

2 QUESTION: Well, witnesses' memories also fade,  
3 do they not?

4 MR. DAVIS: They fade, and they become  
5 incapacitated. The documents get lost or mislaid. So her  
6 case could be utterly destroyed, and she could --

7 QUESTION: I thought as far as witnesses'  
8 memories were concerned, I thought that Mr. Bennett had  
9 conceded that you could have something like Rule 27 of the  
10 Federal Rules of Civil Procedure, depositions to  
11 perpetuate testimony?

12 MR. DAVIS: But discovery depositions, Your  
13 Honor?

14 QUESTION: Yes.

15 MR. DAVIS: Where leads are developed? I'm not  
16 certain that Mr. Bennett would permit that.

17 QUESTION: No. No, responding to the dim memory  
18 problem, that dim memory is a problem. Then you can get  
19 the current memory.

20 MR. DAVIS: Mr. Bennett I found to be very  
21 accommodating, but this Court is going to be enunciating a  
22 constitutional doctrine.

23 QUESTION: Well, I'm not so sure about that,  
24 because even in the Fitzgerald case Justice Powell had a  
25 footnote where he suggested that Congress might pass a law



1 authorizing such a claim against the President. Now, if  
2 Congress could pass a law, then it can't be a  
3 constitutional matter, can it?

4 MR. DAVIS: That is the remedy that the  
5 President -- that the President could seek if he fears  
6 this interference. I think if there's --

7 QUESTION: No, no. In the Fitzgerald case  
8 Justice Powell said that he was leaving over the --  
9 leaving open the possibility that Congress could do away  
10 with the absolute immunity --

11 MR. DAVIS: Oh, I think --

12 QUESTION: -- by law.

13 MR. DAVIS: Yes.

14 QUESTION: By a mere law.

15 MR. DAVIS: I -- the justice -- Chief Justice  
16 Burger was very skeptical of that. There was a suggestion  
17 in it, in dicta, in Justice Powell's opinion.

18 My own view is that if there is an immunity that  
19 arises under the Constitution and the separation of  
20 powers, that Congress by some affirmative act that says a  
21 President now doesn't have that protection, I would be  
22 very skeptical whether Congress could do it.

23 QUESTION: And of course Congress can apparently  
24 make constitutional by statute what is otherwise  
25 unconstitutional under the Commerce Clause, can't it?

1 (Laughter.)

2 MR. DAVIS: Yes, sir, but that --

3 QUESTION: So even if that were true, it  
4 wouldn't be unheard of in our strange jurisprudence.

5 MR. DAVIS: Justice Scalia, I'm not sure I want  
6 to be a part of that.

7 QUESTION: No, but it's true.

8 (Laughter.)

9 QUESTION: The fact is true though. Is it not  
10 true that Congress by statute can --

11 QUESTION: Well, Congress gives power --

12 QUESTION: -- cause something which otherwise  
13 would be held by this Court to violate the Commerce Clause  
14 not to violate it.

15 QUESTION: The Constitution gives Congress the  
16 power to regulate commerce. It doesn't give Congress the  
17 power to regulate immunities. I suppose there's a  
18 distinction.

19 MR. DAVIS: That would be mine.

20 (Laughter.)

21 MR. DAVIS: May it please the Court, there are  
22 other --

23 QUESTION: Well, it would if there's a  
24 Federal -- if the immunity's as a matter of Federal common  
25 law and not Federal constitutional law.

1                   MR. DAVIS: Yes, but it is not here. We  
2 would -- and the Fitzgerald opinion did talk about  
3 presidential immunities and the sources of them, and there  
4 were four sources. The presidency was a recent, much more  
5 recent development than the development of the common law,  
6 and so look for any immunity that the President has in the  
7 Constitution itself, which deals with official power, and  
8 that's purely our point here.

9                   Unless there is an immunity that arises  
10 constitutionally, then there should be no bar to the  
11 progress of this litigation with the courts sensitive to  
12 the burdens of the presidency and should be trusted to do  
13 so.

14                   That's another, I think fundamental problem with  
15 our opponents, is that they do not have a presumption of  
16 trust that the court will deal with these matters --

17                   QUESTION: Well, it's often true, and litigants  
18 always don't trust one another completely.

19                   May I ask you the same question I asked your  
20 opponent. How long do you think it will take to try this  
21 case?

