

NLWJC - Kagan

Counsel - Box 016- Folder 002

Paula Jones Case [1]

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elena kagan to Jack Quinn et al; re: Jones Argument (1 page)	11/19/1996	P5, P6/b(6)
002. letter	Jack Quinn to Edward Ryan; re: Soldiers' & Sailors' Act (partial) (1 page)	09/22/1996	P6/b(6)
003a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)
003b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)
003c. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)
004. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/08/1996	P5, P6/b(6)
005a. note	To Amy, Geof, & Elena; re: Petition (1 page)	05/10/1996	P5
005b. draft	re: Statement of the Case (23 pages)	05/10/1996	P5

COLLECTION:

Clinton Presidential Records
 Counsel's Office
 Elena Kagan
 OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [1]

2009-1006-F

jp2021

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

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Bob

EXECUTIVE OFFICE OF THE PRESIDENT

14-Nov-1996 06:46pm

TO: Jack M. Quinn
TO: Bruce R. Lindsey
TO: Kathleen M. Wallman

FROM: Elena Kagan
Office of the Counsel

SUBJECT: jones oral argument

The jones oral argument has been set for January 13.

Elena
Please
when we see Mr. Bennett
do "next court" July 12
Reeds
TR

Not planning to ^{do} moot courts.

Planning on having work
table - to discuss all issues.
Go over - G Spive, D Shavers
Any coordinating dates

Wed. Dec. 4
meeting to
call.

10:30

Helpful to have
Jack there.

May do
something else
Sun The road.

Another session
of some type.

lot of people
don't do moot -
I like better doing
it this way.
Ophelmin, I sit ready
for early.

COMMENTARY AND ANALYSIS

Paula Jones: A Federal Crime?

A stunning irony, so far unnoticed, lurks in a pair of pending Supreme Court cases: *Clinton v. Jones*, in which the president and his Department of Justice seek to block a sexual harassment lawsuit against him until after he leaves office, and the lesser-known *United States v. Lanier*.

The irony is that the crude sexual advances of which Bill Clinton stands accused by Paula Corbin Jones would apparently be a federal crime under the Clinton Justice

Department's legal analysis in the case

of David Lanier, who was a monstrously lecherous chancery court judge in rural western Tennessee.

Clinton's alleged conduct would be even more clearly a federal crime under the analysis suggested in amicus briefs filed by leading feminist groups and scholars.

Another irony is that while the *Lanier* case has become (understandably) a *cause célèbre* in the women's movement—with every major feminist legal advocacy group in the nation urging reversal of an appeals court decision that threw out Lanier's convictions—the president's so-far-successful effort to slam the courthouse door in the face of Paula Jones until the year 2001 has prompted not a whimper of protest from any of them.

Given all this, the rumor in the Supreme Court press room—that the cases may be set for argument the same day, sometime in January—seems almost too delicious to be true.

(For a fuller discussion of the Jones-Clinton case, see "Her Case Against Clinton," in the November issue of *The American Lawyer*, which I wrote before becoming aware of the parallels presented by the *Lanier* case.)

The two felony counts and five misdemeanor counts of which the jury found Lanier guilty involve a range of conduct between 1989 and 1991, some of it far more loathsome and outrageous than anything Jones claims Clinton did. Lanier was convicted of sexually assaulting five women, including three court employees and a job applicant, the latter under circumstances that may well warrant the 25-year prison sentence decreed by the trial judge.

The job applicant testified that on two occasions, weeks apart, the judge had grabbed her, exposed himself, pushed her head down violently, and forced her to perform oral sex, while implicitly threatening her with an adverse ruling in a child custody dispute if she reported his crimes.

While nobody has ever accused Clinton of that kind

of Jones' complaint, Clinton first reminded her that he was the boss of her boss; then he "took Jones's hand and pulled her toward him," prompting her to remove her hand and retreat several feet; then he approached again and "put his hand on plaintiff's leg and started sliding it toward the hem of plaintiff's culottes [while] attempt[ing] to kiss Jones on the neck"; and then, after being rebuffed again, he "lowered his trousers and underwear exposing his erect penis and asked Jones to 'kiss it.'" Rebuffed a third time, he allegedly pulled up his pants and said, "You are smart. Let's keep this between ourselves."

While Lanier's Count 9 is not part of the pending appeal, another charge against Lanier, which led to a conviction that Justice is seeking to reinstate, also makes for an interesting comparison. Here's how Solicitor General Walter Dellinger summarized the evidence on Page 6 of his brief:

"In 1989, [Lanier] assaulted Sandra Sanders, whom he had hired [as a juvenile court officer]. During one of [their weekly] meetings [in his chambers, Lanier] grabbed Sanders' breast. Sanders tried to remove his hand; she then stood up and walked out of his office. . . . Later, after a court

So, too, she said, are acts involving "unwanted physical sexual contact short of rape or other sexual assault—like . . . sexual pawing and groping."

MacKinnon added: "He used the power of the state he wielded as a . . . public employer to gain access to women so he could sexually use them as a man, and then he used that same state power to silence them." (She was talking about Lanier, not Clinton.)

Meanwhile, the NOW Legal Defense and Education Fund, the Women's Legal Defense Fund, People for the American Way, and 13 other groups suggested in another brief that "aggressively grabbing and squeezing the victims' breasts and buttocks" under color of state law are federal crimes. The American Civil Liberties Union argued that the same is true of "sexual harassment by government officials" with "power to control employment."

(By the way, the five-year statute of limitations on any federal criminal prosecution based on the Jones-Clinton allegations apparently expired on May 8, 1996.)

The *Lanier* case raises complex issues of federal criminal jurisdiction and constitutional law. Lanier was never prosecuted by the state, as he should have been; he came from a politically powerful family, had been the local mayor before becoming a judge, and is the brother of the state's then-district attorney.

The federal prosecution was based on the broad, vague language of 18 U.S.C. §242, a provision that makes it a crime for a state official acting "under color of . . . law" to deprive another person of "rights . . . secured by the Constitution." The Justice Department's theory is that Lanier deprived his victims of their rights to bodily integrity against sexual assault.

The U.S. Court of Appeals for the 6th Circuit produced five separate opinions, with nine judges voting to reverse all the convictions and six dissenting in whole or in part. Chief Judge Gilbert Merritt Jr. wrote for the majority that §242 was such a vague and potentially all-encompassing statute that it must be construed narrowly, and held that it did not cover any of Lanier's "reprehensible" conduct because the Supreme Court had never recognized a constitutional right to bodily integrity against sexual assault.

In the Supreme Court appeal, the Justice Department and the feminist groups argue that rape and forcible sexual assault by a state official like



BY GILBERT MERRITT JR.

...of the American Lawyer Media, L.P. is now being
succeeding errors of the parallels presented by the
Lanier case.)

The two felony counts and five misdemeanor counts of which the jury found Lanier guilty involve a range of conduct between 1989 and 1991, some of it far more loathsome and outrageous than anything Jones claims Clinton did. Lanier was convicted of sexually assaulting five women, including three court employees and a job applicant, the latter under circumstances that may well warrant the 25-year prison sentence decreed by the trial judge.

The job applicant testified that on two occasions, weeks apart, the judge had grabbed her, exposed himself, pushed her head down violently, and forced her to perform oral sex, while implicitly threatening her with an adverse ruling in a child custody dispute if she reported his crimes.

While nobody has ever accused Clinton of that kind of conduct, the Clinton Justice Department is now seeking to reinstate all of Lanier's convictions under a Reconstruction-era civil rights law, 18 U.S.C. §242, including some misdemeanor counts involving conduct hard to distinguish—at least as a matter of law—from the Clinton conduct alleged by Paula Jones.

The similarities begin with one of the lesser charges, as described in Footnote 4 of the Justice Department's petition for certiorari:

"The [trial] court dismissed Count 9, which alleged that [Lanier had] sexually assaulted a woman in his chambers, when she was meeting with him about her case, by exposing his genitals and urging her to engage in sexual acts with him." The woman testified that Lanier had crudely asked for oral sex.

This allegation—deemed criminal by the Justice Department, if not by the trial judge—is exactly what Jones says then-Gov. Clinton did to her on May 8, 1991.

He did it, she says, during an encounter that began with his sending his state-trooper bodyguard to interrupt her performance of her job—at a state conference at a Little Rock hotel where Clinton had given a speech—to summon her to an upstairs suite to meet with Clinton.



session, respondent grabbed Sanders' buttocks. . . . He also, at a later meeting, pinned Sanders to the wall and kissed her on the lips. [Later still, she] demand[ed] an apology. . . . Although [Lanier] apologized, he began to find minor faults with the quality of her work, and eventually he demoted her." (Lanier did not expose himself to this victim, although he did to others.)

If what David Lanier was convicted of doing to Sandra Sanders was a federal crime, can what Bill Clinton allegedly did to Paula Jones be dismissed as merely a crass sexual overture—not even rising to the level of "sexual harassment"—as feminists and other Clinton supporters have suggested?

The Clinton Justice Department's amici in the Lanier case suggest even more strongly than does Dellinger's brief that the sort of conduct of which Jones has accused Clinton would amount to a federal crime.

Feminist Professor Catharine MacKinnon of the University of Michigan Law School, for example, stressed in one brief that "acts of indecent exposure" are federal crimes if done under color of state law.

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In the Supreme Court appeal, the Justice Department and the feminist groups argue that rape and forcible sexual assault by a state official like Lanier, acting under color of law, should be deemed to violate the

victims' constitutional rights, and thus to be crimes under §242. I agree.

But they venture too far down a slippery slope when they seek federal prosecution for acts of sexual harassment that do not rise to the level of forcible assault. It's a tricky line to draw, but I would draw it in a place that would avoid criminalizing the sort of depraved but not forcible conduct of which Clinton is accused by Jones.

But that's not where the Clinton Justice Department and its feminist allies want to draw the line—not in the Lanier case, at least.

And it's interesting to see the president getting a free pass—without even having to answer Paula Jones' allegations—from Clintonites and feminists who clamor for imprisonment of others accused of similar conduct.

Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer magazine. His e-mail address is stuart.taylor@counsel.com. "Closing Argument" appears weekly in Legal Times.

October 23, 1996

MEMORANDUM

TO: John M. Quinn
Robert S. Bennett

FROM: David E. Kendall *DEK*

RE: Paula Jones Case

I attach a note from Scott Armstrong, which itself contains a message from Ron Rotunda, for whatever use it may be.

Cheers!

[Printing to attached desktop printer...]Date: Thu, 17 Oct 1996 14:37:30 -0400 (EDT)
From: Scott Armstrong <sarmst@cni.org>
To: David Kendall
Subject: Forwarded material

Scott

Dear David

Ron Rotunda, who was our "scholar" at the Watergate committee and now teaches constitutional law at U of Illinois and is author of a well known treatise, sent me the following which may be trivial to man of your scholarly bent, but I did not know that Roosevelt had faced lawsuits in office. Since I am not covering the subject, I pass it to someone who might have use of some portion of it.
Scott

----- Forwarded message -----

Date: Thu, 17 Oct 1996 13:23:54 -0500
From: "Rotunda, Ronald D." <RROTUNDA@LAW.UIUC.EDU>
To: 'Scott Armstrong' <sarmst@cni.org>
Subject: RE: A Question

[Omitted material]

By the way, in doing some research for the 1997 pocket part to the Treatise on Constitutional Law, I discovered some interesting information:

President Theodore Roosevelt. President Theodore Roosevelt was sued for actions taken before he became President or Vice President. By the time he became President, his suit was on appeal. He claimed no immunity for suit, and the state court did not suggest that he was protected by any immunity or that the suit or appeal must be stayed until he left the Presidency. People ex rel. Hurley v. Roosevelt, 71 N.E.2d. 1137 (N.Y. 1904)(per curiam)(mem.)

President Harry Truman. President Harry Truman also was sued for actions taken prior to the time he assumed the Presidency or Vice Presidency. Like Roosevelt, he claimed no immunity from suit; Missouri

court did not raise on its own any suggestion that the sitting President had any immunity, either qualified or absolute, simply because the defendant in that suit was now President. 194 S.W.2d 29 (Mo. 1946).

President John F. Kennedy. President Kennedy was also sued for actions taken prior to the time he became President. After he became President, he claimed that the suit must be stayed because he was temporarily protected from suit pursuant to a federal statute [the Soldiers' and Sailors' Civil Relief Act of 1940] because he was then Commander-in-Chief. The court denied Kennedy's motion for a stay and then the case was settled. *Bailey v. Kennedy*, No. 757,200 (Calif. Superior Court 1962); *Hills v. Kennedy*, No. 757,201 (Calif. Superior Court 1962). There were no written opinions.

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**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543**

October 15, 1996

**Mr. Robert S. Bennett
Skadden, Arps, Slate, et al.
1440 New York Avenue, NW
Washington, DC 20005**

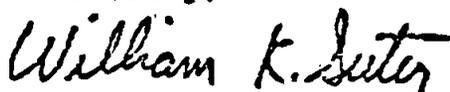
**Re: William Jefferson Clinton
v. Paula Corbin Jones
No. 95-1853**

Dear Mr. Bennett:

**The Court today entered the following order in the above
entitled case:**

**The motion of the Acting Solicitor General for leave to
participate in oral argument as amicus curiae and for divided
argument is granted.**

Sincerely,



William K. Suter, Clerk

cc: Elena

U.S. v. LANIER (95-1717): Prosecution of Sexual Assault as Civil Rights Violation

Issue: Whether a state judge who sexually assaulted several women in his chambers can be convicted under a federal statute that makes it a crime for an official to willfully deprive someone of a constitutional right.

The 6th Circuit held that sexual assault may not be prosecuted in federal court as a violation of the substantive due process right to bodily integrity under a federal statute criminalizing the willful deprivation of a constitutional right by a person acting under the rubric of any law. The 6th Circuit stated that, although the right not to be assaulted is a clearly protected under state law, (1) it is not publicly known or understood as a constitutional right, (2) it has not been declared a constitutional right by the Supreme Court, (3) it is not a right enumerated in the Constitution, and (4) it is not a well-established right of procedural due process. Only a Supreme Court decision applied nationwide, the 6th Circuit concluded, can identify and make specific a "constitutional right" that results in liability under the federal statute.

Lower Courts: U.S. v. Lanier, 73 F.3d 1380 (C.A.6-Tenn. 1996)

Certiorari Granted: June 17, 1996

Action: S.G. filed brief on August 16, 1996

No argument date set.

BRYAN COUNTY BOARD OF COMMISSIONERS v. BROWN (95-1100): Municipal Liability for Inadequate Background Check on Reserve Deputy Sheriff

Issue: Whether an Oklahoma county is liable for its sheriff's decision to hire a deputy with a prior criminal record who assaulted an arrestee.

In *Brown v. Bryan County*, the 5th Circuit sustained a jury verdict that held a county liable under s 1983 for the action of a reserve deputy sheriff which gave rise to an arrestee's excessive force, false arrest, and false imprisonment claims. (The deputy sheriff broke a woman's knees during a traffic stop.) The sheriff, who was the final policy maker for the sheriff's department, hired the reserve deputy in spite of the deputy's extensive criminal record and without first making an adequate background check. Further examination of the deputy's background, the Circuit argued, would have revealed that (1) the deputy had repeatedly violated probation and (2) a warrant had been issued for his arrest. The 5th Circuit stated that a single hiring decision may create municipal liability under s 1983 if that decision was made by a final policy maker responsible for that activity.

Lower Court: *Brown v. Bryan County*, Okl., 67 F.3d 1174 (C.A. 5-Tex. 1995)

Certiorari Granted: April 22, 1996

Action: The S.G. will not file a brief.

Argument is set for November 5, 1996.

THE AMERICAN LAWYER

34158 34960
ROBERT BARNETT
WILLIAMS & CONNOLLY
725 12TH ST NW
WASHINGTON DC 20005
34960 11/01/96



HER CASE AGAINST CLINTON

Paula Jones's claims against President Clinton are far stronger than the media has let on—and far stronger than Anita Hill's against Clarence Thomas.

By Stuart Taylor, Jr.

WHY THE RECESSION WAS GOOD FOR SKADDEN • A CASE "SYNONYMOUS WITH LAWYER GREED"?



PAULA CORBIN JONES (ABOVE): ONLY THREE POSSIBLE SCENARIOS CAN EXPLAIN WHAT TRANSPIRED ON MAY 8, 1991. EITHER JONES LIED CONVINCINGLY TO FRIENDS AND FAMILY THAT DAY; OR THEY ALL CONSPIRED TO CONCOCT A MONSTROUS LIE ABOUT THE PRESIDENT; OR JONES'S ALLEGATIONS ARE SUBSTANTIALLY TRUE.

JANISKE WORLD PHOTOGRAPHY SERVICE, © BATTEN

Millions of Clinton supporters still disdain Clarence Thomas as a sexual harasser. But a comparison of the Paula Jones and Anita Hill episodes suggests that the evidence against the president is far stronger than the media has let on—and far stronger than the evidence against Thomas.

HER CASE AGAINST CLINTON



WHEN WILLIAM JEFFERSON CLINTON V. PAULA CORBIN JONES COMES BEFORE THE U.S. Supreme Court—as expected—in January, all eyes will be on Justice Clarence Thomas. Will a flicker of emotion crease his usually impassive glare as he ponders a she-mid, he-said face pattern so hauntingly reminiscent of his own ordeal five years ago? Will he think of how—in the words that spill like a raging torrent from Thomas's close friend (and sometime self-appointed spokesman) Armstrong Williams—“Mrs. Clinton went out to San Francisco to present Anita Hill with the woman of the year award”? Williams adds: “I wonder when she’s going to present an award to Paula Jones? And where is NOW? People need to see the hypocrisy here.”

It was actually an American Bar Association constitu-

sion on women that presented an award to Hill. But Williams has a point. Hillary Clinton spoke at the August 1992 award luncheon, celebrating Hill for having “transformed consciousness and changed history with her courageous testimony” against Thomas. Both women were hailed as heroines at that ABA convention, by a host of women lawyers and others who have shunned Jones as a pariah.

Generally overlooked, meanwhile, has been the fact that the evidence supporting Paula Jones’s allegations of predatory, if not depraved, behavior by Bill Clinton is far stronger than the evidence supporting Anita Hill’s allegations of far less serious conduct by Clarence Thomas.

Jones’s evidence includes clear proof, scattered through the public record, that then-governor Clinton’s state troop-

BY STUART TAYLOR, JR.

er-bodyguard interrupted the then-24-year-old state employee on the job on May 8, 1991, and took her to meet Clinton—the boss of Jones's boss—alone in an upstairs suite at Little Rock's Excelsior Hotel, for the apparent purpose of sexual dalliance. The evidence also includes strongly corroborative statements made to me by two of Jones's friends, complete with tellingly detailed, seamy specifics—some never published until now—that are remarkably consistent with Jones's allegations about what happened inside that suite. The friends relate how an extremely upset Jones had told one of them within ten minutes of the event, and the other within 90 minutes, that Clinton had suddenly exposed himself and demanded oral sex *after* Jones had rebuffed his efforts to grope her. One of these women, Pamela Blackard, also witnessed the trooper's approach to Jones and her departure to and return from Clinton's hotel room. Both told me that, on the basis of Jones's detailed descriptions and distraught demeanor that day, they are convinced that she was, and is, telling the truth. They both signed sworn, generally worded affidavits for Jones in 1994.

Blackard and the other woman, Debra Ballentine, first told their stories in February 1994 in exclusive interviews to reporter Michael Isikoff, then of *The Washington Post*. But to Isikoff's chagrin, the *Post* printed only sketchy fragments of their accounts, 11 weeks later. Blackard's and Ballentine's detailed, previously unpublished stories provide far stronger corroboration for Jones's allegations than anyone could know from reports by the *Post* or any other major news organization.

