

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	ca. 03/2000	P2, P5	827
002. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (1 page)	n.d.	P2, P5	828
003. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (1 page)	n.d.	P2, P5	829
004. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	ca. 03/2000	P2, P5	830 - Dup of 827
005. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (2 pages)	n.d.	P2, P5	831
006. form	Financial Disclosure Report for Calendar Year 1998 (4 pages)	02/05/2000	P6/b(6)	
007a. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (2 pages)	n.d.	P2, P5	832
007b. form	Financial Disclosure Report for Calendar Year 1998 (4 pages)	02/05/2000	P6/b(6)	
008. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	04/24/2000	P2, P5	833
009. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	04/25/2000	P2, P5	834

COLLECTION:

Clinton Presidential Records
Counsel's Office
Eric Angel
OA/Box Number: 18280

FOLDER TITLE:

Elena Kagan - D.C. Circuit

Kelly Hendren
2009-1006-F
kh554

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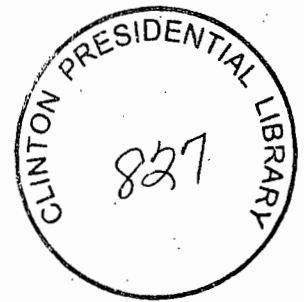
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
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March __, 2000

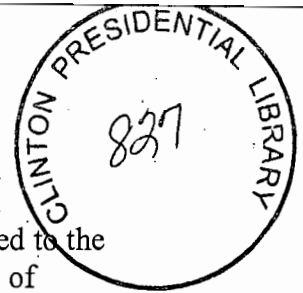
Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing about the nomination of Elena Kagan to serve on the United States Court of Appeals for the District of Columbia Circuit. As you know, the President nominated Professor Kagan in June of last year to fill one of the two current vacancies on the D.C. Circuit. Specifically, I would like to respond to the letter and report submitted to you on August 5, 1999, by Chairman Don Young of the House Committee on Resources. The Administration believes strongly that the matters raised by Chairman Young should not delay Professor Kagan's confirmation. **[add language requesting a hearing?]**

Chairman Young's letter followed an investigation by a Majority-Member-only Task Force of the House Resources Committee into the Administration's response to an occupation and protest by environmentalists at Warner Creek, located in the Willamette National Forest in Oregon. Although the Task Force never asked to meet with or question Professor Kagan, two major criticisms of her nevertheless are expressed in Chairman Young's letter: (1) that while she served in the White House Counsel's Office, she learned of a rumor that law enforcement information had been leaked to the protesters by a White House official, but failed to take appropriate action in response to the allegations; and (2) that during the Task Force's investigation, she did not act to force the White House to produce documents that were the subject of potential White House privilege claims made in response to a Task Force subpoena.

Although I was not Counsel to the President at the time, my staff and I have reviewed these claims, and I am confident that both of these criticisms are completely unfounded. First, **[Professor Kagan possessed no evidence at all that the allegation was true, and she understood that other government officials were aware of and looking into the allegation.]** Chairman Young's own report acknowledges that Professor Kagan's immediate superior was aware of the allegations and took steps to determine whether they were true, and that a high-



ranking official of the Department of Justice knew about the charges and actually talked to the White House employee who was the subject of them. Second, before asserting claims of potential privilege, the White House did not seek the legal opinion of Professor Kagan -- by then a former Counsel's Office employee -- on the merits of that assertion. I discuss each of these matters more fully below.

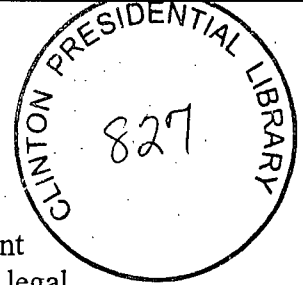
The Task Force's contention that Professor Kagan failed to take appropriate action after learning of the alleged leak is refuted by its own report. The report does not claim that Professor Kagan possessed evidence of wrongdoing on the part of the White House employee in question. Professor Kagan knew only, from a conversation with the employee, that an allegation of wrongdoing had been made, and that the employee strongly denied it. Moreover, Professor Kagan was aware that other government officials knew of and were looking into the allegation. The report itself makes clear that Professor Kagan's immediate superior in the White House Counsel's Office, Deputy White House Counsel Kathleen Wallman, was told of the rumored leak and looked into the matter. Ms. Wallman so testified before the Task Force: "There came a time sometime during the summer [of 1996] when somebody -- I will try to remember who -- I don't remember who brought me this information, but somebody said to me that there was a rumor that someone [at the White House] . . . might be passing information in one direction or another." Asked whether she followed up on the rumor, Ms. Wallman testified that "I thought it was the responsible thing to do to check it out[.]" and that she asked the immediate superior of the affected White House employee to look into it. Eventually, Ms. Wallman was advised that the rumor was "ridiculous" and "not true[.]" and she concluded that there was no basis for pursuing the matter further. Moreover, the report acknowledges that Peter Coppelman, a Deputy Assistant Attorney General at the Department of Justice, knew about the purported leak and actually spoke to the person who allegedly was its source. Given that both Professor Kagan's supervisor and the Department of Justice were aware of this matter, the Task Force's contention that Ms. Kagan should have taken additional action is meritless.

The claim that Professor Kagan was remiss in allowing the White House to assert potential privileges in response to a Task Force subpoena is equally baseless. The documents at issue are four pages of handwritten notes taken by Professor Kagan while she was an Associate White House Counsel, and two documents prepared for the President that are unrelated to Professor Kagan. At the time the privilege issue was raised, Professor Kagan was no longer a member of the Counsel's Office staff (although she continued to work at the White House in a different capacity). As you know, initial decisions about whether to assert potential privileges are made by the White House Counsel's Office and not by former employees of the Counsel's Office such as Professor Kagan. In this case, although we necessarily consulted Professor Kagan about the nature and content of these documents before responding to the Task Force's subpoena, the Counsel's Office did not solicit her legal opinion on whether to assert potential

Honorable Orrin G. Hatch

March __, 2000

Page 3



privileges. Moreover, because we made our decision based on the law and the important constitutional and legal principles involved, Professor Kagan's individual views on the legal merits of our position would not have changed the position we took. Though the Task Force may disagree with the decision we made, it would be terribly unfair to saddle Professor Kagan with responsibility for a decision wholly out of her control.

While we continue to believe that Professor Kagan's notes raise potential privilege issues, we have previously made clear to the Task Force that we would like to reach an accommodation that would allow the Task Force to review them. To this point, the Task Force has expressed no interest in such an accommodation. As part of your Committee's analysis of Professor Kagan's record, we would also like to make her notes available for review by you or a staff member designated by you. **[I would note that Professor Kagan has urged us to take this action to assist you in your assessment of her nomination]** I feel confident that if you review these notes you will conclude, as I have, that they cast absolutely no doubt on Professor Kagan's conduct in this matter or her fitness to serve on the D.C. Circuit.

I am aware that the Members of the Warner Creek Task Force disagree with the Administration's handling of the Warner Creek matter. I ask that you not allow Professor Kagan to become a casualty of those differences, and that she be afforded a confirmation hearing. If you wish to review Professor Kagan's notes, or have any additional questions about Professor Kagan's background or record, I hope you will feel free to have your staff contact me or Senior Counsel for Nominations Mark Childress.