22                   MR. DAVIS: This is a very, relatively simple,  
23 as far as fact pattern case.

24                   QUESTION: I'm not asking you to describe the  
25 case.

1 MR. DAVIS: I --

2 QUESTION: I'm asking you to tell me how long  
3 you think it will take to try it.

4 MR. DAVIS: Depending on stipulations, Justice  
5 Stevens, I would say 4 or 5 days perhaps, but that's just  
6 a guess, and it may -- and we don't know if the case will  
7 be narrowed by --

8 QUESTION: Why would it take 4 or 5 days?

9 MR. DAVIS: Well, I'm thinking of what some  
10 jurisdictions do. In Virginia, in Federal or State court  
11 it would take probably -- it would take a half-an-hour in  
12 the Eastern District, but --

13 (Laughter.)

14 MR. DAVIS: But I don't think it will take very  
15 long, and there's a point to be made about that also.  
16 With today's technology, with live feeds or transcripts  
17 and continuances from day-to-day, or whenever the  
18 President feels that he can --

19 QUESTION: One of the major concerns, of course,  
20 is the extent to which you plan to go into collateral  
21 matters.

22 MR. DAVIS: I can't, and I wouldn't bind,  
23 because I'm not certain whether they are admissible. I'm  
24 not certain what they -- if they would tend to show a fact  
25 that we need to prove I think I would be duty bound as

1 counsel to pursue that.

2 QUESTION: Suppose, because there are other  
3 parties involved, that it were 10 days of trial, 2 working  
4 weeks, and -- pick a number -- 15 depositions. Do you  
5 think that would be a substantial investment of the  
6 President's time?

7 MR. DAVIS: It could very well be. It could  
8 very well be, and --

9 QUESTION: And if it then were in that degree,  
10 you think that he'd be entitled to an order deferring the  
11 litigation?

12 MR. DAVIS: If there was no way, at that time --  
13 this is ab initio, but at that time, if there was no other  
14 way to accommodate his needs, the presidency's needs for  
15 him to perform that job, then a continuance might very  
16 well be appropriate.

17 QUESTION: That's something of a perverse  
18 incentive, then, because then he has the incentive to ask  
19 for a long trial.

20 MR. DAVIS: He may indeed --

21 QUESTION: Mr. Davis --

22 MR. DAVIS: -- if he wants to avoid a trial.

23 QUESTION: Mr. Davis, if we can trust the court  
24 to make that judgment, and if we can trust the court to  
25 make all the specific judgments on an instance-by-instance



1 basis which you think is the appropriate way, why can't we  
2 also trust the court to make a judgment up front that  
3 there are going to be so many specific instances, and the  
4 so many specific instances are going to be so costly to  
5 the President that the only practical thing is to make a  
6 blanket judgment now based upon its good judgment?

7 If we can trust the court to make the first two  
8 kinds of good judgments, why can't we trust a court to  
9 make that third kind?

10 MR. DAVIS: In an appropriate circumstance, and  
11 you're getting to the question of a stay by the district  
12 judge as a discretionary matter rather than as a --

13 QUESTION: Well, they're all discretionary.

14 MR. DAVIS: Well, I think she did this --

15 QUESTION: I mean, it's an exercise of the  
16 court's discretion in each instance. If we can trust them  
17 in the first two examples, which you concede, why not in  
18 the third, assuming there's an evidentiary basis for it?

19 MR. DAVIS: Well, the court needs to have a  
20 factual basis on which to exercise discretion.

21 QUESTION: Okay, and let's assume that the  
22 President's lawyers come in and they provide one.

23 MR. DAVIS: If they do provide a factual basis  
24 that justifies a continuance --

25 QUESTION: Okay.

1 MR. DAVIS: -- then certainly the court has  
2 authority to do it.

3 QUESTION: So the only thing --

4 MR. DAVIS: That's a matter of discretion.

5 QUESTION: The only thing we're really arguing  
6 about, then, is whether there ought to be a blanket rule  
7 that can be invoked simply by saying, I want this deferral  
8 for 4 years.

9 MR. DAVIS: Exactly.

10 QUESTION: As distinct from a rule in which the  
11 President's lawyers are going to come in and say, these  
12 are the practical stakes involved, and they therefore  
13 justify a 4-year continuance. That's all we're really  
14 arguing about.

15 MR. DAVIS: That's all we're arguing about, yes,  
16 sir.

17 Let me just conclude by saying this, that what  
18 the President is seeking would require a number of  
19 changes. They suggest burden of -- changes as to  
20 compelling cases, that he doesn't need this, that the  
21 burden be on the plaintiff, and to delay it is a situation  
22 that would be highly unusual in the normal course, and we  
23 don't need it. The power of the court to deal with this  
24 is ample. If it proves not to be ample, as in Justice  
25 Souter's example --

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Davis.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

WILLIAM JEFFERSON CLINTON Petitioner V PAULA CORBIN JONES  
CASE NO: 95-1853

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BY Don Mari Federico

(REPORTER)