There is, of course, other evidence that warrants skepticism about Jones's account, including the claim by Jones's trooper escort that she happily volunteered to be Clinton's "girlfriend" just after leaving his hotel room. Yet while the ultimate truth remains elusive, this article will show that there are only three logically possible scenarios: that Jones lied in a most convincing manner, and in stunning, Technicolor detail, to both Blackard and Ballentine, on May 8, 1991, and to her sisters soon thereafter; that Blackard, Ballentine, and both sisters later conspired with Jones to concoct a monstrous lie about the president; or that Jones's allegations are substantially true.

MY GUESS IS THAT SHE'S LYING, AT least about the more lurid details," I wrote of Jones in the July/August 1994 issue of *The American Lawyer*. After interviewing Blackard and Ballentine and studying other evidence detailed below, I'm not so sure of that. And I'm all but convinced that whatever Clinton did was worse than anything Thomas was even accused of doing.

I say this as one who voted for President Clinton in 1992 and who may do so again (with multiple misgivings), and as one who lamented Justice Thomas's confirmation to the Supreme Court, and who disagrees deeply with much of his archconservative jurisprudence. I don't want to believe that the president is a reckless sexual harasser, and I'll never know for sure exactly what happened when Clinton was alone with Jones.

But Jones's evidence is highly persuasive.

So, too, is the absence of evidence where one might expect to find it. President Clinton has carefully avoided making *any statements whatever*—sworn or unsworn—about what, if anything, happened between him and Paula Jones. He has never personally, publicly denied that (for example) he

had Jones delivered to his hotel room by his trooper-bodyguard. Moreover, the president's personal lawyer, Robert Bennett, has never denied with specificity this or many other particulars of Jones's factual allegations, either in court or in his countless media appearances. Bennett *has* said that the president "did not engage in any inappropriate or sexual conduct with this woman," and that he "has no recollection of ever meeting this woman." But he has never denied that a meeting took place. Rather, he has uttered many ambiguous noncommittal denials, like "nothing happened in that hotel."

Since the Jones lawsuit was filed, the president and his lawyers have also exploited every delaying tactic at their command, including the pending Supreme Court appeal, to avoid confronting the evidence. Their sweeping and unprecedented claim that the Constitution bars *all* proceedings in *all* "personal damages litigation against an incumbent president" was rejected by the federal district and appellate courts—the latter in a decision stressing that "the Constitution . . . did not create a monarchy."

But they have won by losing. While taking their claim of immunity to the Supreme Court, the president and his lawyers have won interim orders blocking Jones from taking discovery from anyone: not from Clinton, not from the trooper who has said he escorted Jones to Clinton's room at Clinton's direction, not from anyone else. They have also deferred even the filing of an answer by Clinton admitting or denying each of the specific factual allegations of the complaint. Even if—as seems likely—the Supreme Court rejects the president's arguments for stopping all proceedings cold until he leaves office, Clinton and Bennett have already achieved their main goal: The very pendency of Clinton's appeal has stalled—until well after the last election he will ever face—all inquiry into whether he behaved with extraordinary depravity.

The Clinton-Bennett defense strategy has been a success in the media as well as the courts. The president's surrogates and supporters have diverted attention from the most relevant evidence by orchestrating a media blitz depicting Jones as a promiscuous, flirtatious, gold-digging, fame-seeking slut, unworthy of belief. They have characterized her allegations as "tabloid trash," in Bennett's famous phrase, that are being cynically used by Clinton-haters to promote a right-wing agenda. While supporters of Clarence Thomas famously used similar tactics to demonize Hill, they had a far less receptive media audience.

All mainstream news reports and commentaries about Jones (that I've seen) have ignored or downplayed the strength of her corroborating witnesses and other evidence. Many have radiated suspicion of her motives (but not of Anita Hill's); of her nearly three-year delay in making her allegations public (but not of Hill's ten-year delay, or of Hill's decision to follow Thomas to a new job *after* the alleged harassment had started); and of the uncritical joy with which her claims were predictably greeted by Clinton-haters and right-wingers (as Hill's were by Thomas-haters and left-wingers). Many rest on two shaky premises, the first illogical and the second unproven: that Jones's motives must be pure for her allegations to be true, and that her motives are in fact impure.

Meanwhile, not a single one of the feminist groups that clamored first for a Senate hearing for Anita Hill, and then for Clarence Thomas's head, has lifted a finger on behalf of Paula Jones. There is some symmetry here: Many conservatives who reflexively trashed Hill, an apparently demure, digni-

fied law professor, have given the benefit of the doubt to Jones, who projects neither demureness nor dignity. What the Hill-Thomas and Jones-Clinton episodes have in common is that each of them prompted a rush to judgment by people on both sides of the ideological divide whose conclusions were derived not from evidence, but from ideological bias. And most striking, in my view, is the hypocrisy (or ignorance) and class bias of feminists and liberals—who proclaimed during the Hill-Thomas uproar that "women don't make these things up," and that "you just don't get it" if you presumed Thomas innocent until proven guilty—only to spurn Jones's allegations of far more serious (indeed, criminal) conduct as unworthy of belief and legally frivolous.

So maybe it's time—or past time—for an in-depth analysis of the evidence for and against Jones's claims, and how it stacks up against the evidence for and against Anita Hill's. Of course, we don't have all the evidence. But we have a lot of it. And because it is the president himself who has assiduously kept the rest of it from us, it's hardly unfair to him to do a tentative analysis, based on what we know now, of what (if anything) happened between him and Jones on May 8, 1991. Such an analysis follows, interwoven with a chronological account of the tortured process by which Jones's story emerged in early 1994, amid disbelief and derision, and the subsequent course of the lawsuit.

The account will begin with events shedding light on her motives and then focus on more directly relevant evidence. Starting with the magazine article that spurred Jones in early 1994 to break her silence about Clinton's alleged harassment of her—because it implied that she had been one of Clinton's lovers—it will relate the bungled efforts by Jones's first lawyer to get some kind of redress from the president; the fiasco-cum-press conference at which Jones went public at a Clinton-bashing right-wing conclave; her retention of two litigators who call themselves "country lawyers," Gilbert Davis and Joseph Cammarata, of Fairfax, Virginia; the eleven-hour bid by Bob Bennett to head off her \$700,000 sexual harassment lawsuit through long-distance telephone negotiations, with the president apparently sitting in; the allegations of the May 6, 1994 complaint, and the detailed evidence supporting and countering them; and Bennett's multimedia lawyering since the complaint was filed, from his repeated appearances on *Larry King Live* to his orchestration of the president's Supreme Court appeal.

Such lawyering does not come cheap. The accrued fees and costs of Bennett—who has spent more of his own time defending Clinton on television than in courtrooms—and his mega-firm, Skadden, Arps, Slate, Meagher & Flom, have probably mounted above \$2 million already, triple the \$700,000 in damages sought by the Paula Jones complaint. That would bring the total accrued fees and costs of Clinton's four private law firms to about \$5 million [see "Fees: \$5 Million And Counting," page 61]. But to the miraculous good fortune of the president and his lawyers, two big insurance companies have come to the rescue, generously assuming responsibility for Skadden's fees.

You should be so lucky, if anyone ever sues you for sexual harassment.

A WOMAN NAMED "PAULA"

Paula Corbin Jones's life changed dramatically in early 1994, in a chain of events that began when

she was mentioned as one of Bill Clinton's apparently compliant conquests, in an article by conservative journalist David Brock. In a story that detailed allegations by four of Clinton's former state trooper-bodyguards, Brock reported that as governor of Arkansas, Clinton had used the troopers both to procure women who caught his eye—including one named "Paula," who was delivered to Clinton in a room at the Excelsior Hotel—and to facilitate and conceal long-term extramarital affairs with Jennifer Flowers and others.

This was the same David Brock who had written the best-selling 1993 book *The Real Anita Hill*. In a one-sided but semicongenit dissection of old and new evidence about Hill and her charges against Clarence Thomas, Brock had savaged the demure professor as a liar. Among other things, Brock had stressed Hill's apparent (but carefully ununsung) liberal ideological animus against Thomas and her ten-year delay in going public. For this, Brock himself was widely savaged by liberals (like *New York Times* columnist Frank Rich) as a right-wing smear artist.

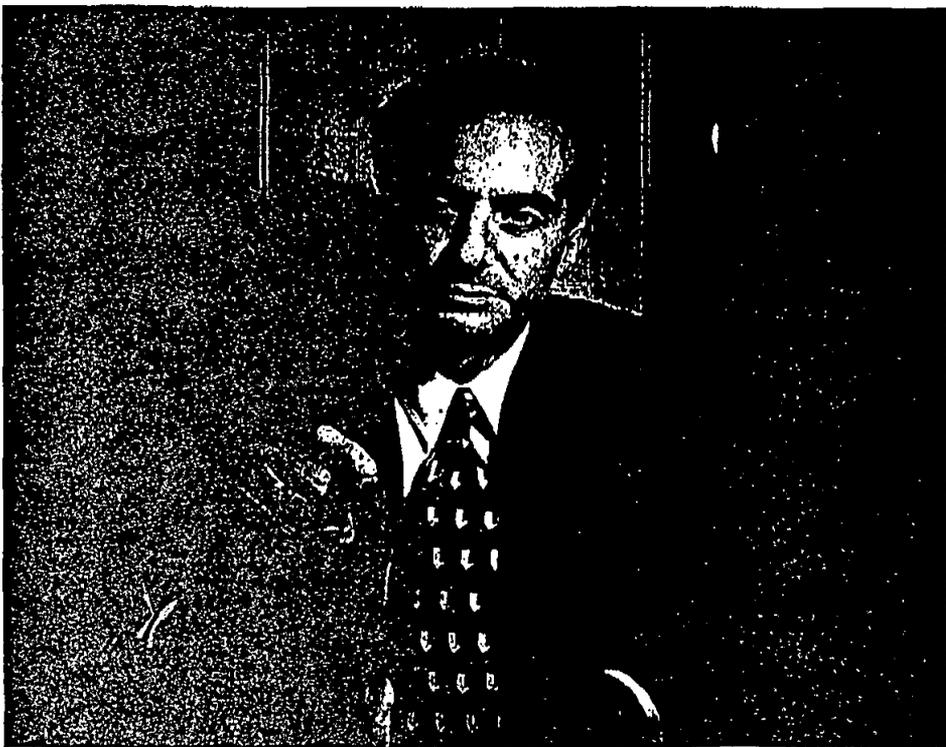
"His Cheatin' Heart," which appeared in the January 1994 issue of the Clinton-bashing *The American Spectator*, began circulating in Washington about December 17, 1993, and in Little Rock soon afterward. It was followed by a long, December 21 investigative piece in the *Los Angeles Times*, reporting the same four troopers' allegations about Clinton's sex life, while stressing a series of efforts made in 1993 by the Clinton camp to dissuade the troopers from speaking out—including phone calls from the president himself to trooper Danny Lee Ferguson, Ferguson—the one who has said Clinton had him deliver Paula Jones to his hotel room—claimed that the president dangled possible federal jobs for him and another trooper (see "A Trooper's Tales," page 63).

According to her complaint, Jones had heard nothing about the Brock article, or its hint of a quick Clinton tryst with "Paula" at the Excelsior Hotel. Having sworn her friends and sisters to silence after the Excelsior encounter in 1991, Jones had been urged to reconsider during the 1992 campaign publicity about Clinton's extramarital adventures with Jennifer Flowers and others. "I called [Paula] and told her she ought to do something," recalls Jones's friend Debra Ballentine. But Jones did nothing, because, she has said, she feared nobody would believe her, and because she was still working under a Clinton appointee. Meanwhile, she got on with her life. She and her husband Stephen had a baby in 1992, and moved to Long Beach, California, in mid-1993. In January 1994 she had returned to Arkansas to visit her friends and family. That's when Debra Ballentine read the key paragraph to Jones over the phone while scheduling a lunch:

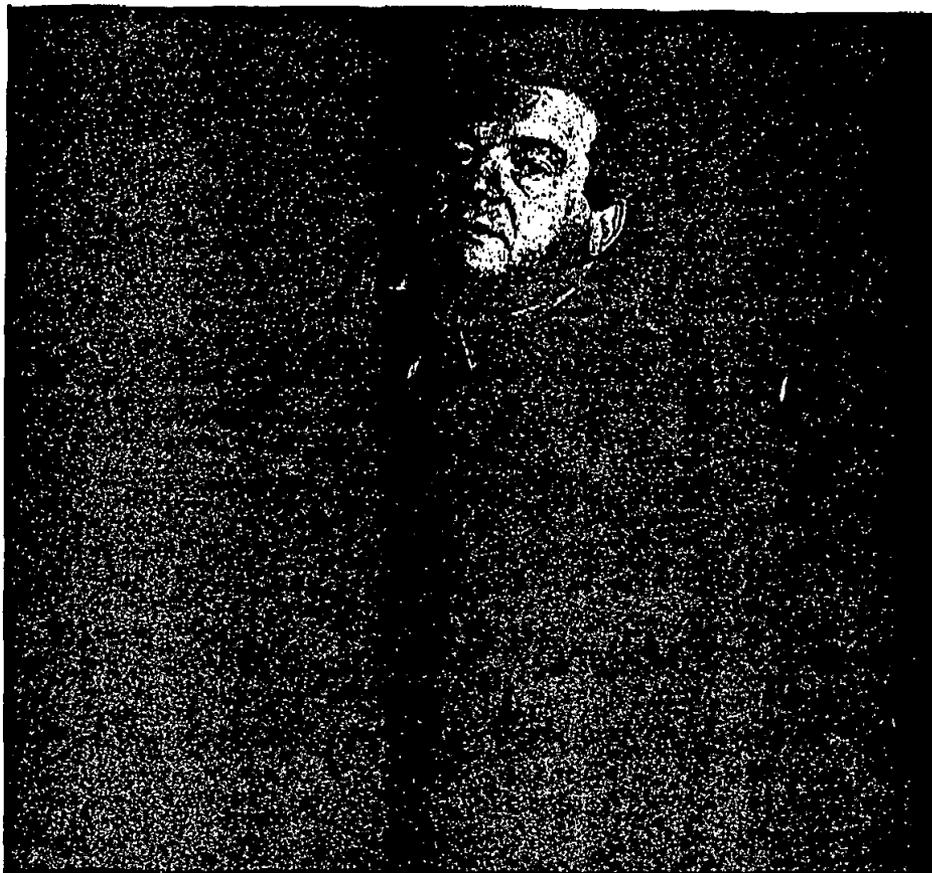
One of the troopers told the story of how Clinton had eyed a woman at a reception in the Excelsior Hotel in downtown Little Rock. . . . Clinton asked him to approach the woman, whom the trooper remembered only as Paula, tell her how attractive the governor thought she was, and take her to a room in the hotel where Clinton would be waiting. As the trooper explained it, the standard procedure in a case like this was for one of them to inform the hotel that the governor needed a room for a short time because he was expecting an important call from the White House. . . . [A]fter her encounter with Clinton, which lasted no more than an hour as the trooper stood by in the hall, the trooper said Paula told him she was available to be Clinton's regular girlfriend if he so desired.



JONES'S ATTORNEYS GILBERT DAVIS (TOP) AND JOSEPH CAMMARATA: "WE CHARGE LESS THAN HALF OF [WHAT CLINTON'S LAWYER BOB BENNETT CHARGES]," QUIPS DAVIS. "AND I LIKE TO THINK WE'RE HALF AS GOOD."



MICHAEL J. BOWLER



WASHINGTON, D.C., SUPERLAWYER BOB BENNETT: WHILE HIS FIRM HAS BEEN ACCRUING AN ESTIMATED \$2 MILLION IN FEES, BENNETT HAS SPENT MORE TIME DEFENDING THE PRESIDENT ON TELEVISION THAN IN THE COURTROOM.

JONES WAS MORTIFIED, ACCORDING to her complaint. She recognized herself instantly as the "Paula" whom the trooper had delivered to the hotel room. So did Debra Ballentine. And so would Pamela Blackard, who had been with Jones at the Excelsior that day, and Jones's two sisters, and her husband. Jones had told all of them that she had rebuffed sexual advances by Clinton that day. What would they believe now? Little Rock is an incubator of gossip, especially about sex. Pretty soon people all over town would hear about how "Paula" had apparently been one of Clinton's conquests, and which Paula it had been.

"When people say something like that, it pisses you off," says Jones's friend Pamela Blackard. "You get mad." Mad at the magazine. Mad at trooper Ferguson, the Clinton bodyguard who had taken Jones to Clinton's hotel room that day, and who was obviously Brock's source. And mad at Bill Clinton—who, as Jones saw it, was responsible for the whole ugly business.

As it happens, Jones ran into Ferguson on January 8, 1994, a day or two after learning of the Brock article, at the Golden Corral Steakhouse in North Little Rock. He was having lunch with his wife while Jones lunched with Ballentine. According to her complaint, Jones confronted Ferguson about the article, and he became apologetic, saying that "Clinton told me you wouldn't do anything anyway, Paula," and observing that "if you de-

cide to go public with this, the [National] Enquirer will pay you a million dollars."

"He apologized over and over again," recalls Ballentine, who witnessed the conversation. "He was acting like he didn't like Clinton at all. . . . He talked to us for a long time." She adds: "It was just crystal clear to me, if I had had any doubt [she had told me the truth]."

Ferguson, on the other hand, denied this and claimed in his June 1994 answer to Jones's lawsuit that Jones had "inquired as to how much money [he] thought that she could make for herself by coming forward with her allegations."

A CHARGE OF EXTORTION

Five days later Ballentine put Jones in touch with her close friend Daniel Traylor, a small-time solo practitioner in Little Rock who does real estate law and other work. Jones wanted him to try to get some sort of redress from Clinton.

What sort of redress? Jones claims that her only purpose was to get the president to make some kind of public statement clearing her name, and that she has never been in it for money or fame. But Clinton surrogates have fanned suspicions about her motives by filling the airwaves with comments like this one by Clinton counsel Bob Bennett on CNN this January: "Look, this is a lawsuit where the initial fee agreement with her lawyer, Mr. Traylor, says he gets a cut of the action of any movies, any book con-

tracts. This is an action which was announced after an extortion threat was turned down. Do the Republicans really want to ride this horse?"

Bennett's mention of an extortion threat apparently refers to an effort Traylor made in January 1994 to send a message to Clinton through George Cook, a politically active Little Rock businessman whom Traylor believed to be close to Clinton. Exactly what was said between them is in dispute. Paula Jones was not present.

Cook, who has said he refused at the time even to convey Traylor's message to the White House, later signed an affidavit about his meeting with Traylor, apparently prepared by a Clinton lawyer in Little Rock: "Traylor . . . said [Jones] had a claim against President Clinton and, if she did not get money for it, she would embarrass him publicly. . . . He said he knew his case was weak, but he needed the client and he needed the money. . . . Traylor said it would help if President Clinton would get Paula a job out in California. I told Traylor that would be illegal."

Traylor told *The Washington Post* in May 1994 that Jones had never suggested that he seek a job or money from the president. He told me that Cook's affidavit "doesn't fairly reflect what was proposed or discussed" in their 90-minute meeting, and denied proposing anything improper. But he turned aside my detailed questions. What's clear is that Traylor was way, way over his head trying to deal with the president. His mishandling of the Paula Jones matter in early 1994 has a lot to do with her difficulty getting people to look at her allegations and evidence seriously ever since.

Traylor had Jones sign the (now terminated) contingent fee contract on which Bennett has cast aspersions. It gave Traylor one-third of any amounts paid to Jones for any news articles or "television, radio, or movie contracts." Jones has said she assumed this was standard language.

According to her current lawyers, Jones turned down an offer of \$700,000 in mid-May 1994 to tell her story on television. She has pledged to give to charity any damage award that may be left over after paying her lawyers.

Jones's promise is unenforceable, of course. So, by the way, is the letter in which President and Mrs. Clinton promised to give to charity (or the government) any money that may be left over from their Presidential Legal Expense Trust, after payment of their own attorneys' fees.

An academic point now, perhaps, since the trust's liabilities dwarf its assets.

A RIGHT-WING PLOT?