I look forward to working with you this year on the important task of filling judicial vacancies.

Sincerely,

Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member

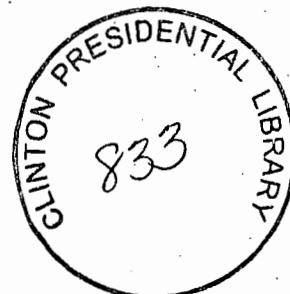
Sarah

Bella - I would appreciate your
looking at this tonight if you can,
since Snyder hearing will
probably take place Thurs.
Changes in bold.

April 24, 2000

Sarah Wilson

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

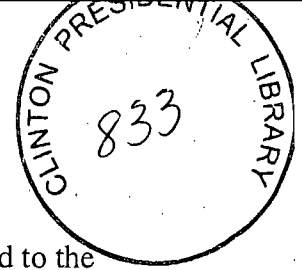


Dear Mr. Chairman:

I am writing about the nomination of Elena Kagan to serve on the United States Court of Appeals for the District of Columbia Circuit. As you know, the President nominated Professor Kagan in June of last year to fill one of the two current vacancies on the D.C. Circuit. Specifically, I would like to respond to the letter and report submitted to you on August 5, 1999, by Chairman Don Young of the House Committee on Resources. The Administration believes strongly that the matters raised by Chairman Young should not delay Professor Kagan's confirmation.

Chairman Young's letter followed an investigation by a Majority-Member-only Task Force of the House Resources Committee into the Administration's response to an occupation and protest by environmentalists at Warner Creek, located in the Willamette National Forest in Oregon. Although the Task Force ^{apparently} never asked to meet with or question Professor Kagan, two major criticisms of her nevertheless are expressed in Chairman Young's letter: (1) that while she served in the White House Counsel's Office, she learned of a rumor that law enforcement information had been leaked to the protesters by a White House official, but failed to take appropriate action in response to the allegations; and (2) that during the Task Force's investigation, she did not act to force the White House to produce documents that were the subject of potential White House privilege claims made in response to a Task Force subpoena. ✓

Although I was not Counsel to the President at the time, my staff and I have reviewed these claims, and I am confident that both of these criticisms are completely unfounded. First, Chairman Young's own report acknowledges that Professor Kagan's immediate superior was aware of the allegations and took steps to determine whether they were true, and that a high-



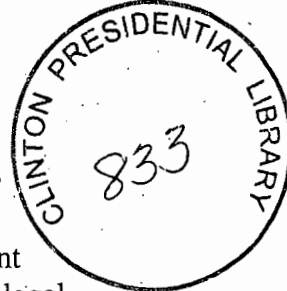
ranking official of the Department of Justice knew about the charges and actually talked to the White House employee who was the subject of them. Second, before asserting claims of potential privilege, the White House did not seek the legal opinion of Professor Kagan by then a former Counsel's Office employee -- on the merits of that assertion. I discuss each of these matters more fully below.

The Task Force's contention that Professor Kagan failed to take appropriate action after learning of the alleged leak is refuted by its own report. The report does not claim that Professor Kagan possessed evidence of wrongdoing on the part of the White House employee in question. Professor Kagan knew only, from a conversation with the employee, that an allegation of wrongdoing had been made, and that the employee strongly denied it. Moreover, Professor Kagan was aware that other government officials knew of and were looking into the allegation. The report itself makes clear that Professor Kagan's immediate superior in the White House Counsel's Office, Deputy White House Counsel Kathleen Wallman, was told of the rumored leak and looked into the matter. Ms. Wallman so testified before the Task Force: "There came a time sometime during the summer [of 1996] when somebody -- I will try to remember who -- I don't remember who brought me this information, but somebody said to me that there was a rumor that someone [at the White House] . . . might be passing information in one direction or another." Asked whether she followed up on the rumor, Ms. Wallman testified that "I thought it was the responsible thing to do to check it out[.]" and that she asked the immediate superior of the affected White House employee to look into it. Eventually, Ms. Wallman was advised that the rumor was "ridiculous" and "not true[.]" and she concluded that there was no basis for pursuing the matter further. Moreover, the report acknowledges that Peter Coppelman, a Deputy Assistant Attorney General at the Department of Justice, knew about the purported leak and actually spoke to the person who allegedly was its source. Given that both Professor Kagan's supervisor and the Department of Justice were aware of this matter, the Task Force's contention that Ms. Kagan should have taken additional action is meritless.

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the Counsel's Office



^{the Counsel's Office} ^{ib}
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^{reiterated}
^{A though} While we continue to believe that Professor Kagan's notes raise potential privilege issues, we have previously made clear to the Task Force that we would like to reach an accommodation that would allow the Task Force to review them. ~~To this point, the Task Force has expressed no interest in such an accommodation.~~ By letter dated April 17, 2000, I ~~once again made clear~~ our desire to reach an accommodation in this matter, and offered to allow the Committee on Resources and/or designated staff to review the relevant documents at the time and place of the Committee's choosing. ~~I can report that~~ On April 24, 2000, we engaged in an accommodation with respect to these documents in which Committee staff reviewed the documents in question, with the understanding that the review was without prejudice to the Committee's ability to insist on full compliance with its subpoena. As part of ~~your~~ the Judiciary Committee's analysis of Professor Kagan's record, we would also like to make her notes available for review by you or a staff member designated by you. I feel confident that if you review these notes you will conclude, ~~as I have~~, that they cast absolutely no doubt on Professor Kagan's conduct in this matter or her fitness to serve on the D.C. Circuit.

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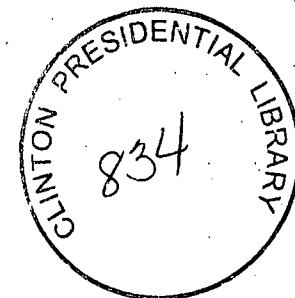
I look forward to **continuing to working** with you this year on the important task of filling judicial vacancies.

Sincerely,

Beth Nolan
Counsel to the President

I thought we
already decided
not to put in
this language

cc: Honorable Patrick J. Leahy
Ranking Minority Member



April 25, 2000

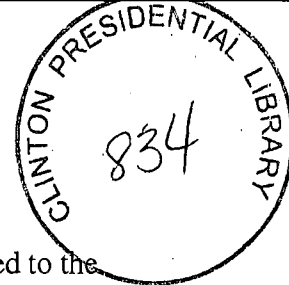
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Chairman
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←

tr. up

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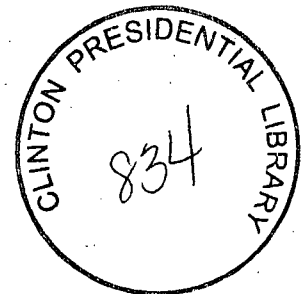
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Sincerely,

Beth Nolan
Counsel to the President



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Clinton Presidential Records
Counsel's Office
Eric Angel
OA/Box Number: 18280

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Elena Kagan - D.C. Circuit; Kagan Letter

Kelly Hendren
2009-1006-F
kh555

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

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2009-1006-F
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- 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]

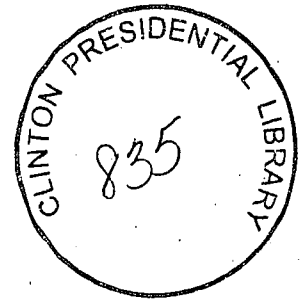
C. Closed in accordance with restrictions contained in donor's deed of gift.