After getting nowhere with George Cook, Traylor—a self-described "yellow-dog Democrat"—called Cliff Jackson, a Little Rock lawyer and longtime Clinton critic with contacts in the national press. Jackson had been retained by two of the troopers to help them peddle their stories about their roles in Clinton's alleged sexcapades. He met with Jones "and was very much persuaded that she was telling the truth," Jackson says. He suggested that one way to get "national exposure" for Jones's story would be to piggyback on a press conference that his trooper clients were already planning, at the upcoming Conservative Political Action Conference (CPAC) in Washington.

"I discussed the downside to that," recalls Jackson, "which was that it would be with me, that I was already demonized as the Bill Clinton nemesis, archenemy—which is a White House creation, I'm

not that. . . And I know [CPAC] was a right-wing organization and that that would be viewed by the mainstream press and media, and spun by the White House, as something suspect."

Despite such warnings, Traylor and his client (oblivious to politics, by all accounts) decided to announce her allegations—and her demand for a presidential apology—at a press conference on February 11, 1994, in conjunction with the CPAC conference. She and her husband appeared on the same stage with Jackson and his trooper clients, who were touting a "Troopergate Whistle-Blowers Fund." Jones told the reporters that Clinton had tried to

kiss her, reached under her clothing, and asked her to perform an unspecified "type of sex." But Traylor did most of the talking, providing few details and severely limiting reporters' questioning of Jones. As a result, says Jackson, "she wasn't allowed to be forthcoming and tell her story." That only enhanced the suspicions generated by Cliff Jackson's sponsorship and the choice of a Clinton-bashing, right-wing conference as a forum.

The press conference was a fiasco, and Jones's vague claims were widely ignored or dismissed as a salacious sideshow. Three days later, six paragraphs deep in a *Washington Post* Style Section color piece,

Lloyd Grove made elegant fun of the whole CPAC affair, ridiculing Jones's press conference as "yet another ascension of Mount Bimbo" played out in front of a "tittering and chuckling" crowd.

The New York Times published four short, sober, skeptical paragraphs the day after the Jones press conference, deep in the paper, ending with a statement for the president by Mark Gearan, then the White House communications director: "It is not true. He does not recall meeting her. He was never alone in a hotel with her." Curiously, Gearan—a careful man who must have checked with the president—omitted the word "room." Jones had not, of

FEES: \$5 MILLION AND COUNTING

IF PAULA JONES'S SEXUAL HARASSMENT SUIT AGAINST President Clinton is "tabloid trash," as Clinton counsel Bob Bennett says, it is proving to be rather expensive trash to dispose of. But fortunately for the president and his lawyers, two big insurance companies, State Farm and Pacific Indemnity, have agreed to pick up the tab.

Bennett, a partner in the Washington office of Skadden, Arps, Slater, Meagher & Flom whose standard billing rate was \$475 an hour in mid-1994 (he refused to tell me what he's charging the president), has deployed a squadron of lawyers since May 1994, and, this year, a couple of law professors who are helping with the president's pending U.S. Supreme Court appeal. Even with no discovery and no trial (so far), Skadden's accrued fees and costs for the Paula Jones case may well have mounted above \$2 million already, by my estimate. And the fees could soar much higher if the Supreme Court tears down the presidential immunity stonewall that Bennett has so far used to shield the president from any factual development on the merits of Jones's claims.

This estimate is extrapolated from public reports by the Presidential Legal Expense Trust, which the Clintons created in June 1994, after the filing of the Paula Jones suit, to take in contributions to help pay their crushing legal expenses. The most recent reports state that in December 1995, the insurers paid Skadden \$891,880 on total billings of \$1,048,707 for services rendered from May 1994 through September 30, 1995. (The \$156,827 that had not been paid, according to the trust's reports, apparently included some or all of Bennett's billings for his many hours defending the president on television and in interviews with reporters.)

That averages to a little over \$60,000 a month for services rendered through September 1995. Since no public disclosures of Skadden's billings have been made since then, and since Bennett has not responded to letters from me inquiring into those billings, any estimate of the accrued Skadden fees to date must be based on outdated numbers. But, assuming that Skadden's fees and expenses have continued to mount at the same \$60,000-per-month rate, this would bring the total estimate above \$1.8 million as of October 31. And that total would rise to nearly \$2.1 million if one assumes (less conservatively) that the monthly legal costs have averaged \$80,000 over the past 13 months, due to the extraordinary costs of seeking rehearing en banc after the January 9 rejection of the immunity claim by the U.S. Court of Appeals for the Eight Circuit; of petitioning for Supreme Court review; and of briefing the case on the merits.

All of which brings the fees and costs of the Clintons' four private law firms put together to *about \$5 million*, adding Skadden's fees to the estimated \$3 million accrued by Washington's Williams & Connolly, the Clintons' main law firm, and \$77,000 accrued by two Little Rock firms that have helped out in the Whitewater, Paula Jones, and other matters.

The Williams & Connolly estimate is computed as follows: The trust's most recent public report shows the firm's billings came to \$2,352,266 (as of June 30) for services rendered through April 30, 1996. The trust's reports show that the firm's average for services rendered for the six months ending April 30 were about \$120,000 per month. If the fees and costs have continued accruing at the same rate for the six months ending October 31, that would bring the total above \$3 million. Assuming a more conservative \$100,000 a month for the past six months—in light of the windup of the Senate Whitewater investigation this spring—would bring Williams &

Connolly down to between \$2.9 million and \$3 million.

To date, the languishing trust—colloquially known as the Clintons' legal defense fund—has reported making payments of only \$691,134 on the First Family's huge legal debt, with a cash balance of only \$141,932 as of June 30. The trust has had difficulty raising money—in part because it chose to limit donors to a maximum of \$1,000 a year, but also because it has yielded to the opinion of the Office of Government Ethics that it could not actively solicit contributions and has stopped accepting money from lobbyists after the president drew criticism for doing so.

Does this mean the Clintons will have to come up with more than \$4 million—perhaps much more—to pay their lawyers?

Not quite. To the great good fortune of the president and his lawyers, Pacific Indemnity and State Farm have bailed them out in the Paula Jones case. Someone (it's unclear who) discovered in June 1995 some facts that had apparently escaped the attention of all the president's lawyers during the first 13 months of the Paula Jones case. This was that each insurer *arguably* had a duty to defend the president against Paula Jones's claims under standard personal liability umbrella policies (covering different time periods), which the Clintons had bought for a trifle in the early 1990s. Even better, the two insurers have obligingly paid (or agreed to pay) the bulk of Skadden's ever-mounting fees after reaching a deal in private negotiations.

Such a deal: You hire one of world's most expensive law firms, and it runs up legal expenses dwarfing the total damages sought by the plaintiff, and then you notify your insurance company a year later that you expect them to pay for it all, and to keep paying as the fees soar through the \$2 million mark.

And the insurance payments are benefiting the law firms as well as the Clintons. Skadden, which would otherwise be holding a very large bag due to the inability of the Clintons and the trust to pay more than a fraction of the fees, is now getting paid by the insurers. That takes the Skadden burden (at least for the time being) off the trust, freeing up its limited funds to pay more to Williams & Connolly. The Clintons are still indebted to Williams & Connolly for well over \$2 million, extrapolating from the \$1,732,266 outstanding balance reported by the trust for services rendered through April 30. As of June 30, the trust had paid Williams & Connolly a total of only \$620,000—including \$200,000 that the trust took back from Skadden in February, after Skadden had hit payroll with the insurers—on billings of \$2,352,266.

Paula Jones's lawyers, Gilbert Davis and Joseph Cammarata, have run up "hundreds of thousands of dollars in time" working on the case, according to Davis. Some of those debts (the rest remain outstanding) have been paid by the Paula Jones Legal Fund, which was set up to receive donations and has taken in something under \$200,000, according to Cindy Hays, a Washington public relations agent who runs the fund. This includes half of the \$50,000 that Jones earned in a No Excuses Jeans promotion. (Jones gave the other \$25,000 to a women's shelter in Virginia.) Hays refuses to disclose names of contributors, saying they were promised confidentiality. A few who have identified themselves as contributors are associated with conservative causes. But Hays says the average donation was \$19 "last time I checked."

"We get tired of reading in the newspapers that it's being funded by the Christian right or by the Republican Party or by the right wing of the Republican Party," adds Hays. "I keep looking for those right-wingers. Where are they? Where is the money from the Christian right?" —S. T.



SINCE THE JONES lawsuit was filed, the president and his lawyers have used every delaying tactic at their command, including the pending Supreme Court appeal, to avoid confronting the evidence.

course, claimed that she and Clinton had been the only two people in the entire Excelsior Hotel that day. A nondenial denial, perhaps? Meanwhile, Clinton aide George Stephanopoulos dismissed Jones's press conference as "a cheap political fundraising trick."

When the press conference flopped, Jackson says, he convinced Traylor to try persuading a national, establishment newspaper of the strength of Jones's allegations and evidence, by "giving them an exclusive, working with them only." Jackson recommended Michael Isikoff, a widely respected investigative reporter, then with *The Washington Post* and now with its affiliate, *Newsweek*.

Isikoff immediately interviewed Jones (at length, on tape), her husband, Pamela Blackard, Debra Ballentine, Jones's two sisters, her mother, and others, including White House officials and Clinton aides in Little Rock, where he did some of his research. In February, he drafted a story stressing the strength of their evidence. But the *Post's* editors held it up, amid multiple requests for more reporting, redrafts, and revisions. "The editors involved felt that more work had to be done right up until the day it was finished and put in the paper," says Robert Kalsch, the *Post's* managing editor. "We were extremely careful in light of the nature of the accusation." Isikoff, on the other hand, later told the *American Journalism Review*: "Having done the reporting, I felt to not publish the story was withholding information from the readers."

Frustrated with the *Post*, Jones and her husband wandered into the welcoming arms of conservative activists and the Christian right, which was beating a path to their door. They agreed to be videotaped by producers for far-right televangelist Jerry Falwell for what turned out to be a scurrilous video called *The Clinton Chronicles*; Jones also appeared on Pat Robertson's *700 Club* show on the Christian Broad-

casting Network and was interviewed by conservative media critic Reed Irvine on his cable television show. Meanwhile, Irvine's *Accuracy in Media* took out full-page ads in the *Post* and other newspapers accusing them of suppressing an important story.

Were Jones (or Traylor, or other people advising her) seeking something more than to clear her good name? They did, after all, create a national scandal to rebut a single paragraph buried deep in a long story in a right-wing journal—a journal that had not even mentioned "Paula's" last name. Jones and Traylor have said their purpose was to bring pressure on Clinton to make a public apology. But the predictable effect has been to generate a huge wave of publicity far more damaging to Jones's reputation than one small paragraph in *The American Spectator* could possibly have been.

"Maybe," says Jones's friend Pam Blackard, "she bit off more than she could chew."

THE \$475-AN-HOUR MAN

What really put Paula Jones's name in the headlines was not her initial press conference, or even the filing of her lawsuit, but rather the decision by President Clinton to retain Bob Bennett to defend the case, which hit the papers on May 3, 1994. Suddenly, it seemed like this must mean real trouble for the president. He already had David Kendall of Williams & Connolly working full-tilt to defend him in the Whitewater investigation; now he was hiring an even more expensive lawyer—the \$475-an-hour man who would be king of the white-collar defense bar—to take on Paula Jones and her hapless solo practitioner from Arkansas.

Bennett, the older brother of conservative luminary William Bennett, had been recommended to the president and Hillary Clinton months before, by Harold Ickes, a top White House official whom

Bennett had represented in connection with the Whitewater investigation. According to two sources with indirect knowledge of the discussions, Bennett had initially met with one or both Clintons in late March or early April 1994, not about Paula Jones but about some of their multifarious other legal problems, including the "troopergate" allegations. As it became apparent that Jones was preparing to sue by May 8, 1994, when the statute of limitations would run out, some Clinton insiders thought the best way to keep her case out of the news was to assign it to some obscure lawyer in Arkansas. But then-White House counsel Lloyd Cutler recommended Bennett, according to Cutler. He reasoned that the lawsuit, once filed, would be a big story in any event, and that Bennett was especially skilled at dealing with the media.

Indeed, unlike Kendall—a tight-lipped, old-school lawyer—Bennett had made a name for himself as being especially good at crafting television sound bites and schmoozing with reporters in his office, and was a capable courtroom advocate as well. He was on a roll, after a succession of high-profile engagements, including the Senate's televised "Keating Five" hearings, in which Bennett had served as special counsel; the defense of aging superlawyer Clark Clifford; and the securing of a presidential pardon for Caspar Weinberger, the former Defense secretary, wiping out his indictment for alleged Iran-contra crimes. As May 1994 began, Bennett was going into sensitive talks with federal prosecutors on behalf of powerhouse then-representative Dan Rostenkowski (D-Illinois), in a criminal investigation that was to culminate in an indictment on May 31, amidst a falling-out between Bennett and Rostenkowski that ended their relationship two days later.

Bennett, who in the past has spent hours talking with me (as he has with many other reporters), spurned a written request I sent him for an interview for this article. Nor did Bennett respond to any of the 31 questions I addressed to White House counsel Jack Quinn on September 24, with a copy to Bennett. Nor did Quinn. Neither man gave a reason, but it may relate to Bennett's complaint that I treated him unfairly in an article in the July/August 1994 issue of *The American Lawyer*. The article, "One Client Too Many," contended that he had failed to consult adequately with Rostenkowski before taking on the Paula Jones matter.

THE COUNTRY LAWYERS

Meanwhile, Daniel Traylor, Jones's Little Rock lawyer, had come to realize that he needed some real litigators to mount a real lawsuit. But he had trouble finding any who would take on the case. Traylor asked around Little Rock; talked to some big plaintiffs firms; and was put in touch—by Patrick Mahoney, an anti-abortion activist, oddly enough—with Patricia Ireland, head of the pro-choice, ultra liberal National Organization for Women.

All in vain. Finally, in late April, the conservative legal grapevine put Traylor in touch with two self-described "country lawyers" with substantial litigation experience, Gilbert Davis and Joseph Cammarata of Fairfax, Virginia. They agreed to take a look at the case, and soon discovered that they would have to work fast: The 180-day statute of limitations for a suit under Title VII of the 1964 Civil Rights Act had expired, and the statute of limitations for most other causes of action was about to expire, on May 8.

Davis and Cammarata worked furiously through

the first few days and nights of May to beat the statute of limitations. They talked to Jones and Traylor by phone and rerafted and expanded Traylor's skimpy draft complaint while running across the street periodically to get coffee at a 7-Eleven store. That's where, in the wee hours of May 4, they also picked up an early edition of *The Washington Post*. The *Post*, prompted by the news that the president had retained Bob Bennett, had finally gone ahead with two long articles by Michael Isikoff (who shared a byline on one of the stories with two other *Post* reporters). The stories, starting on page 1 and filling up an entire inside page, constitute the most complete account of the evidence concerning Jones's allegations that has been published until now. It had arrived just in time for Davis and Cammarata to add to the complaint allegedly defamatory statements (about Jones) made by Bennett and White House officials to the *Post*. Later that morning, Jones's attorneys flew to Little Rock to do what Davis calls "our due diligence."

They met that day with Traylor, Jones, her husband, and their witnesses, and made sure that Jones had "the fortitude," and her story the plausibility, to withstand the pressures of a contentious lawsuit against the president, says Davis, who found Jones to be "a warm and sincere human being." Using Traylor's office, they continued to rework the complaint, let an expectant throng of reporters know that it would be filed the next day, and got a little sleep.

Their four-count complaint included federal sexual harassment claims premised on two Reconstruction-era civil rights statutes (naming trooper Ferguson as a co-conspirator under one of them), and state law claims for intentional infliction of emotional distress and defamation. Cammarata says they had carefully considered adding another defamation claim, against *The American Spectator*. But they decided it would not "pass the legal laugh test": The magazine had merely quoted what trooper Ferguson, whom it had no apparent reason to believe was lying, had said about a woman identified only as "Paula."

THE PRESIDENT IS "IN THE ROOM"

Davis and Cammarata recall the next day's eleventh-hour negotiations with Bennett in a joint interview in the cramped conference room of the modest Fairfax, Virginia, Law Offices of Gilbert K. Davis and Associates. The big, beefy, jovial Davis, who says he's tried cases all over Virginia and in some 20 states, chuckles when asked what it's like litigating against superlawyer Bob Bennett and his mega-firm. Citing a news report that Bennett charges \$450 (not \$475) an hour, Davis quips, "We charge less than half that, and I like to think we're half as good as they are."

Both lawyers say that political animus against Clinton was not their reason for taking the case. Davis, who is seeking the 1997 Republican nomination for attorney general of Virginia, describes himself as a "conservative libertarian populist Republican"; Cammarata says he leans to the Republican side, but once worked for Jimmy Carter's presidential campaign and is "not just a Republican partisan here." In addition to being of counsel to Davis, in the spring of 1994 Cammarata had been working as trial counsel with Besozzi, Gavin & Craven, a Clinton-connected Washington, D.C., law firm, which would soon thereafter dismiss Cammarata for taking Jones as a client.

On the morning of May 5, Davis recalls he called Bob Bennett in response to a phone message that Bennett had left for Traylor. Davis informed Bennett

that he and Cammarata were now taking over the case (while keeping Traylor as local counsel), and were planning to file the complaint by 3 P.M. that day. Recalls Davis: "[Bennett] said something to the effect that, 'Your client has no case. I've talked to the president for a long time, and he completely denies that any of this happened. I've grilled him for hours and hours, and this didn't happen.' . . ."

Davis continues: "And he said, 'Are you aware there are nude pictures of her? I've not seen them.' And I said, 'Well, no, if there are, I'd like to see them.' So they had some knowledge of that already. . . ."

"And I said, 'Well, let me tell you this: My client contends [that] she can identify distinguishing characteristics in his general area; so when your client says that he wasn't even there, that's to the contrary.' . . . And when I told him that, that quieted him down a little bit. . . . And Bob Bennett said something like, 'Well, it sure is different from a regular old personal injury case.'"

The conversation, and several others that day, turned from what Cammarata calls "Bennett's bluster" to an intensive, last-ditch effort to work out a

settlement, the linchpin of which would be some kind of statement by the president to rehabilitate Jones's reputation. "She wanted an apology," recalls Cammarata. "She wanted her name cleared. So we weren't looking for any money," Jones, her husband, and Traylor were with Davis and Cammarata during these Davis-Bennett phone calls.

After some preliminary negotiations, Bennett said he needed to consult with his client before proceeding further. For his part, Davis wanted an assurance that any preliminary agreement worked out by the lawyers would have the approval of the president. Early in the afternoon, there was another phone conversation. "I'm on the telephone talking to Bob Bennett," Davis recalls, "and I said, 'Have you been able to find your client?' and he said, 'Yes, he's in the room.' And I looked at the others, and put my hand over the phone, and said, 'He's in the room.'"

"When he said that," adds Cammarata, "it gave me some chills, because here we are, negotiating directly with the president of the United States."

Minutes later, when Bennett suggested that any agreed-upon statement be read by a White House press spokesman, Davis and Cammarata conferred

A TROOPER'S TALES

ARKANSAS STATE TROOPER DANNY Lee Ferguson—a crucial witness in any trial of Paula Jones's lawsuit against President Clinton—has already told some tangled tales of Clinton damage control efforts on the female front. Ferguson was one of four former members of Clinton's security detail who provided detailed accounts to William Rempel of the *Los Angeles Times*, starting in August 1993, of how Clinton had used the troopers to facilitate extramarital activities and conceal them from his wife and the public. The same troopers later spoke to David Brock of *The American Spectator*. This account is based on reports in the *Times*.

Before the troopers had agreed to speak for the record in 1993, President Clinton got wind of what was going on. He asked Raymond ("Buddy") Young—a Clinton loyalist and former head of the security detail who had been rewarded with a federal job in Texas—about the matter; Young in turn called Ferguson and trooper Roger Perry, according to Young. Perry told the *Times*' Rempel that "he felt threatened when Young warned him that he and the other troopers would see their reputations 'totally destroyed' if they spoke out."