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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



April 13, 2000

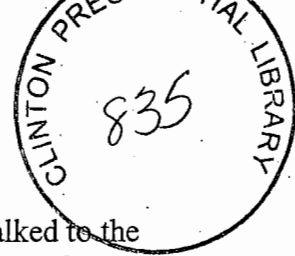
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Committee on the Judiciary
United States Senate
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Washington, D.C. 20510

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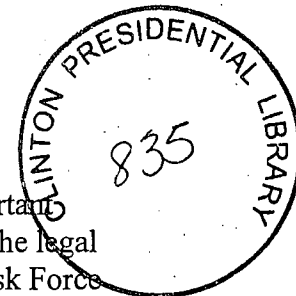
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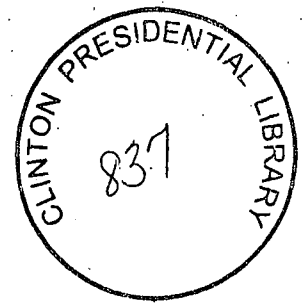
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Sincerely,

Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member



~~March 2000~~

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Chairman
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United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

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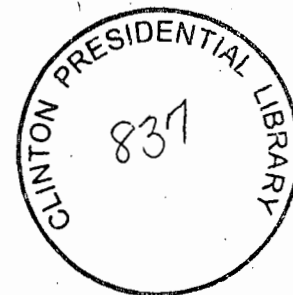
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Steve
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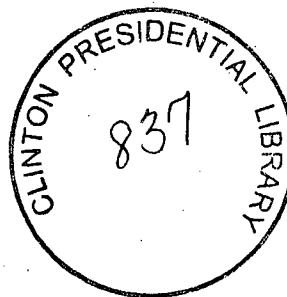
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Sincerely,

Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member



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reiterated my desire to reach an accommodation in this matter.

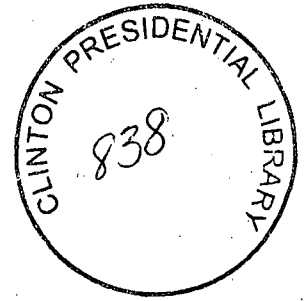
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Continuing to

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April 13, 2000

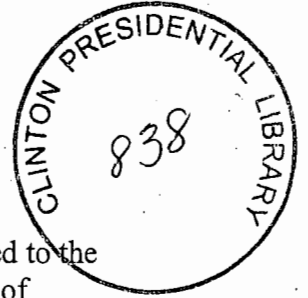
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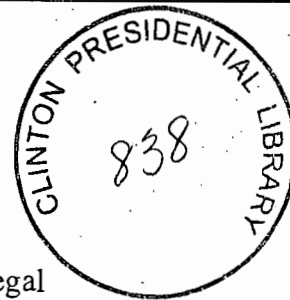
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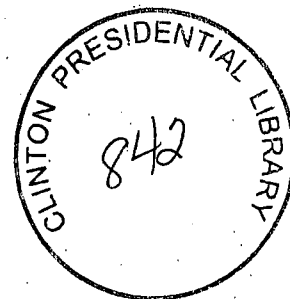
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Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member

03/03/2000 FRI 03:34 FAX



March 2000

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United States Senate
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Washington, D.C. 20510

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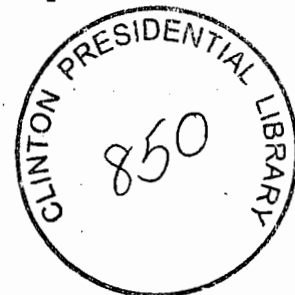
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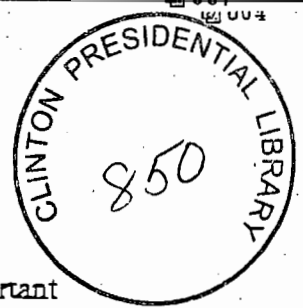
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03/03/2000 FR1 03:35 FAX
Honorable Orrin G. Hatch
March 2, 2000
Page 3



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*Adrianne
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cc: Honorable Patrick J. Leahy
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take this action to assist you in your assessment of
her nomination.*

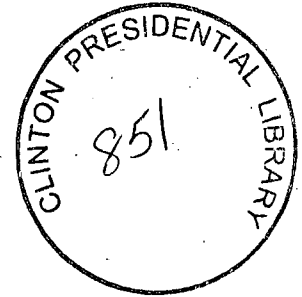
Bern,
Here's the draft we discussed.
Steven Reich

BRL - For your review

DRAFT

Sarah

February __, 2000



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Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

~~We look forward to working with you this year to process the President's nominees for federal district and appellate court judgeships.~~ I am writing specifically about the nomination of Elena Kagan to serve on the United States Court of Appeals for the District of Columbia Circuit. As you know, the President nominated Professor Kagan in June of last year to fill one of the two current vacancies on the D.C. Circuit. ~~However, Professor Kagan was not scheduled for a hearing before the Committee last year.~~

~~A Committee hearing serves many useful purposes. Among them is the opportunity to provide answers to unresolved questions about a nominee, and respond to issues that may be raised about a nominee's record. To that end, I would like to respond to the letter and report submitted to you on August 5, 1999, by Chairman Don Young of the House Committee on Resources. The Administration feels strongly that the matters raised by Chairman Young should not delay Professor Kagan's confirmation.~~

Chairman Young's letter followed an investigation by a Majority-Member-only Task Force of the House Resources Committee into the Administration's response to an occupation and protest by environmentalists at Warner Creek, located in the Willamette National Forest in Oregon. Although the Task Force never asked to meet with or question Professor Kagan, two major criticisms of her nevertheless are expressed in Chairman Young's letter: (1) that while she served in the White House Counsel's Office, she learned of a rumor that law enforcement information had been leaked to the protesters by a White House official, but failed to take appropriate action in response to the allegations; and (2) that during the Task Force's investigation, she did not act to force the White House to produce documents that were the

Honorable Orrin G. Hatch

February __, 2000

Page 2

[I want some
kind of
disclaimer that
I am not
speaking from
personal
knowledge..]

Although I was not Counsel to the President at the time,
my staff and I have reviewed these claims, and I
am confident.

subject of potential White House privilege claims made in response to a Task Force subpoena.

Both of these criticisms are completely unfounded. First, Chairman Young's own report acknowledges that Professor Kagan's immediate superior, ~~the Deputy White House Counsel,~~ was aware of the allegations and took steps to determine whether they were true, and that a high-ranking official of the Department of Justice knew about the charges and actually talked to the White House employee who was the subject of them.

Second, before asserting ^{by then} claims of potential privilege, the White House did not seek the opinion of Professor Kagan -- a former Counsel's Office employee -- on the legal merits of that ~~position~~, and she therefore had no role in that decision. I discuss each of these matters more fully below.

are we
positive?

The Task Force's contention that Professor Kagan failed to take appropriate action after learning of the alleged leak is refuted by its own report. The report makes clear that Professor Kagan's immediate superior in the White House Counsel's Office, Deputy White House Counsel Kathleen Wallman, was told of the rumored leak and looked into the matter. Ms. Wallman so testified before the Task Force that ~~there~~ there came a time sometime during the summer [of 1996] when somebody -- I will try to remember who -- I don't remember who brought me this information, but somebody said to me that there was a rumor that someone [at the White House] might be passing information in one direction or another." Asked whether she followed up on the rumor, Ms. Wallman testified that "I thought it was the responsible thing to do to check it out[,] and that she asked the immediate superior of the affected White House employee to look into it. Eventually, Ms. Wallman was advised that the rumor was "ridiculous" and "not true[,] and she concluded that there was no basis for pursuing the matter further

Can I
see
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of the
Report?

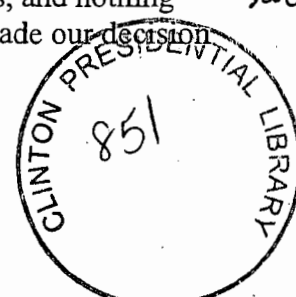
is this
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right?

Moreover, the report acknowledges that Peter Coppelman, a Deputy Assistant Attorney General at the Department of Justice, knew about the purported leak and actually spoke to the person who allegedly was its source. Given that both the White House and the Department of Justice looked into the matter, the Task Force's contention that Ms. Kagan should have taken additional action is meritless.

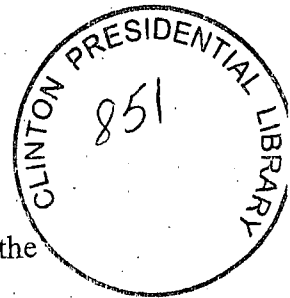
The claim that Professor Kagan was remiss in allowing the White House to assert potential privileges in response to a Task Force subpoena is equally unpersuasive. The documents at issue are four pages of handwritten notes taken by Professor Kagan while she was an Associate White House Counsel, and two documents prepared for the President that are unrelated to Professor Kagan. As you know, decisions about whether to assert potential privileges are made, at least in the first instance, by the White House Counsel's Office and not by former employees of the Counsel's Office such as Professor Kagan. I can assure you that we did not solicit Professor Kagan's opinion on whether to assert potential privileges, and nothing she could have done would have affected the course we elected to pursue. We made our decision

Are
we
sure?

At the time
the privilege issue
was raised, Professor
Kagan was no longer
member of the Counsel's
staff.



Honorable Orrin G. Hatch
February __, 2000
Page 3



based on the law and the important constitutional and legal principles involved, and though the Task Force may disagree with the decision we made, it would be terribly unfair to saddle Professor Kagan with responsibility for a decision wholly out of her control.

While we continue to believe that Professor Kagan's notes raise potential privilege issues, we have previously made clear to the Task Force that we would like to reach an accommodation that would allow the Task Force to review them. To this point, the Task Force has expressed no interest in such an accommodation. As part of your Committee's analysis of Professor Kagan's record, we would also like to make her notes available for review by you or a staff member designated by you. I feel confident that if you review these notes you will conclude, as I have, that they cast absolutely no doubt on Professor Kagan's fitness to serve on the D.C. Circuit.

I am aware that the Members of the Warner Creek Task Force disagree with the Administration's handling of the Warner Creek matter. I ask that you not allow Professor Kagan to become a casualty of those differences, and that she be afforded a confirmation hearing in the normal course of the Committee's business. If you wish to review Professor Kagan's notes, or have any additional questions about Professor Kagan's background or record, I hope you will feel free to have your staff contact me or Senior Counsel for Nominations, Mark Childress. *ste!*

Sincerely,

Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member

*I look forward to working with you this
year as we assume the important task of filling judicial
vacancies.*

Suggested inserts to Nolan letter

Insert A

Indeed, the Administration believes that the charges made in that report are so wrong and so baseless that Professor Kagan is entitled to a chance to respond to them fully. I know, Chairman Hatch, that you are a fair man and that you well understand the harm unjustified allegations can cause. The only way Professor Kagan can clear her name, in light of Chairman Young's decision to make these charges without ever talking with her, is for you to convene a confirmation hearing so that she can answer any and all questions respecting this matter. I am therefore specially requesting that you take this action.

Insert B (after "First,")

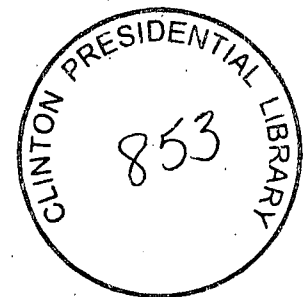
Professor Kagan possessed no evidence at all that the allegation was true, and she understood that other government officials were aware of and looking into the allegation.

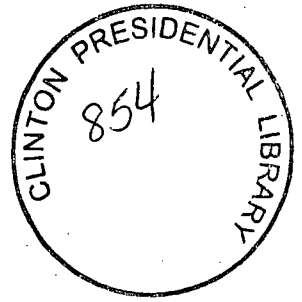
Insert C

The report cannot claim that Professor Kagan possessed evidence of wrongdoing on the part of the White House employee in question; Kagan knew only (from a conversation with the employee) that an allegation had been made about that employee, and that the employee denied it. Moreover, Kagan understood that other government officials were aware of and looking into the allegation. The report itself [continue from "makes clear"]

Insert D

Indeed, Professor Kagan repeatedly requested members of the Counsel's Office to disclose her notes to the Task Force.





March __, 2000

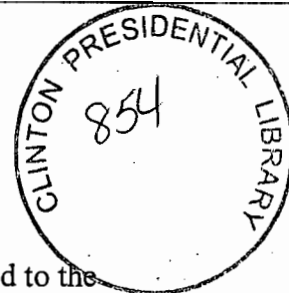
Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing about the nomination of Elena Kagan to serve on the United States Court of Appeals for the District of Columbia Circuit. As you know, the President nominated Professor Kagan in June of last year to fill one of the two current vacancies on the D.C. Circuit. Specifically, I would like to respond to the letter and report submitted to you on August 5, 1999, by Chairman Don Young of the House Committee on Resources. The Administration believes strongly that the matters raised by Chairman Young should not delay Professor Kagan's confirmation. **[add language requesting a hearing?]**

Chairman Young's letter followed an investigation by a Majority-Member-only Task Force of the House Resources Committee into the Administration's response to an occupation and protest by environmentalists at Warner Creek, located in the Willamette National Forest in Oregon. Although the Task Force never asked to meet with or question Professor Kagan, two major criticisms of her nevertheless are expressed in Chairman Young's letter: (1) that while she served in the White House Counsel's Office, she learned of a rumor that law enforcement information had been leaked to the protesters by a White House official, but failed to take appropriate action in response to the allegations; and (2) that during the Task Force's investigation, she did not act to force the White House to produce documents that were the subject of potential White House privilege claims made in response to a Task Force subpoena.