Young, who denied making any threat, told Rempel that he later met with the president in Washington to report what he'd learned. Clinton then telephoned Ferguson, who later told the *Times*' Rempel that "he received a series of telephone calls from the president seeking to 'shut down' the story by persuading the troopers not to talk. During those telephone conversations, Ferguson said, Clinton offered him a choice of federal jobs," as well as dangling possible jobs for Perry.

The *Times* reported all this in a long article by Rempel and Douglas Frantz on December 21, 1993, quoting Perry and trooper Larry Patterson by name and Ferguson and a fourth

trooper anonymously. The article also quoted a response by Bruce Lindsey, President Clinton's closest White House aide. Dismissing the sex allegations as "ridiculous," he stressed that "any suggestion that the president offered anyone a job in return for silence is a lie." But Lindsey conceded that Clinton had called Ferguson—out of concern about "false stories being spread"—and did not explicitly deny that job possibilities had been discussed.

The December 21 article in the *Times*, and Brock's in *The American Spectator*, which had started circulating a few days before, prompted a new flurry of damage control, especially by Betsey Wright, a close Clinton associate from Arkansas who was (and is) working as a Washington lobbyist. She flew to Arkansas and helped publicize trooper Patterson's and Perry's false reports about a 1990 incident in which Patterson had wrecked a state police car and seriously injured Perry, after they had been out drinking together.

Wright also visited Ferguson and his wife, who were both still members of the security detail, serving then-governor Jim Guy Tucker. After intense discussions, Ferguson issued a carefully worded statement through his lawyer, on December 22, 1993: "President Clinton never offered or indicated a willingness to give any trooper a job in exchange for silence or help in shaping their stories." Later that day, however, Ferguson told Rempel he stood by his earlier account that Clinton had asked if he wanted specific federal jobs. The *Times* reported: "Asked if Clinton expressly said that jobs would be offered if the troopers remained silent, Ferguson said: 'He didn't say those words.'"

Ferguson did not return my phone calls. Two people who have discussed the matter with him say they came away strongly suspecting that he had recorded the Clinton calls, and is holding the tapes in reserve in case he ever needs them.—S.T.

and insisted that it be publicly recited by the president himself. "Bob said, 'I don't know, hold on,'" Davis recalls, "and then maybe five or ten seconds after that, he said, 'All right, that's acceptable.'" Davis and Cammarata took this to mean that Bennett had just cleared it with the president.

AT BENNETT'S REQUEST, JONES held off filing suit that day—much to the frustration of the horde of news reporters waiting expectantly at the courthouse. According to Davis and Cammarata, Bennett's most specific proposal, which came later that day, included statements to be issued by the president and Jones, which Bennett and Davis had worked out by phone; at Davis's request, Bennett had the statements typed up and faxed to Davis in Little Rock that evening. Davis and Cammarata released the statements, together with a facsimile transmission sheet on Skadden's letterhead bearing Bennett's name, on October 1, 1994, with a press release detailing the negotiations. Bennett has never questioned the authenticity of the documents or contradicted the specifics of the Davis/Cammarata account.

The president was to say: "I have no recollection of meeting Paula Jones on May 8, 1991, in a room at the Excelsior Hotel. However, I do not challenge her claim that we met there and I may very well have met her in the past. She did not engage in any improper or sexual conduct. I regret any untrue assertions which have been made about her conduct which may have adversely challenged her character and good name. I have no further comment on my previous statements about my own conduct. Neither I nor my staff will have any further comment on this matter."

Bennett had also faxed a proposed statement by Jones: "I am grateful that the president has acknowledged the possibility that he and I may have met at the Excelsior Hotel on May 8, 1991, and has acknowledged my good name and disagrees with assertions to the contrary. However, I stand by my prior statement of the events."

Davis and Cammarata had asked for a provision tolling the statute of limitations for six months, so that Jones could still sue if the president or his staff violated the agreement. Davis says Bennett had firmly rejected any tolling agreement as "a deal-breaker." And while it appeared to Davis that the language faxed by Bennett was "acceptable to Mr. Clinton," Davis says it "was not completely acceptable to Mrs. Jones." Still, he says, "I thought we were fairly close," and might be able to reach agreement the next day.

Then, that night, CNN broadcast claims by unnamed White House sources that the reason Jones had not filed that day was that she realized she didn't have a case and her family opposed the lawsuit. "It was a lie," says Davis; the White House knew that the reason for the delay was Bennett's request for more time to work out a settlement. (Davis does not blame this on Bennett, whom he praises as "a terrific lawyer who keeps his word.")

The CNN report (and others) prompted Davis to break off negotiations the next morning, in a handwritten, faxed "Dear Bob" letter saying that "the complaint will be filed today" because "further efforts to resolve these matters seem fruitless." Davis's letter cited the news reports as evidence "that the 'no comment' provisions are very difficult to rely upon" without a tolling agreement. He added: "Other problems exist, including your client's refusal to make a direct acknowledgment

that he was in the hotel suite with Paula, and that he definitely knows her."

Davis and Cammarata issued their October 1, 1994, press release detailing these negotiations (but not Bennett's statement about the president being "in the room") in response to what they viewed as inaccurate comments by Bennett to reporter Ruth Shalit, writing for *The New York Times Magazine*, on why the negotiations had failed. Bennett had said that Jones's lawyers "would not agree to any language that included an adamant denial" by the president "that this incident occurred." In fact, according to Davis, the Bennett-Clinton settlement proposal included no such "adamant denial." The documents seem to bear him out.

That same day, October 1, Bennett told CNN: "I want to make it clear that these were discussions between lawyers. The president didn't agree or not agree to anything. I wasn't going to present anything to the president of the United States unless it first passed my test." Closely read, Bennett's statement does not contradict any of the specifics of the Davis/Cammarata account of the negotiations. Davis never claimed that the president had "agreed" in any final, legally binding sense. (Bennett and White House counsel Jack Quinn have not responded to letters in which I asked them to point out any inaccuracies in the foregoing Davis-Cammarata account of the May 5, 1994, settlement talks.)

Davis and Cammarata filed the complaint against Clinton and Ferguson on May 6, in the U.S. courthouse in Little Rock, amid a crush of reporters so chaotic that both men still laugh when they recall the scene. "This case is about the powerful taking advantage of the weak," Jones said in a prepared statement. Later that day Bennett entertained another throng of reporters at a press conference, dismissing the lawsuit with what instantly became his most famous sound bite: "tabloid trash with a legal caption on it."

SHE SAID: THE PROPOSITION

Tabloid trash or no, Paula Jones's complaint contains a detailed narrative account of her allegations, which are interspersed below with available evidence supporting and detracting from her claims.

First, a word about who Paula Corbin Jones (then Paula Corbin) was on May 8, 1991. She was 24 years old, and hailed from the hamlet of Lonoke, 30 miles from Little Rock, where she had barely made it through high school. After coming to the state capital, she had bounced through several office and sales jobs before landing a \$6.35-per-hour clerical position at the Arkansas Industrial Development Commission (AIDC), headed by a Clinton appointee. She was engaged to an airline ticket agent and aspiring actor named Stephen Jones.

She was also a curvaceous, big-haired, outgoing, eye-catching woman who sometimes dressed provocatively, was regarded by many as a flirt, and had posed almost nude about four years earlier for a boyfriend who sold the photos to *Penthouse* in 1994, after Jones had become famous.

The May 8 encounter began in the conference room area of Little Rock's 19-story Excelsior Hotel, where the AIDC was hosting the "Governor's Quality Management Conference." The record is clear that Clinton stopped in and made a speech. Jones was at the registration desk, handing out name tags and literature with her co-worker and close friend Pamela Blackard.

Jones claims that she and Blackard both noticed

Clinton staring intently at Jones while he was standing nearby, fielding questions from television reporters. (Blackard said the same to me in an interview.) A few minutes later, according to the published report of Jones's 1994 account to Michael Isikoff of *The Washington Post*, trooper Danny Lee Ferguson—who had previously introduced himself by name as a member of the governor's security detail—approached Jones and said, "The governor said you make his knees knock."

According to Jones's complaint, Ferguson returned to the registration table later, about 2:30 P.M., handed Jones a piece of paper with a four-digit suite number written on it, and said the governor would like to meet with her there. "A three-way conversation followed between Ferguson, Blackard, and Jones about what the governor could want," the complaint says. "Ferguson stated during the conversation: 'It's okay, we do this all the time for the governor.'" Blackard told me she generally recalls such a conversation. The *Post* quoted her in 1994 as having told Isikoff: "I did say to her . . . 'Find out what he wants and come right back. . . . If you're that curious, go ahead.'"

The complaint says that Ferguson escorted Jones to the upstairs floor and pointed out Clinton's suite to her. (Ferguson's answer to Jones's complaint confirms this.) Jones says she knocked and entered, and found herself alone with the governor.

Why did she go? "I was very excited the governor wanted to see me," Jones said in an interview with Sam Donaldson that was aired on June 16, 1994, on ABC's *Primetime Live*. "[W]hen me and my friend [Blackard] had talked about it, we thought we might—could get a job. . . . That's the only reason why I would think that he would want me up there. . . . I did not know him or any of his past before that day." Pamela Blackard also appeared briefly on the program confirming Jones's account of the approach.

Trooper Ferguson's various accounts of these events—to David Brock, to William Rempel of the *Los Angeles Times*, to fellow troopers, and in his answer to the complaint—lend strong support to Jones's allegations as to how she ended up alone in a room with Clinton, while suggesting that she had eagerly courted and welcomed any sexual advances by the governor. Here's what Ferguson told the *Los Angeles Times* in 1993, according to articles published on May 23 and June 11, 1994, in interviews that were initially off the record:

"Ferguson recalled that Clinton had directed him to approach a woman who was working behind the registration desk at a seminar of the Arkansas Industrial Development Corp. at the Excelsior Hotel in Little Rock. Ferguson said the governor told him that the woman had 'that come-hither look' and that he wanted to meet her privately.

"Acting on Clinton's orders, Ferguson said, he first secured a room by telling the hotel manager that the governor was expecting an important call from the White House and needed a private room. . . . 'He gave us a room and Clinton sent me down' to invite Jones to the room, Ferguson said." Ferguson also told the *Times* that afterwards Clinton had said, "We only talked."

It is possible that Ferguson in fact sought out Jones and delivered her to Clinton on his own initiative, for his own purposes, and was lying to the reporters. Possible, but not likely.

Ferguson told what superficially seemed a very different story in his cryptic, carefully lawyered, June 10, 1994, answer to the complaint, which seeks \$700,000 in total damages from him and Clinton. By that time (Ferguson has told reporters),

he had been leaned on by Clinton operatives and had gotten several phone calls from the president himself, all in 1993.

Ferguson's answer made no mention of what he had said to Jones, or what Clinton had said to him. Rather, he claimed that before following Ferguson up to the room, Jones had made "several comments to . . . Ferguson about how she found Governor Clinton to be 'good-looking' and about how she thought his hair was sexy," and had asked him to relay these comments to the governor. (Jones denies this.) But closely read, Ferguson's answer said nothing inconsistent with his statements to reporters that "Clinton had directed him to approach" Jones before Jones had said anything to Ferguson. And it confirmed a critical element of Jones's account by admitting "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel."

All this amounts to clear and convincing proof of Jones's allegation—which has never been specifically denied by the president personally or by his lawyer Bennett—that then-governor Clinton, the boss of Jones's boss, sent a state trooper to interrupt the 24-year-old state employee's performance of her job and bring her to his hotel room.

For what purpose? If—as Jones claims she naively hoped at the time—what Clinton had had in mind had been getting her a better job or something like that, the president could have said so by now. The evidence—and the absence of any other plausible explanation—strongly supports Jones's allegation that the purpose of this exercise was to give Clinton an opportunity to make some kind of sexual overture. And that seems pretty shabby no matter what, exactly, happened in that hotel room. Shabbier than anything Clarence Thomas was ever even accused of doing by the not-exactly-unimpeachable Anita Hill.

Hill said that Thomas as her boss had persistently pestered her in late 1981 and 1982 to date him and talked dirty to her about pornographic movies involving big-breasted women and animals, his own sexual prowess, "Long Dong Silver," "pubic hair on my Coke," and the like. Hill did not accuse Thomas of a single overt request for sex or a single unwelcome touching. Indeed, she initially stopped short of alleging that she had been a victim of "sexual harassment" at all. And while Hill recalled objecting to this conduct, she was not too horrified to follow Thomas's rising star, after the allegedly offensive conduct had started (and, she claimed, stopped for awhile), from the Education Department to the Equal Employment Opportunity Commission (EEOC). Nor was Hill too horrified to keep in touch with Thomas in subsequent years—getting him to write a letter of recommendation that helped her land a law teaching job at Oral Roberts University in 1983, phoning him repeatedly after she went there, inviting him to make an appearance there, and more.

Indulging for the moment the assumption that Paula Jones is lying about what happened inside the hotel room, and the further assumption that Anita Hill was telling the whole truth, which would be worse: What Hill says Thomas did? Or what then-governor Clinton almost certainly did in having his trooper fetch him a 24-year-old, star-struck, low-level state worker whom he had never met?

INSIDE THE HOTEL ROOM

Here's what Jones alleges in her complaint—with paragraph numbers and some paragraph



WERE JONES OR HER advisers seeking something more than to clear her name? They had, after all, created a national scandal to rebut a single paragraph buried deep in a long story in a right-wing journal.

breaks omitted—and with a caution that this gets pretty raunchy:

Clinton shook Jones's hand, invited her in, and closed the door. A few minutes of small talk ensued, which included asking Jones about her job. Clinton told Jones that Dave Harrington is "my good friend." [He] was [the Clinton-appointed] director of the AIDC [and] Jones's ultimate superior within the AIDC.

Clinton then took Jones's hand and pulled her toward him, so that their bodies were in close proximity. Jones removed her hand from his and retreated several feet. However, Clinton approached Jones again. He said: "I love the way your hair flows down your back" and "I love your curves." While saying these things, Clinton put his hand on plaintiff's leg and started sliding it toward the hem of plaintiff's culottes. Clinton also bent down to attempt to kiss Jones on the neck.

Jones exclaimed, "What are you doing?" and escaped from Clinton's physical proximity by walking away from him. Jones tried to distract Clinton by chatting with him about his wife.

Asked by reporters in 1994 why she had not simply left the room at that point, Jones said she had always been intimidated by important people and had not wanted to do anything that might upset the governor. She also noted (according to *The Washington Post*): "I will never forget the look on his face. His face was just red, beet red." The complaint continues:

Jones later took a seat at the end of the sofa nearest the door. Clinton asked Jones: "Are you married?" She responded that she had a regular boyfriend.

Clinton then approached the sofa and as he sat down he lowered his trousers and underwear exposing his erect penis and asked Jones to "kiss it." There were distinguishing characteristics in Clin-

ron's genital area that were obvious to Jones.

Jones became horrified, jumped up from the couch, stated that she "was not that kind of girl" and said: "Look, I've got to go." She attempted to explain that she would get in trouble for being away from the registration desk. Clinton, while fondling his penis, said: "Well, I don't want to make you do anything you don't want to do." Clinton then stood up and pulled up his pants and said: "If you get in trouble for leaving work, have Dave call me immediately and I'll take care of it." As Jones left the room Clinton looked sternly at Jones and said: "You are smart. Let's keep this between ourselves." . . .

Jones left the hotel suite and came into the presence of trooper Ferguson in the hallway. . . . Jones said nothing to Ferguson and he said nothing to her during her departure from the suite. Jones was visibly shaken and upset when she returned to the registration desk.

Ferguson, in his answer to the complaint, has painted a very different picture of Jones's demeanor when he saw her "some 20 to 30 minutes" after she had entered Clinton's room: She "did not appear to be upset in any way," and "asked if the governor had a girlfriend and Danny Ferguson answered negatively, and she then responded that she would be the governor's girlfriend." In this respect, Ferguson's answer was consistent with his 1993 comments to reporters and other troopers. (It was inconsistent in another respect: Ferguson reportedly told David Brock in 1993 that he had "stood by in the hall" while Jones was with Clinton; in his June 1994 answer, he denied this, saying he had gone back downstairs and had next seen Jones there.)

Ferguson also claimed in his answer that when he encountered Jones a week or two later, she asked if Clinton had said anything about her, and wrote down her home phone number for him to give



WHICH IS WORSE? What Hill says Thomas did? Or what then-governor Clinton almost certainly did in having a trooper fetch a 21-year-old, low-level state worker whom he had never met?

Clinton. "She said to tell him that she was living with her boyfriend," Ferguson added. "and that if the boyfriend answered, Governor Clinton should either hang up or say that he had a wrong number." Jones, on the other hand, says in her complaint that while she was delivering some documents from the AIDC to the governor's office, Ferguson spotted her and said, "Bill wants your phone number. Hillary's out of town often and Bill would like to see you." Jones said she refused. On later occasions, the complaint says, Ferguson asked, "How's Steve?" and made a comment about the Jones's new baby, which "frightened [her] and made her feel that her activities were being monitored."

The complaint says Jones was accosted by Clinton sometime after the May 8, 1991, incident, when he spotted her in the Rotunda of the Arkansas State Capitol: "Clinton draped his arm over plaintiff, pulled her close and tightly to his body, and said: 'Don't we make a beautiful couple—beauty and the beast?' Clinton directed this remark to his bodyguard, trooper Larry Patterson." Trooper Patterson confirmed this in an interview with *The Washington Post*.

"I KNOW HE GRABBED HER"

The most impressive evidence supporting Paula Jones's allegations comes from six witnesses—including Pamela Blackard and Debra Ballentine, whom I interviewed separately on October 1, by phone—who have confirmed that she told each of them that same day (or soon thereafter, in three cases) that she had rebuffed sexual advances by Clinton. These witnesses include Jones's two sisters, her husband, and her mother. All six—including a sister who has impugned Jones's motives—have said they believe her account of Clinton's conduct.

None of these witnesses has yet testified, due to

the president's success in blocking discovery. All six gave their first media interviews in February 1994 under the exclusive-access agreement Jones's lawyer T aylor had made with Michael Liskoff of *The Washington Post*. Since then, as far as I know, neither Blackard nor Ballentine had spoken to any other reporter in much detail until they spoke with me.

Blackard, now a homemaker, is married, with a 5-year-old son. She lives in Lonoke, Arkansas, where she and Jones had been friends "since we were 2," forging what she says is "a special bond." As an eyewitness to some of the events in the hotel, Blackard provides especially strong corroboration. She not only confirms every important aspect of Jones's account of the Ferguson approach, but gives a vivid description—more detailed than in her affidavit or any previously published article—of what Jones said on her return from Clinton's hotel room.

"I could see her shaking," as she came walking back to the registration desk, Blackard says. "I could see real far away something was wrong. . . . It took her a while to tell me about it. She was upset, kind of shaky, and had to get her breath." After "five or ten minutes," Blackard recalls, Jones related what had happened. Blackard says she has difficulty remembering the details offhand now—more than five years later—but that "I know he grabbed her. She said he just kept on moving close to her and putting his hand on her knee, and every time she stopped him he did something else." I asked Blackard if she recalled Jones describing something dramatic happening just before Jones had left Clinton. "He dropped his pants," she responded, "and I don't remember his exact words, but you know what he wanted." She seemed hesitant to elaborate. Had Jones indicated that Clinton had wanted something that Jones could do without undressing? Blackard said yes.

Blackard added, "It's true. I believe her. If some-

one goes up, and comes back in ten minutes, and is shaking—she didn't have time to make all that stuff up. And I'm like her best friend [at the time], Why would she tell me something like that? . . . And she said, 'I don't want you ever to tell anybody.'" "Why not?" I asked. "He's a governor," Blackard responded. "He's powerful. And we both had state jobs. I was pregnant. I was 24. We were, like, two young girls. . . . We didn't know what we could do, so we're like—we're not telling anybody." Blackard said she had spoken to no reporters in detail other than Liskoff and me. "I'm so scared of the press, that they would turn things around . . . and twist my words around," she explained.

DEBRA BALLENTINE SWORE IN HER February 1994 affidavit that Jones had come to her office—a large Little Rock engineering firm where Ballentine was (and is) the marketing coordinator—around 4 P.M. that day. After describing the Ferguson approach and other preliminaries, the affidavit says, "Ms. Jones stated that . . . she rebuffed three separate unwelcomed sexual advances by the governor. Ms. Jones described in detail the nature of the sexual advances which I will not now recount."

Ballentine, now 34 (Jones is 30), gave a fuller recounting to me on October 1. While Jones was one of her closest friends, she said, it had been highly unusual for Jones to drop in unannounced at work as she had that day, and that "I could tell just by looking at her that something was wrong." Jones had started, Ballentine recalls, by saying, "You're not going to believe what just happened to me," and had then gone through the whole encounter.

Ballentine has confirmed Jones's essential allegations: "She said he was putting his hands on her legs and he was trying to put his hands up her dress. . . . She said, 'Debbie, he pulled his pants down to his knees and he asked me to [perform oral sex] right then.' . . . Before she left, he told her, 'I don't want to make you do anything you don't want to do.'" Ballentine adds: "He also told her he knew she was a smart girl and her boss—what's his name? Dave Harrington?—is a good friend of mine," and he told her, "I know you're a smart girl and you're going to do the right thing."

Ballentine recalls that Jones also told her that day about the mysterious so-called "distinguishing mark" that Jones's complaint says she saw on Clinton, and on which Jones's lawyers say they are relying to corroborate her account. She added: "I said [to Jones], 'You need to go to your boss right away.' She said, 'I can't—they're good friends.' I said, 'You need to go to the police.' She said, 'I can't—they took me up there.' She just felt there was nothing she could do. . . . People just don't understand why she waited so long. She wouldn't ever have done anything if that cop [trooper Ferguson] hadn't told that story [to *The American Spectator*]."

Ballentine also recalls that Jones was extremely worried that day about how Stephen Jones, then her fiancé and now her husband, would react if he ever found out the lurid details of what had happened.

Is it possible that Jones did something in that hotel room that she feared would get out to Steve Jones or others, and lied to her friends as a cover story that day? Or that they all concocted a big lie in January 1994 after David Brock's article came out? It's possible. But Blackard and Ballentine don't come across as false accusers. Neither has courted publicity, and both—Blackard in particular—at first evinced reluctance to talk to me. Moreover, Blackard's husband still worked for the AIDC.

Jones's former employer, when Blackard first signed the affidavit in February 1994.

Some other evidence: Both Blackard and Ballentine told me that they had given similar, perhaps more detailed accounts to Michael Isikoff of the *Post* in 1994—at a time when their memories were fresher, when Jones's detailed complaint (which their recollections track so well) had not been drafted, and when these witnesses had had less time to be coached by lawyers than they have now.

Isikoff confirms this. He was quoted in a book by Larry Sabato and S. Robert Lichten, *When Should the Watchdogs Bark?*, as saying of Blackard and Ballentine: "[They] are enormously impressive and influenced me greatly in pushing for this. . . . They struck me as highly credible, as people who did not have axes to grind in this. They were spontaneous, they were highly detailed, and they were very up-front. And they're not out seeking publicity. You can accuse Jones of that, but not these two. . . . To the extent the story could be checked out, it did check out."

This hardly comes across in the May 4, 1994, article that the *Post* finally published. It noted that Blackard and Ballentine had signed affidavits "supporting Jones's account after conferences in the office of Jones's attorney, Traylor," and Blackard's account of the Ferguson approach and Jones's departure to meet with Clinton. But all the *Post* reported about Blackard's account of Jones's return was this: "Jones was 'walking fast' and 'shaking.' She said that Jones had told her that Clinton had made unwanted advances and Jones implored her to tell no one. 'We were both kind of scared. We weren't thinking straight. I thought I could lose my job. She thought she could lose her job.'"

And all that the *Post* reported from Ballentine's detailed interviews with Isikoff was that she had observed Jones "breathing really hard" when she came to see Ballentine that day and that "Ballentine said Jones 'couldn't believe she was so stupid for going upstairs.'" When I read this to Ballentine, she offered a correction: "That is what I said to her. I said, 'I couldn't believe you were so stupid. You know how he [Clinton] is.' But she didn't know, and she probably didn't think it was stupid then."

Paula Jones also gave detailed accounts of Clinton's conduct to her two older sisters, according to the sisters. Lydia Cathey, who is about two years older, confirms that she had "ushered her sister into her bedroom, shut the door, and comforted her sister as she cried on the bed," as reported by the *Post*.

In an October 9 telephone interview, Cathey added this: "She came over here. She wanted to talk to me. She was very upset. She was bawling. She was shaking. And I'm 100 percent for her. It's all true." Had Jones described what Clinton had done? "Down to the very last detail," says Cathey. "Dropped his drawers and tell [sic] her to 'kiss it.'" Cathey added: "I tried to comfort her. She felt ashamed, even though she hadn't done anything wrong. She felt awful. . . . She was afraid she was going to lose her job, that he was going to get her fired, because she ran out of [Clinton's hotel room]. He was the governor. Every day at work, she was on pins and needles."

I could not reach Jones's husband—to whom Jones did not tell the lurid details at the time for fear of wrecking their relationship, according to her complaint. Nor have I been able to reach her mother or her sister Charlotte Brown.

Here's what the *Post* published from their interviews with Isikoff: Stephen Jones said Paula told him at the time that Clinton had made a pass at her. Delmar Corbin, Jones's extremely religious,

churchgoing mother, said that Jones told her within a couple of days that Clinton had "wanted to put his hands on her and kiss her," but she "didn't tell me near as much as she told her sisters I think because she knows how much it would hurt me." Charlotte Brown, who is about six years older than Jones, said she had said in a "matter-of-fact" way that Clinton had propositioned her" that day.

Brown has drawn more publicity than all of the other five Jones witnesses combined, because she has aggressively trashed Jones's motives in going public—and caused a major rift in the family—by asserting that Jones did not seem upset on May 8, 1991, and that Jones had said in early 1994 that "whichever way it went, it smelled money." Her husband, Mark Brown, has said that he thinks Jones made the whole thing up: early on, he sought out the Clinton defense team to volunteer his help.

Nonetheless, in a February 1994 interview with Isikoff, Charlotte Brown provided rather strong confirmation for the essence of Jones's story. Most of it was left out of his May 4 article. More was mentioned in his May 6 article reporting on a May 5 television appearance in which Charlotte Brown trashed her sister and said Jones had been "thrilled" on May 8, 1991. Isikoff noted that in his interview with Brown in February 1991 Brown had said that on the day of Jones's alleged harassment, Jones told her: "This guard came up to [Jones] and told her that Bill Clinton wanted to see her. She told me when she met him, he asked her to have oral sex and she refused. . . . Asked if she believed her sister's story, she said she did because she had never known Jones to lie."

TAKEN TOGETHER, THESE SIX WITNESSES, all of whom have said Jones told them contemporaneously about Clinton's unwelcome advances, provide far stronger corroboration than has ever been mustered on behalf of Anita Hill. While four witnesses testified that Hill had told them in vague, general terms of being sexually harassed, only one of them (Hill's friend Susan Hoerchner) said Hill had identified Thomas as the harasser. The other three said Hill had complained (much later) of harassment by an unnamed "supervisor." And there is at least some evidence suggesting that Hill could have been referring to someone other than Thomas in her complaints to all four witnesses.

Hoerchner—who had pressed Hill after Thomas's nomination to go public with her charges—confidently asserted in her initial media interviews and Senate staff deposition that Hill's complaints of having been sexually harassed by her boss had come in phone calls before Hoerchner had moved from Washington to the West Coast in September 1981. But Hill claimed Thomas's offensive behavior had started some three months after that. When this contradiction was pointed out, Hoerchner revised her testimony, saying, "I don't know for sure" when Hill first spoke of sexual harassment. In addition, when asked by a Senate Republican whether she had ever filed a sexual harassment charge herself, Hoerchner said no; when confronted with a record showing that in fact she had filed such a charge, against a fellow workman's compensation judge, she responded, "I cannot say that I didn't."

Despite the relative weakness of Hill's corroborating witnesses, every scintilla of seeming corroboration that has been offered for Hill's story has been eagerly scooped up by, among others, *The Washington Post*, even while it was deep-sixing the

far more compelling accounts of Pamela Blackard and Debra Ballentine. The leading example was the *Post's* October 9, 1994, story rehashing three-year old allegations by former Thomas subordinate Angela Wright. At over 6,000 words, it was longer than all *Post* articles focusing on the evidence in the Paula Jones case combined. "Her Testimony Might Have Changed History," the headline announced. "Angela Wright remembers thinking: I believe her because he did it to me," the nut paragraph declared.

Did what? The punchlines, deep in the article, were a bit suspect: "Clarence Thomas did consistently pressure me to date him," Wright told the *Post*, and had once showed up unannounced at her apartment. Once, the article said, he had "commented on the dress I was wearing" and asked her breast size. And: "I remember him specifically saying that one woman had a big ass." But lost in the depths of this article were the facts that Wright had been fired by Thomas (and at least two other employers) for poor job performance, including being rude and disruptive to colleagues; that three witnesses said they had heard her vow to get Thomas back; and that Wright did not even claim that Thomas's alleged conduct amounted to sexual harassment.

The *Post's* takeout on Angela Wright proved to be only the opening salvo in a huge wave of publicity in the fall of 1994 revisiting the Hill-Thomas episode—most of it palpably slanted to overstate the quality of the evidence against Thomas. The centerpiece was *Strange Justice*, a best-seller by Jane Mayer and Jill Abramson of *The Wall Street Journal*, which published a long excerpt leading with a claim by a woman of extremely doubtful credibility (who has since suggested that Mayer and Abramson distorted her account) that in the summer of 1982, Thomas's apartment had in it "a huge, compulsively organized stack of *Playboy* magazines," and walls "adorned with nude centerfolds." The smoothly tendentious Mayer-Abramson book was greeted with uncritical hosannas by news organs ranging from *The New Yorker* to *Newsweek* to ABC's *Nightline*, *Turning Point*, and *Good Morning America*. Meanwhile, all of the same news organs were ignoring Paula Jones and her far stronger, far more current evidence of far more odious alleged conduct by a far more powerful man—the incumbent President of the United States.

HE SAID: NONDENIAL DENIALS

What says the accused?

President Clinton's only public comment about Jones's allegations (unless I've missed one) came at a photo session the day her suit was filed: "Bob Bennett spoke for me. . . . I'm not going to dignify this by commenting on it." That's it. Clinton has never personally confirmed or denied any of the particulars of her allegations. Bennett has persuaded the courts to let him defer even a formal answer to the complaint. And the media have barely noticed that Clinton has taken the moral equivalent of the Fifth Amendment.

Meanwhile, the Clinton legal and public relations teams seem long ago to have abandoned the statement that Clinton "was never alone in a hotel with her," issued by then-White House communications director Mark Gearan the day Jones went public. One indication that this line of defense has become inoperative was the alleged May 5, 1994, Clinton-Bennett proposal to settle the matter by offering to have the president read in public a statement conceding the possibility that he had met

with Jones "in a room at the Excelsior Hotel," and asserting that "she did not engage in any improper or sexual conduct." Now, the operative defense seems to be Bennett's assertion that Clinton has "no recollection" of meeting Jones. It reminds me of what President Nixon said (on tape) to three top aides on March 21, 1973: "Perjury is an awful hard rap to prove. . . . Be damned sure you say, 'I don't remember. . . . I can't recall.'"

Compare Clarence Thomas. He angrily denied Anita Hill's allegations under oath in Senate Judiciary Committee testimony. Of course, he, unlike Clinton, really didn't have the option of similarly ducking by refusing to "dignify" Hill's allegations and having aides and lawyers issue nondenial denials—not if he wanted to get to the Supreme Court.

Defenders of President Clinton (like those of Clarence Thomas) stress with some agency that the conduct of which he stands accused by Paula Jones is so far out of character that the woman must be lying. "What she [Jones] alleges is simply inconceivable as Clinton behavior," was the 1994 reaction of Betsy Wright, who had been Clinton's chief of staff in Arkansas and helped his 1992 campaign combat allegations of extramarital affairs—"blimbo eruptions," in Wright's now-famous phrase. The same Betsy Wright has also said, however, that she was convinced that state troopers in Clinton's security detail were soliciting women for him and he for them, as four of them have alleged. Wright said so both in late 1993, to David Gergen, then a top White House official (according to James Stewart's 1996 book, *Blood Sport*), and in interviews with reporter David Maraniss of *The Washington Post* (according to his 1995 Clinton biography, *First in His Class*).

After receiving a phone call from the president in which the Maraniss book was discussed, Wright, who now is executive vice-president of the Wexler Group, a Washington lobbying firm, issued a statement through her lawyer denying Maraniss's account of these interviews. Maraniss responded that he had double-checked every detail with Wright, and she had confirmed them all, before publication. (Neither Wright nor Gergen returned my phone calls seeking comment before press time.)

All in all, there is strong evidence that Clinton had a pattern and practice of using state troopers to hustle women. That alone is not sexual harassment (though when the governor does so with reason to know that the woman is a state employee busy doing her job, it's getting close). But in the end it comes down to this: Either Clinton harassed Paula Jones on May 8, 1994, in a fashion that seems out of character, or she lied most compellingly to her friends Blackard and Ballentine immediately afterwards, or they are all lying now.

Let's not forget that just as nobody but Jones has publicly accused Clinton of sexual harassment or similarly reckless sexual advances, nobody but Anita Hill has publicly accused Clarence Thomas of talking as dirty as Hill said he talked. Indeed, the Clarence Thomas behavior alleged by Anita Hill seemed as inconceivable to many of his friends and colleagues as does the Bill Clinton behavior alleged by Paula Jones. A parade of female current and former colleagues and subordinates of Thomas came forward as character witnesses for him in 1991. They said that he unflinchingly treated women with respect, nurtured their careers, and was proper to the point of prudishness in his demeanor in the workplace.

Some acquaintances of questionable credibility (such as Angela Wright) did suggest that Thomas

sometimes spoke crudely, or peremptorily announced things like "you're going to be dating me." Others have recalled, more credibly, that Thomas had a taste for pornography, and for talking and laughing about it, at least while he was at Yale Law School, years before meeting Hill. Many Thomas foes took this as confirmation that he must have talked about pornography to Hill. But any interest Thomas may once have had in talking about dirty pictures with people who did not object is no better proof that he harassed Hill than Clinton's widely reported interest in extramarital adventures is proof that he harassed Jones.

A QUESTION OF CHARACTER

Probably Jones's biggest problem is that she is generally regarded as a loose woman unworthy of belief. Indeed, many people—especially lawyers and others of the intellectual and monied classes—need only see a newspaper photograph of Jones, with her big hair and overdone makeup, to discount her claims. (That was my first reaction, at least.) "Tabloid trash"—Bennett's phrase—resonates.

And then there are the almost-nude photos of Jones frolicking in bed that were taken by a faithless former lover in about 1987, sold by him to *Penthouse* in 1994, and published in its January 1995 issue, after Jones had unsuccessfully sued to enjoin publication. The existence of such photos of Jones was, as noted above, one of the first things that Bennett mentioned, in his first conversation with her lawyer Gilbert Davis, according to Davis.

The class bias that helps explain why Anita Hill received so much warmer a reception in elite circles than Paula Jones may be a healthy thing, to the extent that it evidences the (relatively) declining significance of race as a source of prejudice and stereotyping. But it has not yet been proven that unsophisticated, big-haired, makeup-caked women from small hamlets in Arkansas—even ones who pose topless for sleazeball boyfriends—are any less likely to tell the truth than Yale-educated law professors like Anita Hill. To the contrary, lawyers are trained in devising clever ways of distorting the truth.

It's true, and relevant, that Jones's brother-in-law Mark Brown has called her a teaser and manipulator of men who would do anything for money or fame, and a sexual exhibitionist who had proudly displayed nude photos of herself to family members. But Brown—whom Jones and her sister Lydia have both dismissed as "crazy"—may not himself be the most credible of characters. According to the *Post*, in his home of Cabot, Arkansas, "he was led out of a town council meeting [in 1993] for shouting vulgarities at the mayor," who "says the . . . Marine Corps dropout is known around town for 'blowing off' in restaurants."

Friends like Debra Ballentine have described Jones as friendly, open, honest, naive, and totally apolitical. And Jones, unlike Hill, has not been caught in any significant lies of much relevance to the alleged harassment. (In fact, her lawyers, like Hill's, claim that she has passed a polygraph test; the examiner, James Wilt, of Vienna, Virginia, provided me with a copy of a letter he sent Davis stating that "it is my opinion Mrs. Jones was truthful in her responses" to questions about whether she had lied in describing her most graphic allegations against Clinton during a May 24, 1994, polygraph examination.)

While Hill's specific allegations about Thomas cannot definitively be proved or disproved, some of

her other statements appear to have been deliberately misleading. In sworn testimony one morning, for example, Hill denied—five times—any recollection of having been told that she might be able to spur Thomas to withdraw merely by making a confidential statement detailing her allegations, without ever going public. But that afternoon, after conferring with her lawyers, Hill corrected herself, volunteering that "there was some indication [by a key Democratic staffer] that [Thomas] might not wish to continue the process" if confronted with her statement.

Hill's explanations of some other matters were patently incredible, such as her suggestions that the main reason she had followed her alleged harasser from the Education Department to the EEOC was that she feared she might otherwise find herself jobless. The overall pattern, detailed by Suzanne Garmen in "Why Anita Hill Lost" in the January 1992 *Commentary*, was a "disquieting quality that she displayed . . . as [being] more ambitious and calculating than she let on. Her testimony on this subject seemed to show a lack of candor, and this fact alone may have been a basis for mistrusting her." She also had far stronger ideological disagreements with Thomas than she let on.

In addition, while Hill was praised by many friends and colleagues, others, like former EEOC colleague Phyllis Berry (who had been fired by Thomas), told the Senate that Hill was "untrustworthy, selfish, and extremely bitter," after Thomas had given someone else a promotion Hill had wanted.

Much of the disbelief with which Jones has been received is attributable to her reputation (as of 1994) for flirtatiousness, provocative dress, and having slept around, as detailed in publications including *People* and *Penthouse*. It's reasonable, and legally relevant, to speculate that Jones's appearance, demeanor, and willingness to meet with Clinton alone for no apparent purpose may have emboldened him to think that sexual overtures would be welcome. But "that doesn't mean that she had bad character or should be considered a target for some predator," in the words of her lawyer Gilbert Davis. And it's odd to hear such traits held against Jones by feminists who would ordinarily go ballistic at any suggestion that a flashy-looking woman was "asking for it."

When Anita Hill came forward with legally dubious, ten-year-old claims long after any and all relevant statutes of limitations had run, you didn't hear many of them dismissing her claims as legally frivolous. Jones, it seems, is different. "I read the complaint," said Lynne Bernabei, a plaintiff's sexual harassment lawyer in Washington, on a CNN talk show, "and from a legal perspective, it seems like the worst she describes is womanizing, unwelcomed sexual advances, which may be morally or otherwise politically repugnant to people, but is simply not illegal."

Wow. This is a feminist?

It's true that Paula Jones's legal claims have their weaknesses, especially her rather vague and implausible allegations that her supervisors at the Arkansas Industrial Development Commission discriminated against her on the job in retaliation for having displeased the governor by refusing to submit to his advances. But her legal theories are hardly frivolous. A single, extremely outrageous act of sexual harassment, without much more, can arguably support a "hostile working environment" claim, both under Title VII and under the older civil rights statutes cited by Jones.

"THE TRUTH WILL OUT HERE"

The president's choice of a legal strategy is hardly what one might expect from a falsely accused person victimized by a complete fabrication. If "nothing happened in that hotel," as Bennett says, why not simply reveal all relevant facts, cooperate in discovery, seek summary judgment, and get rid of the case? Why spend \$2 million in lawyering, desperately seeking to prevent the evidence from coming out? And if nothing really happened, why did then-White House special counsel Lloyd Cutler go on television on May 24, 1994, and warn: "The entire presidency could turn on the occurrence of a trial like this?"