Although I was not Counsel to the President at the time, my staff and I have reviewed these claims, and I am confident that both of these criticisms are completely unfounded. First, **[Professor Kagan possessed no evidence at all that the allegation was true, and she understood that other government officials were aware of and looking into the allegation.]** Chairman Young's own report acknowledges that Professor Kagan's immediate superior was aware of the allegations and took steps to determine whether they were true, and that a high-



ranking official of the Department of Justice knew about the charges and actually talked to the White House employee who was the subject of them. Second, before asserting claims of potential privilege, the White House did not seek the legal opinion of Professor Kagan -- by then a former Counsel's Office employee -- on the merits of that assertion. I discuss each of these matters more fully below.

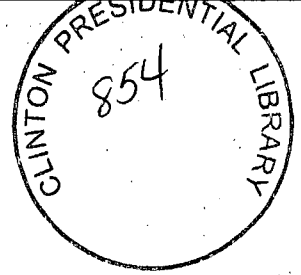
The Task Force's contention that Professor Kagan failed to take appropriate action after learning of the alleged leak is refuted by its own report. The report does not claim that Professor Kagan possessed evidence of wrongdoing on the part of the White House employee in question. Professor Kagan knew only, from a conversation with the employee, that an allegation of wrongdoing had been made, and that the employee strongly denied it. Moreover, Professor Kagan was aware that other government officials knew of and were looking into the allegation. The report itself makes clear that Professor Kagan's immediate superior in the White House Counsel's Office, Deputy White House Counsel Kathleen Wallman, was told of the rumored leak and looked into the matter. Ms. Wallman so testified before the Task Force: "There came a time sometime during the summer [of 1996] when somebody -- I will try to remember who -- I don't remember who brought me this information, but somebody said to me that there was a rumor that someone [at the White House] . . . might be passing information in one direction or another." Asked whether she followed up on the rumor, Ms. Wallman testified that "I thought it was the responsible thing to do to check it out[,] and that she asked the immediate superior of the affected White House employee to look into it. Eventually, Ms. Wallman was advised that the rumor was "ridiculous" and "not true[,] and she concluded that there was no basis for pursuing the matter further. Moreover, the report acknowledges that Peter Coppelman, a Deputy Assistant Attorney General at the Department of Justice, knew about the purported leak and actually spoke to the person who allegedly was its source. Given that both Professor Kagan's supervisor and the Department of Justice were aware of this matter, the Task Force's contention that Ms. Kagan should have taken additional action is meritless.

The claim that Professor Kagan was remiss in allowing the White House to assert potential privileges in response to a Task Force subpoena is equally baseless. The documents at issue are four pages of handwritten notes taken by Professor Kagan while she was an Associate White House Counsel, and two documents prepared for the President that are unrelated to Professor Kagan. At the time the privilege issue was raised, Professor Kagan was no longer a member of the Counsel's Office staff (although she continued to work at the White House in a different capacity). As you know, initial decisions about whether to assert potential privileges are made by the White House Counsel's Office and not by former employees of the Counsel's Office such as Professor Kagan. In this case, although we necessarily consulted Professor Kagan about the nature and content of these documents before responding to the Task Force's subpoena, the Counsel's Office did not solicit her legal opinion on whether to assert potential

Honorable Orrin G. Hatch

March __, 2000

Page 3



privileges. Moreover, because we made our decision based on the law and the important constitutional and legal principles involved, Professor Kagan's individual views on the legal merits of our position would not have changed the position we took. Though the Task Force may disagree with the decision we made, it would be terribly unfair to saddle Professor Kagan with responsibility for a decision wholly out of her control.

While we continue to believe that Professor Kagan's notes raise potential privilege issues, we have previously made clear to the Task Force that we would like to reach an accommodation that would allow the Task Force to review them. To this point, the Task Force has expressed no interest in such an accommodation. As part of your Committee's analysis of Professor Kagan's record, we would also like to make her notes available for review by you or a staff member designated by you. **[I would note that Professor Kagan has urged us to take this action to assist you in your assessment of her nomination]** I feel confident that if you review these notes you will conclude, as I have, that they cast absolutely no doubt on Professor Kagan's conduct in this matter or her fitness to serve on the D.C. Circuit.

I am aware that the Members of the Warner Creek Task Force disagree with the Administration's handling of the Warner Creek matter. I ask that you not allow Professor Kagan to become a casualty of those differences, and that she be afforded a confirmation hearing. If you wish to review Professor Kagan's notes, or have any additional questions about Professor Kagan's background or record, I hope you will feel free to have your staff contact me or Senior Counsel for Nominations Mark Childress.

I look forward to working with you this year on the important task of filling judicial vacancies.

Sincerely,

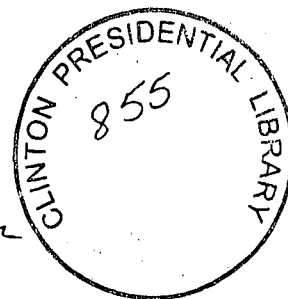
Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member

Steven, Sarah —

This is a tentative letter — Thank you. Attached
are some suggested edits — mostly inserts. I have
typed out these inserts on a single page.

February __, 2000 Elena



Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

DRAFT

Dear Mr. Chairman:

I am writing about the nomination of Elena Kagan to serve on the United States Court of Appeals for the District of Columbia Circuit. As you know, the President nominated Professor Kagan in June of last year to fill one of the two current vacancies on the D.C. Circuit. Specifically, I would like to respond to the letter and report submitted to you on August 5, 1999, by Chairman Don Young of the House Committee on Resources. The Administration believes strongly that the matters raised by Chairman Young should not delay Professor Kagan's confirmation.

— Insert A —

Chairman Young's letter followed an investigation by a Majority-Member-only Task Force of the House Resources Committee into the Administration's response to an occupation and protest by environmentalists at Warner Creek, located in the Willamette National Forest in Oregon. Although the Task Force never asked to meet with or question Professor Kagan, two major criticisms of her nevertheless are expressed in Chairman Young's letter: (1) that while she served in the White House Counsel's Office, she learned of a rumor that law enforcement information had been leaked to the protesters by a White House official, but failed to take appropriate action in response to the allegations; and (2) that during the Task Force's investigation, she did not act to force the White House to produce documents that were the subject of potential White House privilege claims made in response to a Task Force subpoena.

Although I was not Counsel to the President at the time, my staff and I have reviewed these claims, and I am confident that both of these criticisms are completely unfounded. First, ^{Insert B} Chairman Young's own report acknowledges that Professor Kagan's immediate superior was aware of the allegations and took steps to determine whether they were true, and that a high-

Honorable Orrin G. Hatch
February 2, 2000
Page 2

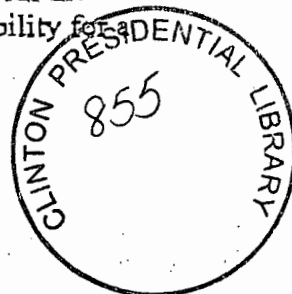
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Insert C
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Insert D
(although she continued to work at the White House in a different capacity).



Honorable Orrin G. Hatch
February __, 2000
Page 3

repeat our offer of ~~several~~
months ago to

conduct in this matter
or her

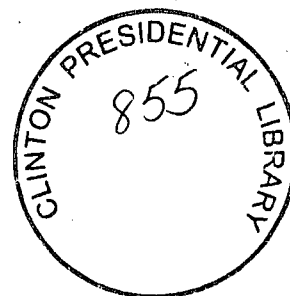
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I am aware that the Members of the Warner Creek Task Force disagree with the Administration's handling of the Warner Creek matter. I ask that you not allow Professor Kagan to become a casualty of those differences, and that she be afforded a confirmation hearing in the normal course of the Committee's business. If you wish to review Professor Kagan's notes, or have any additional questions about Professor Kagan's background or record, I hope you will feel free to have your staff contact me or Senior Counsel for Nominations Mark Childress.

I look forward to working with you this year on the important task of filling judicial vacancies.

Sincerely,

DRAFT
Beth Nolan
Counsel to the President



cc: Honorable Patrick J. Leahy
Ranking Minority Member

as soon as possible so that she can
respond to the Task Force's

~~criticisms~~ ~~of her~~
~~nomination~~

I would note that I.M. Kagan has urged us to take this action to assist you in your assessment of her nomination.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (2 pages)	05/22/1996	P5 858
002. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/08/1996	P5 859
003. memo	Elena Kagan to Jack Quinn et al; re: Jones Litigation (1 page)	05/07/1996	P5 860
004. legal brief	re: Reply to Paula Jones' Opposition to the President's Motion (3 pages)	05/07/1996	P5 861
005. memo	Elena Kagan to Jack Quinn et al. re: Jones Litigation (1 page)	05/06/1996	P5 862
006a. fax cover sheet	David Strauss to John Quinn; re: Certiorari Petition (1 page)	04/26/1996	P5 863
006b. memo	Geof Stone and David Strauss to Bob Bennett & Amy Sabrin; re: The Petition (5 pages)	04/26/1996	P5 864
007. memo	Geof Stone and David Strauss to Bob Bennett and Amy Sabrin; re: The Petition (5 pages)	04/26/1996	P5 865
008. memo	Elena Kagan to Jack Quinn et al. re: Supreme Court Procedures (1 page)	04/05/1996	P5 866
009. memo	Elena Kagan to Jack Quinn et al; re: Supreme Court Litigators [partial] [page 2 withdrawn in full] (2 pages)	04/05/1996	P5, P6/b(6)
010. memo	Elena Kagan to Jack Quinn & Kathy Wallman; re: Supreme Court Litigators [partial] [pages 2 and 3 withdrawn in full] (3 pages)	03/11/1996	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: CF 814

FOLDER TITLE:

Paula Jones Kathy Wallman's Files [Elena Kagan Memos]

Jimmie Purvis
2009-1006-F
ek-jh2028

RESTRICTION CODES

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

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

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

- b(1) National security classified information [(b)(1) of the FOIA]
- 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]

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).

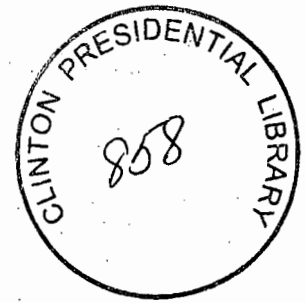
RR. Document will be reviewed upon request.

WJC LIBRARY PHOTOCOPY

THE WHITE HOUSE

WASHINGTON

May 22, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: JONES LITIGATION

As the Washington Times reported today, Reps. Dornan and Stump are attacking the President for claiming an entitlement to a deferral of litigation under the terms of the Soldiers' and Sailors' Relief Act. I am attaching the materials they are circulating, as well as the relevant pages of the cert petition.

I believe the problematic sentence on the top of page 15 was the result of the SG's office suggesting to Bennett, after reviewing a draft of the brief, that the President could and should ask for relief directly under the Soldiers' and Sailors' Act. Bennett inserted the sentence after receiving these comments.

In the Washington Times, Bennett notes that the reference to the Act is fleeting, says "we're not pushing that argument," but acknowledges that the petition argues that the Act is applicable to the President. I do not think we should say even this much. I think we should say that the cert petition is not requesting relief on this basis and that the petition used the Act (along with several other legal rules) as a simple analogy to show that courts often grant deferrals of litigation.

I would therefore recommend a response to the Dornan/Stump charges that goes something as follows:

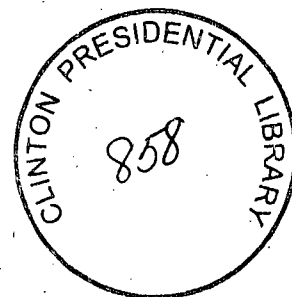
These charges are a deliberate and unfair misreading of the President's legal papers in hopes of gaining political mileage.

The Soldiers' and Sailors' Civil Relief Act is mentioned in a section of the petition arguing only that it is not unusual for courts to do what the President seeks -- defer litigation in order to serve important public interests. The Soldiers' and Sailors' Act is simply an example -- the petition also offers five others -- of a rule of law that commands such a deferral. All of these are analogies; they are not the basis for requesting a stay of litigation.

The President asked for a stay under established principles of constitutional law, in order to protect the ability of a President to perform his constitutional duties free from the

distraction of harassing litigation. He did not claim -- even though as a technical point of law he might have been able to do so -- any relief under the Soldiers' and Sailors' Act.

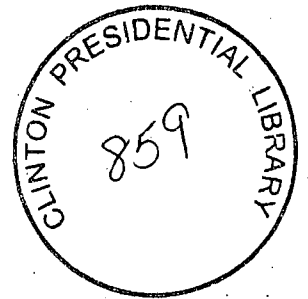
The statement Bennett is issuing today, which is also attached, is consistent with the above approach.



THE WHITE HOUSE

WASHINGTON

May 8, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: JONES LITIGATION

I have talked with both Amy Sabrin and David Strauss about whether to seek more time from the Supreme Court now that the Eighth Circuit has denied our request. Their strong advice is that we not do so. I agree.

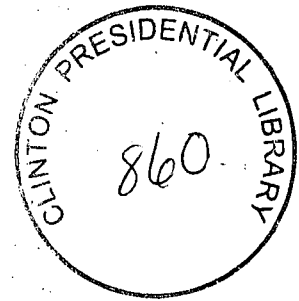
There are two significant dangers associated with seeking more time from the Supreme Court. First, the Court may decide the President is trying to manipulate the system -- that he is seeking added time not for the stated reasons (to bring new lawyers up to speed, etc.), but for the political purpose of trying to delay the litigation until after the election. The fact of the matter is that litigants usually do not go to the Supreme Court to get an extension of a stay. If the President does go to the Court to ask for more time, his action may appear devious, unseemly, even desperate. It may look that way to the Court -- and assuming it gets press (I can see Kamen doing an item on this, for example), it may look that way to the public.

Second, the Court will get its first impression of the case in a relatively unfavorable context. It is impossible for a motion of this kind to present the President's position in its best light. There is a risk that the Justices, seeing only an abbreviated version of the President's position, will form preconceptions of the case that ultimately will work against him.