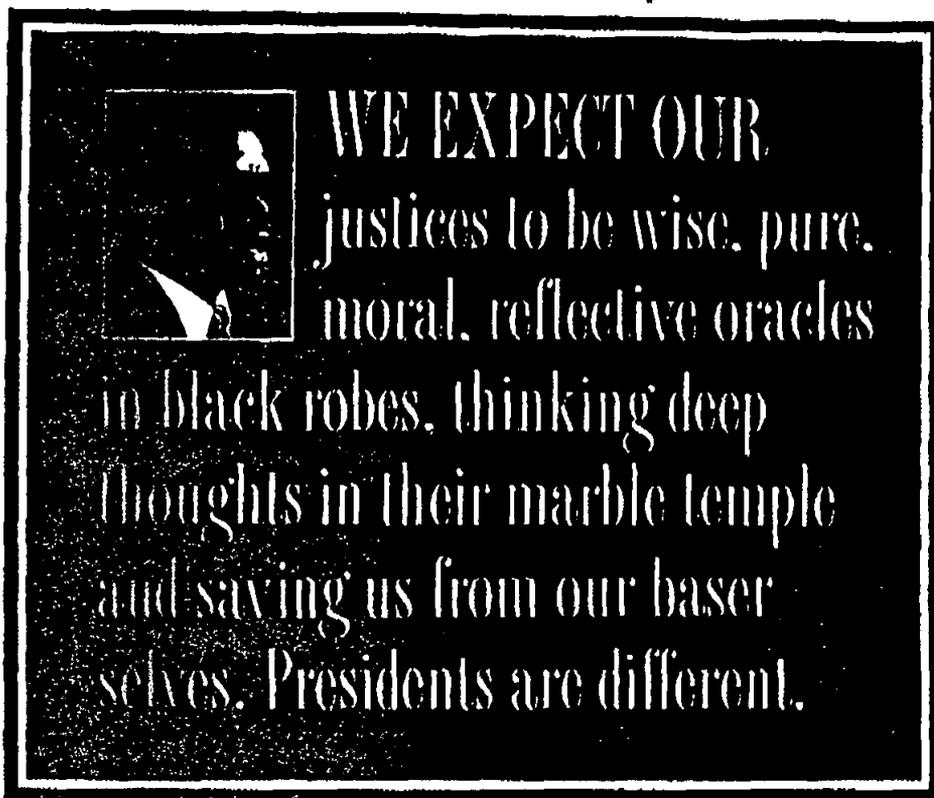
Jones's lawyers have visions of putting the president between the rock of damaging admissions and the hard place of possible perjury; of troopers testifying about a pattern and practice of Clintonian predation: of grilling alleged former lovers of the president to ask them if they noticed a "distinguishing mark"; of compelling a physical examination of the president and getting his medical records (much sought after by the Dole campaign) to find any such mark, or any evidence that one has been removed. But Bennett has shut them out, so far, by losing on the presidential immunity claim in the district court and appealing, and then losing in the Eighth Circuit and appealing again, first for en banc review, then for Supreme Court review. Meanwhile, there has been no factual answer for Clinton to file. No depositions. No interrogatories. No discovery into whether there is, in fact, a distinguishing mark. No trial.

Assuming Clinton's reelection, most handicappers think that the Supreme Court will reject at least the broadest aspects of Clinton's claim and send the case back to lower courts for further proceedings. Bennett has a wave of other motions to dismiss up his sleeve—for failure to state a claim on which relief can be granted and for excessive delay before filing suit, at least. But there could well be discovery, and possibly even a trial, during a Clinton second term. "The truth will out here," says Jones attorney Gil Davis, optimistically. "If she's not telling the truth, well, shame on her."

But given that Paula Jones's claims against Bill Clinton are both more serious by far than Anita Hill's against Clarence Thomas, and supported by much stronger corroborating evidence, why have the media and a lot of other people acted as though the opposite were true?

Several reasons. Most obviously, Anita Hill's charges were spread before the public precisely at the time when Thomas was under the white-hot spotlight of a Supreme Court confirmation proceeding. She was a superficially impressive accuser, far more so than Jones. The subsequent televised hearings that transfixed the nation made it impossible to ignore her charges. And many people—not just liberals—had already been so put off by Thomas's evasive performance and lack of candor about his views on issues, in his initial hearing, that they were hardly prepared to give him the benefit of the doubt when he swore passionately that not one particle of Hill's detailed account was true.

Jones's allegations, on the other hand, were so seamy, and charged Clinton with such incredibly depraved conduct, and first came to light in such a suspect way, that a lot of people didn't want to think about them. One reason was scandal fatigue: With so many allegations of fraud, perjury, and other wrongdoing swirling around the Clintons, most people had little interest in thinking



about what many news organizations dismissed as just another "sex scandal"—especially one in which there can never be dispositive proof of exactly what happened. And they didn't have to think about it, partly because neither Paula Jones nor Bill Clinton was testifying at any televised hearing, and partly because the media didn't publish the evidence.

The disparate treatment of the two episodes also has something to do with the difference between justices and presidents. If we don't like a Supreme Court nominee, can we always hope that if he's defeated, we'll like the next one better; if Clinton's defeated, we know who we'll get: Bob Dole. Moreover, we expect our justices to be wise, pure, honest, moral, reflective oracles in black robes, thinking deep thoughts in their marble temple and saving us from our baser selves. Presidents are different. If Bill Clinton's political success has taught us anything, it is that a president can win strong public approval despite broad and deep public doubts as to his moral character and truthfulness. There also seems to be a widespread assumption that whatever it takes to clamber that high on the slippery pole of political success, and then to do the messier aspects of the job, can only be found in a person driven by an almost superhuman lust for power and other gargantuan appetites.

But ultimately, an inescapable part of the disparate treatment of Thomas and Clinton is simple political orientation. One of the most striking things about the Hill-Thomas battle was how many people seemed confident that they knew that he (or she) was telling the truth, before the evidence was in, and how almost everyone who believed her happened to be on the liberal side, and almost everyone who believed him on the conservative side. Now, with Paula Jones, there's been something of an ideological inversion.

HOW TO EXPLAIN THE MAINSTREAM media's manifest disdain for Paula Jones and Clarence Thomas, and admiration for Anita Hill? Part of it is class bias against what one Washington bureau chief called "some sleazy woman with big hair coming out of the trailer parks." But that's not all of it. Not, that is, unless you believe that the press would have given similar coverage to a similar accuser, making similar allegations, supported by similar evidence, against Newt Gingrich, or Jesse Helms, or George Bush, or Steve Forbes.

That's not what I believe. I think that the political orientations of most reporters, editors, and producers are at work here. It's no accident that in a survey by The Freedom Forum and the Roper Center of 139 Washington, D.C., bureau chiefs and congressional correspondents, 89 percent of respondents said they had voted for Bill Clinton in 1992 and 7 percent for then-President Bush. Mickey Kaus, then of *The New Republic*, was more honest than most of his colleagues when he wrote after Jones's February 1994 press conference: "I thought it wasn't a big story, but not because I didn't believe it. . . . How can reporters justify ignoring Jones while paying so much attention to Anita Hill or the accusers of Senator Packwood? . . . Clinton is . . . the best president we've had in a long time. That is the unspoken reason that the sex charges haven't received as much play as you might expect. . . . Few journalists want to see the president crippled."

Not this president, anyway.

If nothing else, these two episodes illustrate how hard it is for any of us to see clearly through the fog of preconception in which we all live to a greater or lesser degree. I would suggest, however, that those who have made Anita Hill a heroine, Clarence Thomas a goat, and Paula Jones a pariah, need to try harder to overcome their prejudices. They need to look the facts in the face. ■

EXECUTIVE OFFICE OF THE PRESIDENT

24-Sep-1996 11:09am

TO: Jack M. Quinn
TO: Kathleen M. Wallman

FROM: Elena Kagan
Office of the Counsel

SUBJECT: jones reply brief

Our reply brief in the Jones case is due on October 9. I have been in touch with Geof, David, and Amy on the substance, and I am happy with the direction they seem to be taking. But of course it's hard to tell much about a brief without reading it -- so we need to get a copy of the brief in time for us to comment meaningfully on it.

Amy, who (under Bob's direction) is still in control of timing and mechanics, has said she is "aiming" to get us a draft on Oct. 2, but cannot promise to do so. I think Oct. 2 would be fine, but anything later is too near the weekend to give us reasonable time to comment. I have told this to Amy quite emphatically.

I think it might make sense for you, Jack, to call up Bob and reiterate this message. In the end, Amy does what Bob says, and the only way we can be sure to get the brief on Oct. 2 is to make Bob commit to it.

Let me know if you decide to call and what response you get.

THE WHITE HOUSE

WASHINGTON

September 21, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: PAULA JONES CASE

Contrary to my last memo on this subject, a group of scholars has filed a brief on behalf of Paula Jones (though a bit late). Let me know if you want to see it or any other brief filed in the case.

E-mail
to Tuck.

Amy Fabrin

Due OCT 9

20 pp.

Conf. call - central Themes

1. Power vs. access (They cancel):

issue is really - what's best way to accomplish

set of powers

2. Restate Remind - This is lot time in history.

Get back to ground.

extreme new remedy - flip this -

it goes forward, significant departure from

what has happened in past.

What particular points?

Don't respond to hist. anal

Don't overargue on Fitzgerald.

Rebutte briefly that this is simple case.

Geop: Protections are historical like exist in many cases

too - but cts recog limits.

Emphasize - purpose of protection - for public (not "purely
personal")

Respond

7th - to printer

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

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

MOTION OF THE UNITED STATES AS AMICUS CURIAE
FOR DIVIDED ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting petitioner. We further request that the United States be allowed 15 minutes of argument time. Petitioner wishes to cede 15 minutes of argument time to the United States and therefore joins in this motion. Granting this motion accordingly would not require the Court to enlarge the overall time for argument.

This is a private civil action for damages against the President of the United States based on conduct that is alleged to have occurred before the President took office. A divided panel of the Eighth Circuit rejected the contention, advanced by the President and by the United States as amicus curiae, that private civil actions for damages against a sitting President should be deferred until the conclusion of the President's service in office.

2

The court of appeals held that both discovery and trial could proceed during the President's term.

In the view of the United States, to require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties. A sitting President cannot defend himself against private litigation seeking to impose personal financial liability, and bear the substantial burdens that such an undertaking entails, without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to do so would place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions, and would therefore violate the separation of powers under the Constitution. The United States has accordingly filed a brief amicus curiae arguing that this litigation should be stayed during the pendency of the President's service in office.

The United States has a substantial institutional interest in protecting the office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be compelled to take part in judicial proceedings in state or federal court. As we note in our brief in this case (see U.S. Br. 2 n.1), the United States has participated in several other cases that have presented

3

related issues of Presidential participation in judicial proceedings. We therefore believe that oral presentation of the views of the United States would be of material assistance to the Court.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996



**U.S. Department of Justice
Office of the Solicitor General**

The Solicitor General

Washington, D.C. 20530

September 24, 1996

MEMORANDUM TO: Jack Quinn
Counsel to the President

FROM: Walter Dellinger 
Acting Solicitor General

FYI.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. letter	Jack Quinn to Edward Ryan; re: Soldiers' & Sailors' Act (partial) (1 page)	09/22/1996	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [1]

2009-1006-F
jp2021

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

September 22, 1996

[002] Mr. Edward F. Ryan

P6(b)(6)

Dear Mr. Ryan:

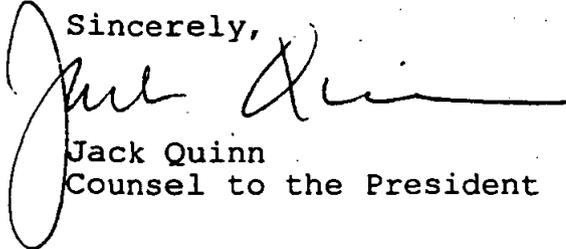
Thank you for your letter, which Leon Panetta forwarded to me.

Though I appreciate your views, you should know that the President has never claimed relief from suit under the Soldiers' and Sailors' Act and has no intention of ever doing so. The President has argued that he is entitled to a stay of litigation because of important constitutional principles involving the separation of powers.

The Soldiers' and Sailors' Act came into the President's brief as a simple example. The President's lawyers were trying to show that stays of litigation are not uncommon -- that courts often grant stays for important public reasons. In that context, the lawyers offered five examples -- of which the Soldiers' and Sailors' Act was but one -- of situations in which courts postpone litigation.

I hope this alleviates your concerns. Thank you again for writing.

Sincerely,



Jack Quinn
Counsel to the President

Q & A ON JONES BRIEF AND SOLDIERS' AND SAILORS' ACT

Q: How could you have claimed that the Soldiers' and Sailors' Act entitles you to a stay of a sexual harassment suit brought against you? Don't you understand that even as Commander-in-Chief, you are a civilian and not entitled to the protections given to those on active military service?

A: As I understand what my lawyers wrote, they never claimed relief under the Soldiers' and Sailors' Act. They said that I am entitled to a stay of the lawsuit not because of that piece of legislation, but because of important constitutional principles, involving the separation of powers.

The way the Soldiers' and Sailors' Act came into the brief was as a simple example. My lawyers were trying to show that stays of lawsuits are not uncommon -- that courts often grant stays for important public reasons. In that context, my lawyers offered five examples -- of which the Soldiers' and Sailors' Act was but one -- of situations in which courts postpone litigation.

My lawyers have explained this many times by now. The continued accusations that I claimed relief under the Soldiers' and Sailors' Act are the result of real distortion. Let me say again: I didn't claim relief under the Soldiers' and Sailors' Act and I have no intention of ever doing so.

Q: Were you aware of the references to the Soldiers' and Sailors' Act in either the recent petition to the Supreme Court or in prior legal papers.

A: I didn't read the recent petition prior to its being filed. Some time ago, I had a general discussion with my lawyers about my argument that there should be a stay in this case. But we did not discuss any specifics relating to particular cases or statutes. We talked only about the basic constitutional principles.

Q: If you didn't rely on the Soldiers' and Sailors' Act as a basis for relief, why did your lawyer think it necessary to file a separate legal pleading a few days later retracting this claim.

A: My lawyer didn't retract the argument, because there was no argument to retract. Again, I have never argued that I should get a stay of this lawsuit under the Soldiers' and Sailors' Act. What my lawyer did, in a routine reply brief that would have been filed in any event, was to make clear what the original petition had argued and what it had not argued. That was necessary because of the distortion and the misstatements surrounding the original petition.

TALKING POINTS/FACT SHEET ON SUPREME COURT'S DECISION TO GRANT
THE PRESIDENT'S PETITION IN THE PAULA JONES CASE

The President and his attorneys are gratified by the Supreme Court's decision to review the Court of Appeals' decision ("grant cert") in the Paula Jones case.

The Court will consider the President's claim, wrongly rejected by the Court of Appeals, that as a matter of constitutional principle, private civil damages actions against a sitting President should be deferred until the President leaves office. This claim presents an issue of importance to both the Presidency and nation -- precisely the kind of issue the Supreme Court should address.

No President has ever had to cope with the distractions of defending a lawsuit while in office, and the President and his attorneys -- as well as the Department of Justice, which supported the President's request for a stay of the litigation -- believe that the Constitution entitles any President to a simple postponement of litigation so that he can fulfill his constitutional responsibilities. The deferral of litigation for a specified, limited period is quite common in our legal system as a way to protect such important interests.

The Court's decision to consider the case, as is almost always true in Supreme Court practice, is a simple one-sentence order. There is no reasoning given.

Briefing in the case will occur during the summer and early fall. Argument has not yet been scheduled, but is likely to occur in the first few months of the next Supreme Court Term, which begins in October.

THE WHITE HOUSE
WASHINGTON

September 16, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *al*
SUBJECT: PAULA JONES CASE

I just received a complete set of the amicus briefs filed in the Paula Jones case. On our side: the SG and our group of law professors. On their side: the ACLU and the Coalition of American Veterans (CAV). They no longer have a law professors' brief.

The brief of the CAV concedes that the reference to the Soldiers and Sailors Act is an analogy, but argues that "the power to analogize laws is the power to create laws." I kid you not.

Please let me know if you would like copies of any or all of these briefs.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003a. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [1]

2009-1006-F
jp2021

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

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

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

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003b. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

Paula Jones Case [1]

2009-1006-F
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003c. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	07/24/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

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Telecon w/ Walter Dellinger

1. Failed to convey sense of demands of Presidency.

Talk to Luchinsky / Goodwin.

2. Flesh out burdens of litigation.

Hard look at literature. More concrete / quality -
how absorbing.

3. - start w/ - what it will be Pres answerable to courts
in 50 states.

Ab/donalds

whole set needed.

never going to pt.

otherwise - ch. productive.

I have to call (w/ DS/GS)

- Jethries

- Farkh / Freny / Frickey

Gun Run?



Boh → Carter → Ford



WHITE HOUSE WEEKLY

Elena (JA)/KW/ BCL

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Monday, July 29, 1996

WHW Volume 17, Number 30

CAPITAL DIARY

Immigrants And Strange Animosities

BY LLEWELLYN KING

Peter Jennings, who reads the news on ABC-TV in an avuncular and concerned way, is, one presumes, rolling in money. This is just as well, because the welfare reform bill, which is about to leave Capitol Hill for 1600 Pennsylvania Avenue, is aimed at people like Jennings, among others.

Jennings is a Canadian citizen who has not changed his nationality. He once said that his mother would never forgive him if he became an American, although he has lived here for many years and achieved great success.

The Republican welfare bill censures people like Jennings. They cannot draw welfare under it and their children can be denied school lunches. The bill implies that there is some sort of moral failure in people who do not become citizens; that they have an overriding loyalty to some other power and are here for no better purpose than to rip off our social services.

It is one more unpleasant aspect of this unpleasant piece of legislation, this bill designed—like three strikes, you're out—to produce a crueller, harsher America.

This bill, which is supposed to turn layabouts into productive citizens imbued with a work ethic, has at its heart a desire not only to make the poor, the stupid and

(Continued on page 2)

Vets May Resurrect Attack On White House Paula Jones Defense

BY TONY CAPACCIO

A veterans' group is considering filing an *amicus curiae* brief with the Supreme Court in order to press its opposition to what has been widely seen as a claim by President Clinton that, as the nation's commander-in-chief, he is on "active-duty" status.

The group spearheaded a Memorial Day weekend attack on the president for purportedly using such a claim in an alleged attempt to delay the progress of the Paula Jones sexual harassment case. The controversy neatly captured the fact that, although the Cold War is over and his Pentagon team is credited with good management credentials, Clinton remains vulnerable on the "commander-in-chief" issue.

A Supreme Court filing by the Coalition of American Veterans could tap that vulnerability—and might in the process elevate national defense, now fairly dormant in the presidential campaign, as a campaign issue. Currently, the coalition is assessing whether to bring its fight to the nation's highest court; seven attorneys are scheduled to meet on either Thursday or Friday to

(Continued on page 4)

Israel Among Most 'Extensive' In Economic Espionage—CIA

BY TONY CAPACCIO

For the first time on the public record, the CIA has identified the governments of France and Israel as among a handful of nations it says are "extensively engaged in economic espionage" against the United States, *White House Weekly* has learned.

In contrast, the CIA concluded in the just-released testimony that Japan—an ally viewed by some as among the most unscrupulous in trying to steal U.S. technology—engages in "mostly legal" collection efforts.

"We have only identified about a half-dozen governments that we believe have extensively engaged in economic espionage as we define it," said the CIA in May 10 written material provided to the Senate Select Committee on Intelligence.

"These governments include France, Israel, China, Russia, Iran and Cuba. Japan and a number of other countries engage in economic

(Continued on page 5)

Vets May Attack Again... (Continued from page one)

discuss the group's legal options.

Retired Marine Corps Col. William "Lucky" Luchsinger, the coalition's chairman, this week acknowledged the organization's hope that a filing might influence both general public opinion and the court's verdict, even if that filing missed prescribed legal deadlines.

"We are processing it now. We are looking at people who would take the case *pro bono*," Luchsinger said. "It's a question of timing. We may do it anyway because if we don't, who will?"

Luchsinger said his coalition, unlike most veterans' organizations, gets actively involved in political and even legal issues.

Time appears to be on the coalition's side. The Supreme Court on June 24 agreed to hear the case, effectively delaying Jones' high-profile lawsuit until after Election Day. Clinton's attorneys have 45 days from June 24 to file a "brief on the merits." The document's preparation is on schedule, the president's attorneys confirmed yesterday.

Interested parties then have 30 days in which to file *amicus curiae* or "friend of the court" briefs supporting Jones or Clinton, the court clerk's office said. "I think public opinion is important.... They are cognizant of public opinion," Luchsinger said of the Supreme Court.

Luchsinger also acknowledged that his organization, once nearly bankrupt, has leveraged its Memorial Day roll for fund-raising purposes.

In attacking the White House, veterans' groups, GOP lawmakers and *New York Times* columnist Maureen Dowd interpreted Clinton's legal defense, as offered in a May 15 Supreme Court brief, as resting largely on purported "active service" status as commander-in-chief.

According to this view, Clinton was claiming to be eligible under the Soldiers' and Sailors' Civil Relief Act of 1940 for a delay of the sordid civil case. Critics and reporters failed to mention, however, that as far back as August 1994 Clinton legal briefs maintained that he was *not* relying on the act.

Instead, according to Clinton attorneys, the act has been

referenced to illustrate a defense theory: If the act grants soldiers temporary legal relief while on active service, then the president, by dint of his greater responsibilities, should enjoy similar status.

"It is arguable that the Act expressly applies to the President as Commander-in-Chief but we do not press the argument here," said an Aug. 10, 1994, filing.

Who is right can be debated on *Geraldo*. What is evident is that the issue is not as clear-cut as the Memorial Day firestorm suggested.

For its part, the coalition spent \$144,300—nearly its entire budget—placing, in 24 major and regional papers, full- and quarter-page ads featuring a May 27 letter of criticism signed by five Congressional Medal of Honor winners.

The papers included the *Washington Times*, the *Orange County Register*, the *Philadelphia Inquirer*, *Stars and Stripes*, the *St. Petersburg Times* and the *Detroit News*. Luchsinger said the coalition wanted to "straighten the record"

over what he claimed was the Clinton legal team's continued reliance on the Soldiers' and Sailors' Act.

"I understood Clinton's attorneys ain't giving up," said Vietnam War veteran Elliot Williams, past president of the Congressional Medal of Honor Society. "They are dropping the issue of the 1940 Sailors' Act. It's new words, but it's going to be the same claims."

Williams said the letter reflected one step aimed at politically energizing veterans' groups—not on behalf of any one candidate, but simply to get more involved. "There are 18 chartered groups out there and they are not getting together. They are guarding their turf for membership. They won't admit that, but it's the truth," Williams said, adding that he hopes the coalition's past and future involvement will bring the groups together.

Williams said the May 27 letter, to which he is a signatory, reflected language he and another Vietnam medal winner and former Army Public Affairs chief, Maj. Gen. Patrick Brady, had drafted. Adding some confusion, however, Brady said in an interview that he never talked to Williams and can't remember who called him asking him to sign the letter.

"I drafted the letter, but a lot of stuff was drafted by Brady," Williams said. "Then collectively we came out with one letter. The coalition got some things in there, too. They were full partners. Let's put it that way."

"To retreat from the call to arms and then later embrace its code when it is convenient is an outrage to all who served," said the letter in recounting Clinton's 1960s draft history.

"It is a distasteful irony that you would invoke the Act at a time when we remember those who gave their lives while wearing the uniform of the American military you once professed to loathe," the letter added.

The phrase about "loathing the
(Continued on next page)

'It's a question of timing. We may do it anyway because if we don't, who will?'

'Extensive' In Economic Espionage... (Continued from page one)

collection, but we believe their efforts are mostly legal and involve seeking openly available material or hiring well-placed consultants," the CIA said in its testimony.

The new material was released without fanfare yesterday as part of a declassified hearing volume on "Current and Projected National Security Threats to The United States."

Until the new CIA statement, the U.S. government had never publicly confirmed that Israel has engaged in clandestine attempts to gain U.S. technology.

Israel Embassy spokesman Gadi Baltiansky said yesterday he was not aware of the CIA material, but he stated: "Israel is not engaged in any form of espionage in or against the United States."

Economic espionage has been a hotly debated topic in national security and defense industry circles.

So concerned was the Clinton administration that, in 1994, it set up a National Counterintelligence Center (NACIC) to pool FBI, CIA, Defense Intelligence Agency, State Department and National Security Agency resources.

It was NACIC's research that led to a listing of the governments, according to the material. "The Center has narrowly defined economic espionage to include a government-directed or orchestrated clandestine effort to collect U.S. economic secrets or proprietary information," the testimony said.

"The Counterintelligence Center has examined a

number of countries from the standpoint of their willingness to conduct economic espionage against U.S. interests," said the CIA in the material released yesterday.

"We see government-orchestrated theft of U.S. corporate science and technology data as the type of espionage that poses the greatest threat to U.S. economic competitiveness."

News of the CIA characterization of Israel comes as that nation is reacting with anger to the Clinton administration's denial of a pardon for convicted spy Jonathan Pollard.

A widely publicized—and equally criticized—Defense Investigative Service (DIS) "Counterintelligence Profile" on Israel, disclosed in February, recounted public-record examples of industrial espionage.

"Israel aggressively collects military and industrial technology. The United States is a high-priority collection target," said the profile, which also implied that U.S. citizens with ethnic ties to Israel are prone to betray U.S. technology.

CIA Director John Deutch in Feb. 22 testimony hit the DIS profile as "a terrible document."

In a Feb. 28 report, the General Accounting Office, without explicitly naming Israel—which it identified only as "Country A"—said it "conducts the most aggressive espionage operation against the United States of any U.S. ally."

The new CIA material tends to corroborate rather than to debunk the DIS and GAO assessments.

Vets May Attack Again... (From previous page)

military" was in Clinton's now infamous Dec. 3, 1969, letter to Arkansas ROTC official Col. Eugene Holmes. Three years earlier, then-Boatswain's Mate First Class Williams won his Medal of Honor for taking on 10 Viet Cong junks and sampans in a savage river firefight.

"Mr. President,...withdraw your use of the Soldiers' and Sailors' Civil Relief Act," the letter said.

Clinton's attorney, Robert Bennett, acknowledged in an interview the conclusions of a May 22 Congressional Research Service opinion relied on by Republicans to attack Clinton: that the commander-in-chief title does not imply "active duty."

"I agree, but we've never argued that. We are not saying he is on active duty," Bennett said.

"Everybody has been over the papers," said an exasperated Bennett when asked why the issue had not surfaced two years ago, when the 1940 Act was first brought up in his legal briefs. "At no time did any-

body raise a question, no print or television reporter. The point was never made an issue."

Just one excerpt illustrates the case's complexity:

In a June 5, 1995, reply brief, for example, lawyers for Clinton wrote: "The President does not rely directly on the Act, choosing instead to invoke the constitutional protection due the presidency. Nonetheless, we feel compelled to address certain statements about the Act [made] in the opposing briefs...."

"Although the Act does not expressly include the commander-in-chief, a review of the legislative history reveals no intent to exclude him and it would be consistent with the overall purpose of the Act to extend its coverage to the commander of the armed forces...."

"In any event, the Act provides a useful example of another instance in which our legal system subordinates the interests of individual litigants to overriding national interests when circumstances require."

For Conference Information See

WORLD WIDE WEB SITE: <http://www2.dgsys.com/~kingcomm>
EMAIL ADDRESS: kingcomm@dgs.dgsys.com

DAVID STRAUSS

Due late -
Amy 8th

Scadden people
Geoff / you
SG people / Dellinger.

noon
tomrw

Annex by
conf. call

agenda: bull session
about The brief.
Angles / -

Draft - ??

more time?

SG may want?

AMY

want totally final copy - ~~to~~ give to W.H.

mid ^{to} late

(account in printer time)

not sure something to
give before that.

Also discuss -
Amicus - v Sullivan - not going to be
K. able to do.

THE WHITE HOUSE

WASHINGTON

June 26, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *AK*

SUBJECT: JONES LITIGATION

1. Our merits brief is due on August 8.
2. David Strauss is putting together an outline for the brief, which he will fax to Jack, as well as to Bennett, within the next few days.
3. We should think (quickly) about whether we want any amicus briefs other than one from legal scholars. David suggested, for our consideration only: (1) a brief from members of Congress, making the case that our position is in the interest not just of the President, but of effective national government; (2) a brief from members of the defense bar, emphasizing how (and how often) litigation can be used to harass those in the public eye; and/or (3) a brief from some conservative think tank committed to a strong executive, demonstrating that this is not a partisan issue.

A problem with (1) is that if only Democrats joined, the brief would increase the partisan feel of the case. A problem with (2) and (3) is that getting such a brief might be difficult -- and our efforts to do so might become public.

Withdrawal/Redaction Marker Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/08/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

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2009-1006-F
jp2021

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Amy, Geof, and Elena—

Here is my work. In the "reasons" part I ended up typing things over instead of working on Amy's draft, principally because I could get a better sense of the overall document that way.

I concentrated on making the petition shorter. I know I succeeded at that. Whether it's better is another matter. I'm sure that in addition to various infelicities that I introduced, there are things I left out that should be put back in.

It may make sense for Geof and Elena to wait until Amy gets another copy produced before trying to make sense of this.

FAX TRANSMISSION COVER FORM

DATE: 5/10/96

TIME SENT: 9:25 am

FROM: LAW SCHOOL FAX PHONE NUMBER: (312) 702-0730

NAME: David Strauss

The University of Chicago
The Law School
1111 East 60th Street
Chicago, Illinois 60637

PHONE NUMBER: (312) 702-9494

TO: FAX PHONE NUMBER: (202) 456-1647

NAME: Elena Nayan

ADDRESS: _____

PHONE NUMBER: _____

NUMBER OF PAGES (including this cover form): 26

CONFIRMATION OF RECEIPT DESIRED: YES _____ NO _____

(TMC-"fax"-5/16/91)

COMMENTS:

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005a. note	To Amy, Geof, & Elena; re: Petition (1 page)	05/10/1996	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8285

FOLDER TITLE:

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005b. draft	re: Statement of the Case (23 pages)	05/10/1996	P5

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Counsel's Office
Elena Kagan
OA/Box Number: 8285

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THE WHITE HOUSE

WASHINGTON
May 10, 1996

MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*
SUBJECT: JONES LITIGATION

As you know, the cert petition must be filed by this coming Thursday; according to Amy Sabrin, that means it should be given to the printers on Monday. Sabrin is currently incorporating Strauss's and Stone's comments. She hopes to have a new draft by very late tonight or (more likely) tomorrow morning. She would like any comments we have by Saturday afternoon.

We should figure out how we want to handle this process: How involved should we be in the editorial process? And if we do want to get involved, how should we coordinate in such short order our own thoughts and comments?

THE WHITE HOUSE

WASHINGTON
May 10, 1996

MEMORANDUM FOR JACK QUINN

FROM: ELENA KAGAN *EK*

SUBJECT: JONES LITIGATION

Amy Sabrin called to ask whether you had spoken with Bruce about taking the names of the Arkansas attorneys (Kathy Graves from Bruce's old firm and Stephen Engstrom) off the pleadings. I believe we all agreed that we should do so, assuming Bruce agrees.

Jones suit on way to top court

By Frank J. Murray
THE WASHINGTON TIMES

A chesslike Supreme Court gambit began yesterday after the 8th U.S. Circuit Court of Appeals denied President Clinton's second plea to delay Paula Corbin Jones' sex-harassment suit until he leaves the White House.

A panel of the St. Louis appeals court yesterday set the maneuvers in motion by refusing to give Mr. Clinton's attorneys additional time to submit the case to the Supreme Court.

Attorneys for Mrs. Jones say if variables fall their way and Mr. Clinton doesn't use delaying tactics open to him, they could take evidence under oath this summer and certainly before Election Day.

"If he has time to campaign, which is not a necessary function of the presidency, he certainly has time to give a deposition," an optimistic Gilbert K. Davis said.

A member of the president's private legal team said he will petition the high court by next Thursday's deadline to review his immunity claims, and expects the court will hear novel issues involving postponement of the matter until his presidency ends, which could be as late as Jan. 20, 2001.

Mrs. Jones' attorneys plan to answer shortly after Mr. Clinton's brief reaches the clerk's office, and not wait the 30 days available to them. They expect the court to act before summer recess and deny a full hearing on Mr. Clinton's claim that official duties keep him too busy to respond.

Mr. Clinton's attorneys said they will not request extra time from the high court, although such requests often are granted. In this case it would be filed first before Justice Clarence Thomas, who handles all 8th Circuit emergency matters. He could rule on it or refer it to the full court.

Simply filing their petition on time will invoke an automatic extension of a lower court stay until the Supreme Court finishes the case. That would include any request for rehearing. While rarely granted, it could not be disposed of until the fall term begins Oct. 7.

Under new rules, the justices do not consider a case until at least 10 days after the opposition brief is filed, giving a petitioner time to respond. The most likely deadline for paperwork to be considered this term would be June 5.

The final secret session at which justices discuss new cases has long been scheduled for June 21. They also routinely hold another conference on the court's final day.

If the case is put on the docket, arguments probably would be heard in December with a decision in 1997. Granting Mr. Clinton immunity on a civil suit related to events that occurred before he became president would allow a claim that eluded Presidents Kennedy, Truman and Theodore Roosevelt.

"Witnesses may die. Documents may be lost. Memories may fade," Mr. Davis said as he issued a statement in which Mrs. Jones called for early action.

"I am elated. It looks like my case can finally move forward after so long an effort by Mr. Clinton to avoid it," she said.

If the court denies Mr. Clinton's petition, District Judge Susan Webber Wright would oversee a process of legal responses. They include motions to dismiss Mrs. Jones' suit, opposition to written or oral questioning, production of evidence and scheduling.

Depositions could start with Mr. Clinton's co-defendant Danny Ferguson, the Arkansas state trooper Mrs. Jones accuses of directing her to a hotel room where she maintains Mr. Clinton exposed himself after she refused his overtures.

"If the Supreme Court denies their petition, we would be in depositions and discovery this summer," said Mr. Davis, who became a Republican candidate for Virginia attorney general after his firm took Mrs. Jones' case.

RNC ready to begin airing first TV ad for Dole campaign

By Ralph Z. Hallow
THE WASHINGTON TIMES

The Republican National Committee yesterday unveiled its first major advertising effort in behalf of Bob Dole's presidential campaign, a 30-second television spot that blasts President Clinton's tax increases.

The ad, produced by media consultant Mike Murphy, focuses on the 4.3-cent gasoline tax that Mr. Clinton and Congress, then controlled by Democrats, pushed through in 1993.

"Three years ago," it begins, "Bill Clinton gave us the largest tax increase in history, including a 4-cent-a-gallon increase on gasoline. Bill Clinton said he felt bad about it."

A video of Mr. Clinton then shows the the president saying, "People in this room [are] still mad at me over the budget because you think I raised your taxes too much. It might surprise you to know I think I raised them too much, too."

"OK, Mr. President," the announcer says. "We were surprised. So now, surprise us again."

Mr. Dole's face then appears, and the announcer says, "Support Senator Dole's plan to repeal your gas tax, and learn that actions do speak louder than words."

The spot will be broadcast, beginning today, nationally on CNN and in undisclosed local markets. It will run for at least two weeks.

Mr. Clinton yesterday offered to sign a gas-tax repeal if Republicans do not attach amendments unpalatable to the administration. They aren't likely to, and the ad is

aimed to pressure the president while reminding voters of his tax record.

At a news conference where the GOP spot was unveiled, Republican National Chairman Haley Barbour said the party will spend about \$300,000 on this ad and escalate the air war against Mr. Clinton with more-specific issue ads all the way through the Republican National Convention in August.

The Dole campaign is virtually out of money and bumping up against federal primary spending limits, and the RNC finds itself with only about a third of the cash that the Democratic National Committee, the cash-rich Clinton campaign and allied labor unions have to spend on advertising through August.

At the news conference, Mr. Barbour was peppered with questions about why so many Republicans have been attacking each other instead of Mr. Clinton and the Democrats.

Reporters tried in vain to get Mr. Barbour to comment on why Ohio Gov. George V. Voinovich, a Dole friend who has been touted as a potential running mate for the senator, said last week that rescinding the gas tax was less important than deficit reduction and that, besides, gas prices aren't too high.

Nor would Mr. Barbour discuss Sen. Alfonse M. D'Amato of New York, Mr. Dole's national campaign chairman, and his public criticism of House Speaker Newt Gingrich.

Reporters also asked Mr. Barbour about Rep. Peter H. King,

New York Republican, who this week criticized Mr. Gingrich and House Majority Leader Dick Armey of Texas by name — and, by implication, Mr. Dole and Mr. Barbour. Mr. King accused them of adopting a "Southern, anti-union attitude that appeals to the mentality of hillbillies at revival meetings."

Mr. King made his remark after all four GOP leaders criticized the Democrats' proposal to raise the minimum wage and the labor unions for using members' dues for a \$35 million political fund to help re-elect Mr. Clinton.

Asked if he planned to send these and subsequent RNC ads to Mr. Voinovich and Mr. King so they would be sure to understand the party's message, Mr. Barbour shook his head said, "We were all brought up to praise in public and criticize in private."

The amount of money that the RNC is dedicating to the ad campaign is relatively small but follows the Democrats' strategy, conceived by strategist James Carville, of targeting only key districts likely to yield a large payoff.

"The battle is not national this year," said GOP media consultant Alex Castellanos. "That amount of money can be effectively used in key districts in battleground states over two weeks."

He noted that people who watch CNN are more likely to vote and to be paying attention to the presidential contest six months before the election.

"This is a battle for the hearts and minds of the most politically active people at this point."

Clinton blames time constraints for inaccurate ad

By Paul Bedard
THE WASHINGTON TIMES

When it comes to re-election advertising blasting Senate Majority Leader Bob Dole, President Clinton says he's trying to be truthful and accurate, but it's tough to do in 27 seconds of air time.

The issue: a Clinton television ad that attacks the Republicans for trying to cut Medicaid and Medicare when in fact they only proposed slowing the rate of spending growth — something the Clintons proposed in their own health reform plan.

When he was asked at a press conference yesterday if he would match his bipartisan rhetoric by changing the ad to make it more accurate, the president angrily denounced the press, claiming the media have taught him to equate reductions in proposed spending growth with a cut.

"We all learned to use it from the press," Mr. Clinton said.

Mr. Clinton claimed he was "amazed" when he came to Washington and found that politicians and the media sometimes use shorthand to describe spending reductions.

"I'm just trying to be straight with the American people," he said. But he acknowledged that his attack ads aren't entirely accurate because the ad makers

don't have enough time to tell the complete story, he said.

"If you have 27 seconds to talk to the American people, how long does it take to say 'A proposed cut in the rate of increase but a real cut if it is less than the rate of increase plus growth?'" the president asked reporters.

And anyway, he added, Americans think the two are the same.

White House spokesman Michael McCurry said "using the nomenclature that's available, a cut's a cut, and if you're an elderly person who is facing what the impact of those premium increases or reductions in services would be, it's going to feel like a cut."

Of course, the White House didn't always feel that way. The president and first lady Hillary Rodham Clinton, for example, forcefully fought off charges they were cutting health care spending in their failed health reform package. The cuts were actually a reduction in the rate of increase.

In a October 1993 speech to retirees, for example, the president said cuts were not equal to slowing growth — exactly what the Republicans have proposed.

"Today, Medicaid and Medicare are going up at three times the rate of inflation. We proposed to let it go up at two times the rate of inflation. That is not a Medi-

care or Medicaid cut . . . so when you hear all this business about cuts, let me caution you that is not what is going on. We are going to have increases in Medicare and Medicaid, and reduction in the rate of growth," the president explained then.