As against these dangers, filing a motion for an extension of time probably gets the President nothing. It is unlikely that the Court will grant such a motion, especially given the ability of the other side (see above) to characterize the request as overtly political. And part of what the President would gain from the grant of the motion he probably won't even need, given the chance that the Court either will grant the cert petition or will postpone denial of the petition until after the recess.

THE WHITE HOUSE

WASHINGTON
May 7, 1996



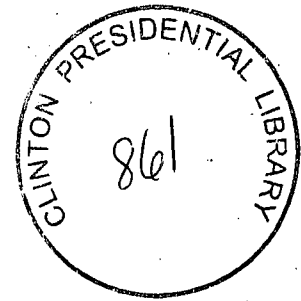
MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *ek*

SUBJECT: JONES LITIGATION

1. Attached is a draft reply to Jones' opposition to our motion for a stay. It's OK. David tells me he's going to try to recast the first paragraph slightly (I think it sounds disingenuous as written) and insert a paragraph on our need for the extension.

2. I've told David and Geof that they should do a serious, full edit on the draft of the cert petition.



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 95-1050 and 95-1167

PAULA CORBIN JONES,

Appellee/Cross-Appellant :

v. :

WILLIAM JEFFERSON CLINTON,

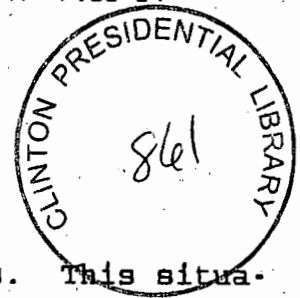
Appellant/Cross-Appellee :

Cross-Appeals from the United
States District Court for the
Eastern District of Arkansas

**PRESIDENT CLINTON'S REPLY
TO PAULA JONES' OPPOSITION TO THE PRESIDENT'S MOTION
TO EXTEND THE STAY OF MANDATE**

Counsel for Ms. Jones contend that the President is effectively seeking a 113-day stay, not a 30-day stay, and that if the President's request for an extension is denied, the Supreme Court will rule on the certiorari petition before it recesses for the summer, thereby ending the stay. This argument misapprehends both the nature of the stay and the procedures of the Supreme Court.

1. The stay, as embodied in the current order and in Rule 41(b), is effectively indefinite. Once the President notifies the Court that he has filed his petition, the stay will continue until the Supreme Court disposes of the matter. If the high Court grants the President's petition, this means that the stay will continue until it ultimately rules on the merits, which could be considerably longer than 113 days. If it denies the petition, the

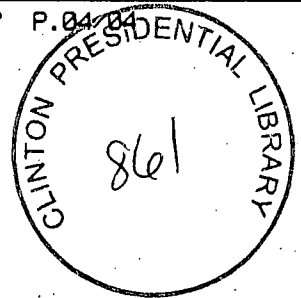


stay will expire with that denial, whenever it occurs. This situation will not be affected by whether this Court forces the President to file on May 16 or June 17, 1996. ~~_____~~

2. It is highly unlikely that the Supreme Court would rush to decide the significant issues presented by the petition before the summer recess. Even if the extension were denied, and even if Mrs. Jones' counsel believe they can do justice to the issues in this case under the expedited deadline they set for themselves, this would mean only that there is an opportunity for the high Court, as Mrs. Jones' counsel are careful to state, to "consider" the matter.

3. Nor is there any certainty that the Supreme Court would deny the petition, as the Opposition assumes. In initially granting the stay, this Court implicitly found that there was a reasonable possibility that certiorari would be granted, and we of course are confident, as was Judge McMillian, that it will be. In that case, the stay would continue indefinitely. The point is that neither the parties nor this Court can predict with certainty what the Supreme Court will do, and we respectfully submit that this Court should not base its judgment on speculation about how the high Court will handle its docket.

4. Mrs. Jones' counsel renew their attempt, denied by the district court and this Court previously, to sever the claims against State Trooper Ferguson from those against President Clinton.



We will not here repeat the findings of the district court on the inseparable nature of those claims, which were quoted in our previous reply brief on the stay, but call the Court's attention to those pleadings.

Respectfully submitted,

By: _____

Robert S. Bennett, Esq.

Carl S. Rauh, Esq.

Alan Kriegel, Esq.
Amy R. Sabrin, Esq.
Stephen P. Vaughn, Esq.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
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(202) 371-7000

Kathlyn Graves, Esq.

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220 Worthen Bank Building
200 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 371-0808

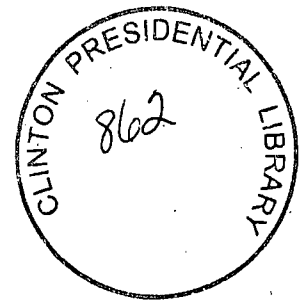
Stephen Engstrom, Esq.

WILSON, ENGSTROM, CORUM,
DUDLEY & COULTER
809 West Third Street
Little Rock, Arkansas 72202
(501) 375-6453

Counsel to President William J. Clinton

THE WHITE HOUSE

WASHINGTON
May 6, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*
SUBJECT: JONES LITIGATION

1. Jones's attorneys have filed an opposition to our motion to extend the stay. They are completely aware of why we want what we want: they talk in concrete terms about when their opposition to cert has to be filed for the Court to review the cert petition this Term. They also charge that we are asking for the stay for solely political reasons. I think we probably should respond to this pleading, though I'm less certain what we ought to say. In the end, I hold out no great hopes that anything we say will matter; I suspect their pleading dooms our chances for an extension.

2. Amy Sabrin has circulated a draft cert petition to our office, as well as to Geof and David. It's not bad (though it could be better) on the merits; in certain ways, it shows the effects of the communications she has had over the past few weeks with Geof and David. But it just doesn't read like a cert petition. It's too brieflike; it's too long; it's insufficiently pointed; it attempts actually to make arguments, rather to show the substantiality of issues. I think it might make sense, Jack, for you to ask Geof and David to provide not merely comments on this draft, but the actual next draft of the petition, using this draft as a base.

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637-2786

DAVID A. STRAUSS
HARRY N. WYATT PROFESSOR OF LAW

TELEPHONE: 312.702.9601
FAX: 312.702.0730

Friday, April 26, 1996

BY FAX

The Honorable John M. Quinn
Counsel to the President
The White House
Washington, D.C.
FAX 202-456-6279

Re: *Clinton v. Jones* (U.S. Sup. Ct.)

Dear Jack:

Here is a memo about the certiorari petition. I've sent a copy to Bob and Amy too.