Tony Blankley, spokesman for House Speaker Newt Gingrich, welcomed the president's criticism of the Democratic National Committee ad attacking the Republicans.

"I was glad to hear him concede we are in fact not cutting Medicare," he said.

Mr. Blankley also poked fun at Mr. Clinton's excuse that his ads aren't accurate because his re-election team is simply following the standard political practice of using shorthand when describing spending proposals.

"I thought that was the single most humorous line in American politics since Nixon said, 'I am not a crook,'" said Mr. Blankley.

Meanwhile, Republican National Committee spokesman Ed Gillespie rapped the president's portrayal of his briefing room press conference as bipartisan.

To forswear politics at the same time Democrats are running ads attacking Republicans on Medicare "even for Bill Clinton was a stretch," Mr. Gillespie said. He accused the president of going "one spin too far."

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

PAULA CORBIN JONES, :
: Appellee/Cross-Appellant :
v. : Cross-Appeals from the United
: States District Court for the
: Eastern District of Arkansas
WILLIAM JEFFERSON CLINTON, :
: Appellant/Cross-Appellee :

MEMORANDUM IN SUPPORT OF
PRESIDENT CLINTON'S MOTION FOR A STAY OF MANDATE

Pursuant to Federal Rule 41(b) of Appellate Procedure, President William Jefferson Clinton hereby moves for a stay of the Court's mandate for 30 days pending his petition to the United States Supreme Court for a writ of certiorari. A stay is warranted because the interests the President seeks to preserve by his petition to the Supreme Court would be injured irreparably if the mandate is not stayed, and because the Supreme Court in all probability will agree to consider the President's appeal, and possibly to reverse.

Introduction

This is an extraordinary case raising constitutional issues of profound consequence to the Presidency and the Judiciary. The President will ask the Supreme Court to consider two issues: First, whether the Constitution requires that private civil damages claims against a sitting President be

deferred until he leaves office, and second, even if the Constitution does not require it, whether a court may defer such litigation in the public interest and as a matter of judicial discretion.

Permitting this litigation to go forward would obliterate the very right the President seeks to vindicate through appeal -- the public's right to have the President's full time, attention and energy devoted to the execution of his unique constitutional duties. The petition would be rendered nugatory and this interest irretrievably damaged if the stay were not issued. For this reason, in cases such as this, where the defendant asserts an immunity from the burdens of litigation, courts have recognized repeatedly that the litigation should be stayed pending completion of all appeals. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994).

Moreover, the Court in this case made new law regarding the Presidency and separation of powers. Before the panel's ruling, no court had ever compelled a sitting President to stand trial in a private civil damages suit. The fact that this appeal raises novel and serious questions of constitutional law which have not been, but should be, settled by the Supreme Court, makes it a likely candidate for Supreme Court review. See Supreme Court Rule 10.1(c).

The unprecedented nature of the panel's holding, as well as the Court's own difficult meditations on these issues --

as evidenced by the numerous opinions that resulted, the forceful dissents, and the Court's lengthy consideration of the Petition for Rehearing -- demonstrate further that the Supreme Court quite possibly would disagree with the panel. This therefore is precisely the kind of appeal that justifies a stay. See United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J. in chambers)).

Background and Procedural History

On May 6, 1994, Paula Jones filed a civil damages complaint against President Clinton and Arkansas State Trooper Danny Ferguson. The complaint contains four counts against the President, two arising under federal civil rights acts and two based on Arkansas common law. Three of the claims rest upon an alleged incident of sexual harassment that purportedly occurred in 1991, while Mr. Clinton was Governor of Arkansas. The fourth claim, sounding in defamation, accrued while he was President, and is premised on statements attributed to the White House Press Secretary and the President's lawyer denying Ms. Jones' well-publicized allegations against the President.

The plaintiff seeks \$400,000 in compensatory damages and \$300,000 in punitive damages. Trooper Ferguson is named as a co-defendant in two of the counts.

Shortly after the complaint was filed, the district court determined to resolve the threshold issue of presidential immunity before requiring the President to undertake any other

burdens of litigation. Jones v. Clinton, 858 F. Supp. 902 (E.D. Ark. 1994) (citing Mitchell v. Forsyth, 472 U.S. 511, 525 (1985)). The President promptly thereafter moved to dismiss the complaint, without prejudice, on grounds of temporal presidential immunity, and to toll the statute of limitations until he left office, thereby preserving the plaintiff's ability to refile at that time. In the alternative, the President contended that the litigation should be stayed in its entirety during his service as Chief Executive. Additionally, because the allegations involving Trooper Ferguson were so closely intertwined with those against the President, the President asserted that any proceedings against the Trooper should be held in abeyance as well.

The Solicitor General filed a Statement of Interest on behalf of the United States, supporting the President's position that an incumbent Chief Executive should not be required to litigate private civil damages suits of this kind. The Solicitor General also asserted that due to the nature of the allegations in this particular case and the factual congruency between the claims against Trooper Ferguson and those against the President, staying the claims against the Trooper was essential to ensure that the Presidency was fully protected.

The district court denied the President's motion to dismiss, and held that discovery could proceed immediately, including discovery against the President.¹ The trial court

¹ Discovery was subsequently stayed pending appeal.

found that there was no exigency to the plaintiff's pursuit of damages in this particular case, however, and stayed trial until the President's term of office expired. The court reasoned that such a stay was required by the rationale of Nixon v. Fitzgerald, 457 U.S. 731 (1982), and was also an appropriate exercise of a trial court's discretion pursuant to Federal Rule of Civil Procedure 40 and the equitable powers of a court to manage its own docket. Jones v. Clinton, 869 F. Supp. 690, 699 (E.D. Ark. 1994). The stay was extended to include trial of the claims against Trooper Ferguson, which the court found were inseparable from those against the President. Id.

President Clinton appealed those parts of the lower court's order denying his motion to dismiss and permitting discovery to go forward. The Solicitor General, representing the United States, supported his appeal as amicus curiae. Ms. Jones cross-appealed the district court's order staying trial.

On January 9, 1996, a divided panel of this Court rejected the President's appeal and granted Ms. Jones' appeal. Holding that "the Constitution does not confer upon an incumbent President any immunity from civil actions that arise from his unofficial acts," the panel opinion affirmed the district court's decision denying the motion to dismiss and allowing discovery to proceed. Jones v. Clinton, 72 F.3d 1354, 1363 (8th Cir. 1996). The majority went further, reversing the district court's order staying trial. In a footnote, the panel held that because the Constitution as construed by the majority did not confer immunity

on a President from private civil damages claims, the district court abused its discretion by staying any part of these proceedings. 72 F.3d at 1361 n.9. Judge Ross issued a forceful dissent, asserting that the demands of the President's constitutional duties and principles of separation of powers justified staying the litigation altogether until he leaves office. 72 F.3d at 1367-1370 (Ross, J., dissenting).

On January 23, 1996, President Clinton filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc with this Court. He was joined in this petition by the Solicitor General. Soon afterward, this Court asked Ms. Jones to file a response, indicating that the petition merited serious consideration by the Court. Nevertheless, on March 28, 1996, the Court announced that the petition for rehearing was denied. According to Fed. R. App. P. 41(a), this Court's mandate is due to issue on April 4, 1996.

Argument

THIS CASE MEETS THE STANDARD FOR STAYING A MANDATE FOUND IN RULE 41 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 41(b) provides for the Court's mandate to be stayed upon a showing "that a petition for certiorari would present a substantial question and that there is good cause for a stay." Good cause exists where, as here, the applicant can show he will suffer irreparable injury if the stay is not issued, and that there is a reasonable probability that certiorari will be

granted and that the Court of Appeals could possibly be reversed.
United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993).

In considering whether "good cause" exists, courts have further refined the standard to a four-part test:

First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. . . . Second, the applicant must persuade [the Court] that there is a fair prospect that a majority of the [Supreme] Court will conclude that the decision below was erroneous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. . . . And fourth, in a close case it may be appropriate to "balance the equities" -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (quoted in Holland, 1 F.3d at 456).²

I. THE PRESIDENT AND THE PRESIDENCY WOULD SUFFER IRREPARABLE HARM IF THE STAY IS DENIED.

In his petition to the Supreme Court, President Clinton will assert that pursuant to the Constitution, separation of powers and the public interest, a Chief Executive must and should be spared the burdens of private civil damages litigation while in office. The President and the Presidency's interests would suffer irreparable harm if the mandate were to issue in this

² Other justices have articulated the same standards in "formulations that differ slightly in form, but not in substance." Holland, 1 F.3d at 456. See, e.g., Barnes v. E-Sys., Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301 (1991) (Scalia, J., in chambers); Curry v. Baker, 479 U.S. 1301 (1986) (Powell, J., in chambers); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (Powell, J., in chambers). Appeals courts apply these same standards. Holland, 1 F.3d at 456.

case, for this would permit all motions, discovery and possibly even trial to go forward -- thereby extinguishing the very right the President seeks to preserve, before the Supreme Court has an opportunity to rule on the question. When, as here, the case could become moot if the Court's mandate is executed pending "the normal course of appellate review," issuance of a stay is warranted. In re Bart, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers); see also, Garrison v. Hudson, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers).

As the Supreme Court recently explained, requiring an official with a colorable immunity claim to defend a suit for damages before he could obtain appellate review would, among other things, work the very distraction from duty that the immunity was intended to avoid. Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. ____, 114 S. Ct. 1992, 1997 (1994) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). For this reason, courts have held repeatedly that denials of official immunity are subject to immediate appeal under the collateral order doctrine. Behrens v. Pelletier, ___ U.S. ____, 116 S. Ct. 834 (1996). See also Mitchell, 472 U.S. at 525-27 (benefits of immunity are essentially lost if a case is erroneously permitted to go forward); United States v. Moats, 961 F.2d 1198, 1203 (5th Cir. 1992) (where the immunity asserted encompasses protection from becoming involved in the litigation process, "the risk of harm from having to defend the lawsuit remains constant and is an irreparable loss"); Wright v. South Ark. Regional Health Ctr.

Inc., 800 F.2d 199, 202 (8th Cir. 1986) (if the defendant were required to go forward, any subsequent finding in the defendant's favor on the immunity issue could not undo the fact that the person had to stand trial in the first place).

Obviously, if a President or any party has a right to immediate appeal in order to prevent irreparable harm that would occur if litigation were to proceed, it follows that the litigation should be stayed pending appeal. For this reason, courts also have recognized that immunity appeals constitute a special class of cases that require a stay pending resolution of appellate review. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("until this threshold immunity question is resolved, discovery should not be allowed"); Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994) ("the stay of discovery, of necessity, ordinarily must carry over through the appellate court's resolution of [the immunity] question, so long as the appeal is non-frivolous") (emphasis in original); English v. Dyke, 23 F.3d 1086, 1089 (6th Cir. 1994) ("While the [qualified immunity] issue is before the trial court or the case is on appeal, the trial court should stay discovery.").³

³ An exception to this general rule exists in some cases of qualified immunity, where limited discovery into the factual circumstances surrounding the qualified immunity defense may be appropriate. See, e.g., Lovelace v. Delo, 47 F.3d 286, 288-89 (8th Cir. 1995). The exception is not relevant here, where the President's assertion of temporal immunity raises purely legal questions that turn on his constitutional status.

The need for a stay here is all the more compelling because a sitting President requests it to prevent irreversible damage to important constitutional and public interests. The essence of President Clinton's appeal is that litigating non-exigent private civil damages claims would distract from his ability to perform official functions, and would open the door to potential constitutional confrontations between the Executive and the Judiciary.

Special solicitude is due to claims such as this, alleging a threatened breach of essential presidential prerogatives under the separation of powers. Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982). In Fitzgerald, the Supreme Court held that denials of presidential immunity are subject to immediate appeal. Id. As the high Court later explained, this was necessary because Nixon's appeal presented compelling public and constitutional interests that would be irretrievably harmed even if a former President were denied an immediate review to vindicate the Chief Executive's asserted right to be free from the rigors of trial. Digital Equipment, 114 S. Ct. at 1997. Here, where litigation threatens to distract an incumbent President from his weighty public duties, the injury that would result to the public and constitutional interests at stake is all the more serious.

II. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL CONSIDER THIS CASE SUFFICIENTLY MERITORIOUS TO GRANT CERTIORARI.

Until the panel ruled in this case, no court in the Nation's history had ever compelled a sitting President to stand trial as a defendant in a private, civil lawsuit. In fact, the panel found not only that private civil damages actions against incumbent Chief Executives may go forward, but that they must go forward, holding that trial courts are without even discretionary power to stay them. Jones v. Clinton, 72 F.3d 1354, 1361 n.9 (8th Cir. 1996).

This exceptional case thus presents two issues of profound significance to both the Judicial and Executive branches of government: First, whether the Constitution requires that private civil damages claims against a sitting President be deferred until he leaves office, and second, even if the Constitution does not require it, whether a court can defer such litigation in the public interest, as a matter of judicial discretion. The serious implications of these issues and the Circuit's historic holding virtually assure that the Supreme Court will grant the President's writ. See Supreme Court Rule 10.1(c) (writ may be granted where Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by [the Supreme] Court.").

Indeed, all the federal judges who have considered this case to date have recognized that it raises unique, important and unresolved questions of federal law. The majority opinion

described this as a "novel question," id. at 1356, 1363, and the trial court too was conscious of the fact that "new law is being made" here. Jones v. Clinton, 869 F. Supp. 690, 700 (E.D. Ark. 1994).

Likewise, Judge McMillian, dissenting from this Court's refusal to rehear this case en banc, specifically noted his belief that the Supreme Court would agree to hear this case:

Although this court has refused to consider this important case en banc, I have every confidence that the issues of national concern in this case relating to the judiciary's relationship to the presidency will command the attention of the United States Supreme Court.

Jones v. Clinton, No. 95-1050/1167, slip op. at 5 (8th Cir. Mar. 28, 1996) (McMillian, J., dissenting from the denial of the suggestion for rehearing en banc).

The majority's ruling, moreover, rejected not only the President's position, but that of the Solicitor General as well. Under these circumstances, it is highly likely that the Supreme Court will grant certiorari to review these critical issues.

III. THERE IS A "FAIR PROSPECT" THAT A MAJORITY OF THE SUPREME COURT WILL CONCLUDE THAT THE DECISION BELOW WAS ERRONEOUS.

In reviewing this motion for stay, the Court also must consider whether there is a "reasonable possibility" or a "fair prospect" that the President's petition will be successful, i.e., that five members of the Supreme Court could vote to reverse this Court's decision. Holland, 1 F.3d at 456. In so doing, the Court is to set aside the fact that it already has expressed its views on the President's position, and "dispassionately assess

the merits of the case in light of the available evidence and determine . . . how the Justices will assess the judgment [the Court has] rendered." Williams v. Chrang, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam). It must be stressed, moreover, that the President's burden is to show only that there is a reasonable possibility, not a probability, that five justices could vote to reverse.

The unyielding and unprecedented nature of the panel's holding -- that incumbent Presidents must without exception submit to the jurisdiction of federal courts to litigate private civil damages claims -- alone is sufficient to establish that there is a "fair prospect" that the Supreme Court could disagree. The possibility of reversal is further heightened by the fact that this holding touches upon principles of separation of power and inter-branch comity.

This Court's own experience with Jones v. Clinton also provides substantial evidence that there is at least a "fair prospect" that a majority of justices could reach a different result than the panel majority did here. The panel split two-to-one, with the dissent disputing the majority's determination on almost every material issue.

In particular, the dissent sharply disagreed with the majority's interpretation of Nixon v. Fitzgerald, the Supreme Court decision most relevant to this case, and ardently argued that the majority's resolution would not sufficiently protect the Presidency or prevent breaches of separation of powers:

The majority's decision leaves as many questions unanswered as it answers: Must a President seek judicial approval each time a scheduled deposition or trial date interferes with the performance of his constitutional duties? Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? Finally, can a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict?

Jones v. Clinton, 72 F.3d at 1369 (Ross, J., dissenting).

The denial of the suggestion for rehearing en banc also provoked a spirited dissent from Judge McMillian, who like Judge Ross expressed concern that the opinion granted excessive power to trial judges:

[N]othing prohibits the trial judge from ordering the President to appear, testify, provide discovery, answer numerous interrogatories and requests for admissions at the trial judge's almost unrestricted discretion. Indeed, figuratively, the courts may "bandy him from pillar to post." If that does not violate the separation of powers between the President and the judiciary, what does?

Even assuming a trial judge of reasonably good judgment, judicial control over the sitting President of the United States as a defendant in an ongoing civil lawsuit must constitute a far greater affront to our separation of powers principles than that which was at stake in the Fitzgerald case, where the defendants was not a sitting president.

Jones v. Clinton, No. 95-1050/1167, slip op. at 4 (McMillian, J., dissenting from denial of suggestion for rehearing en banc).

No fair reading of these dissents could find their concerns without significant merit or their reasoning frivolous.

Even Judge Beam in concurrence conceded that the President and his amicus "raise matters of substantial concern given the constitutional obligations of the office." Id. at 1363.

In these circumstances, this Court must surely recognize that there is at least a "reasonable possibility" that five Justices of the Supreme Court could agree with Judge Ross, Judge McMillian, the President and the Solicitor General of the United States, and vote to reverse, notwithstanding this Court's belief in the correctness of the panel's ruling.

Quite apart from the constitutional issues here presented, there is also a fair possibility that a majority of justices would be disturbed by the panel's cursory holding that the district court had no discretion to grant a stay on equitable grounds. Indeed, the majority found that the trial court was prohibited from issuing a stay here, absent a constitutional basis for doing so. Jones, 72 F.3d at 1361 n.9. Additionally, Judge Beam's concurring opinion would appear to recognize a constitutional right to speedy trial for civil plaintiffs, another legal proposition which is not free from doubt. Id. at 1365. (Beam, J., concurring.)

As the Solicitor General forcefully asserted in its Amicus Brief in Support of Suggestion of Rehearing En Banc, these findings are debatable as matters of law and have troubling practical ramifications for all courts and litigants, not just the President. Id. at 5-8. There is therefore a fair prospect that the Supreme Court would be inclined to redress these parts of the

panel's opinion, regardless of how it views the constitutional issues presented here.

IV. THE EQUITIES BALANCE IN FAVOR OF A STAY.

We respectfully assert that the case for issuing a stay here is so overwhelming, and that the injury to the interests of the Presidency and the public is so clear and irreversible, that there is no need to balance the relative harms to the applicant and respondent. Cf. Rostker, 448 U.S. at 1308 ("in a close case it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large") (emphasis added). However, even if this Court concluded that the question is a close one, the interests of the public and the Presidency far outweigh any potential harm to the plaintiff that would be caused by a stay.

As explained above, the President and the public would be irreparably harmed if he were compelled to defend this lawsuit pending appeal. The very right he seeks to vindicate by appeal would be extinguished. The plaintiff's rights, by contrast, would be preserved; if the petition is denied or the Court of Appeals affirmed, she could still pursue her claims for damages.

Moreover, as the trial court found, "the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of an urgent nature for her." Jones v. Clinton, 869 F. Supp. at 699. In fact, as both the district court and Judge McMillian observed, the plaintiff waited three years to file suit. She also has promised to give any damages

she receives to charity. Thus, the plaintiff has no exigent need to pursue damages. Finally, while Ms. Jones may be concerned about the preservation of evidence pending the Petition, her inconvenience in this regard is no greater than that endured by any other plaintiff in cases where claims of official immunity are appealed. Indeed it is less, because the President's counsel have agreed to cooperate in preserving any evidence that threatens to be lost during appeal.

Thus, the harm to the plaintiff, if the mandate is stayed, is far less severe than the irreparable injury to the interests of the Presidency and the public that would occur without a stay. The balance of equities therefore weighs in favor of a stay.

Conclusion

For the reasons stated above, this Court should stay its mandate for a period of 30 days to allow the President to file a petition for a writ of certiorari with the Supreme Court, and upon notification that the petition has been filed, continue

the stay until final disposition by the Supreme Court, as provided in Rule 41(b).

Respectfully submitted,

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