With all best wishes,

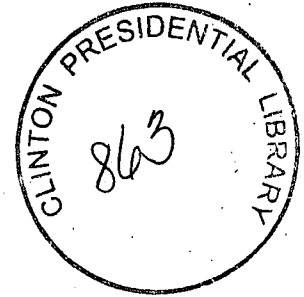
to: Kathy, Bruce, Elena

Sincerely,

David

This is good stuff,
esp. for a first impression.
We should discuss how
to help ensure their
smooth integration into
Bob's team —

Jack



THE UNIVERSITY OF CHICAGO

THE LAW SCHOOL

MEMORANDUM



Friday, April 26, 1996

To: Bob Bennett
Amy Sabrin

From: Geof Stone
David Strauss

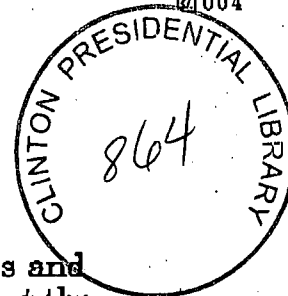
Copy: Jack Quinn

Re: The petition

Here are some thoughts on the certiorari petition. DAS has already talked with Amy Sabrin about several of these and we all seem to be on the same page.

First, a general thought. Perhaps the biggest single hurdle for us to overcome is the sense that our approach would place the President "above the law" and would give him a special privilege that no one else has. To deal with this, it might be worth emphasizing, to a greater degree than we have so far, this point: in seeking a deferral of the litigation, the President is simply asking for something that the legal system already provides to other parties in a variety of situations. There are numerous well-established legal doctrines that already, in various contexts, require plaintiffs to defer the prosecution of their claims, sometimes for several years. These include abstention doctrines, exhaustion doctrines, doctrines allowing interlocutory appeals, automatic stay doctrines in bankruptcy, as well as the examples mentioned in the court of appeals briefs (the Soldiers' and Sailors' Civil Relief Act and the deferral of civil proceedings in favor of a parallel criminal prosecution). There are probably other examples that we can dig up.

These other doctrines aren't exactly like what we're seeking for the President; the other side will be able to distinguish them in various ways. But the differences are matters of degree, not kind. It is very far from unheard of, in our system, for civil plaintiffs to find that, because of the need to accommodate other interests, they have to wait a substantial period before pursuing their claims in court.



Our papers in the court of appeals do a terrific job of making the argument—which will obviously be central to our position before the Supreme Court—that the President has extraordinary responsibilities and is therefore entitled to protection from civil litigation while in office. But the emphasis on the extraordinary nature of the President's job, while completely justified, may tend to create the impression that we're asking for an extraordinary form of relief. This in turn feeds the other side's "above the law" sloganeering. In fact, the relief we're seeking is quite comparable to what the courts already afford in many other contexts—and our reasons for asking for a deferral of the case are much more compelling than the reasons present in those other contexts.

Here are some specific thoughts on how the petition might unfold:

Questions Presented. Tentatively at least, it seems to us that the questions presented should be along these lines: (1) Whether, in the absence of exceptional circumstances, a district court is required to defer the trial of a civil suit against the President. (2) Whether a district court has discretion to defer the trial of a civil suit against the President.

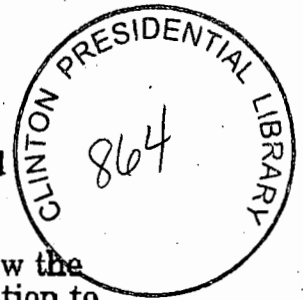
Three comments:

i. At least in the petition, we should follow the lead of *Nixon v. Fitzgerald*, where the plurality did not explicitly say that Presidential immunity was required by the Constitution. (The *Fitzgerald* formulation was that immunity is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers." 457 U.S. at 749.) We should use the same formulation, or one like it. It might look like overreaching to go further than *Fitzgerald* did.

ii. It would be a good idea, we think, to avoid calling the protection we're seeking an "immunity," given the way the court below tried to capitalize on that term. (As it happens, what we're asking for isn't technically an immunity at all—it's just a continuance, or the equivalent.)

iii. We will obviously have to work out how to characterize the presumption in favor of deferral; since we don't argue for an absolute bar, under what circumstances may the courts entertain a claim against the President? We are potentially vulnerable to an endless parade of hypotheticals here. If we are too restrictive, we look as if we're overreaching; but if we would allow relatively minor suits against the President, we risk trivializing our position. For the most part, though, this problem can wait until the merits brief.

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issues were inextricably intertwined; but our two questions presented disentangle them. Analytically they're entirely distinct.)

Although we shouldn't spend a lot of space on it, we should renew the jurisdictional objection in the Supreme Court for two reasons (in addition to the fact that it's jurisdictional): the Court will have a harder time denying certiorari if there is a serious jurisdictional issue in the case; and we might save the district court's order deferring the trial even if we lose the discovery part of the case.

Statement. This should be pretty straightforward. It should make the panel majority opinion look extreme (not a difficult task) and highlight the dissent and division below. We can use the dissenting opinions to make several of our points.

Reasons for granting the petition. We should start off with a paragraph or so summarizing our principal arguments. As we see it, there are four:

1. The court of appeals' decision is inconsistent with *Nixon v. Fitzgerald* and with "the constitutional tradition of the separation of powers."

a. Here we should emphasize the language of *Fitzgerald* and the historical sources cited by the *Fitzgerald* opinion (Story, Jefferson, and the Framers). The main pitch should be that the court of appeals simply ignored one entire aspect of *Fitzgerald*—that immunity is needed not just to ensure fearless decision-making but to protect the President against distraction and harassment while he is in office. We should rely on Justice Powell's language to make our arguments to the maximum extent possible.

b. This might be a good place to quote the famous Learned Hand aphorism to the effect that, illness aside, being involved in litigation is the worst thing that can happen to anyone. It's no different for a President, except that his litigation, like his illnesses, becomes the nation's problem.

c. Our argument on the second question is that even if the President didn't have a right to have the litigation deferred, the district judge certainly had the discretion to defer the trial. We should make this argument not as an explicit fallback, but along the lines of: the court of appeals' ruling on this point was an even more egregious error. This discussion should be short; we want to heighten the impression that the court of appeals was off the rails, but we don't want to make a compromise decision by the Supreme Court (essentially reinstating the district court's decision) seem too attractive to the Justices.

2. The cure prescribed by the court of appeals—"judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule" (slip op. 13)—is worse than the disease. District judges—or state trial judges—will literally be passing judgment on

whether the President is spending his time in the right way. We should be as concrete as possible in giving examples. We should consider, if not here then in the merits brief, describing the President's actual schedule for some period of time to make the point as concrete and vivid as we can.

3. The relief we seek—deferral of the litigation—is, contrary to the panel majority, far from extraordinary and unknown. In fact deferral is required in many other contexts, for reasons that do not approach in importance the reasons we assert here. This is the point we described at the beginning of this memorandum.

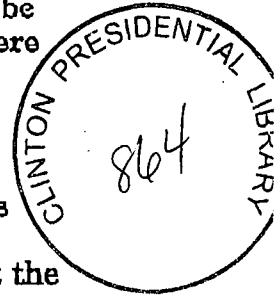
4. This is an issue of obvious national importance. It would be utterly incongruous for this issue to be decided by a fragmented panel of the Eighth Circuit. For the Court not to decide it now would mean that the President would have to undergo discovery and a trial—even though he might have a constitutionally based right not to. If he prevailed at the trial the Court would never even have an opportunity to vindicate his claim. These are, of course, precisely the reasons that the Court has recognized a right to an interlocutory appeal in cases of this kind, and they call for a grant of certiorari here.

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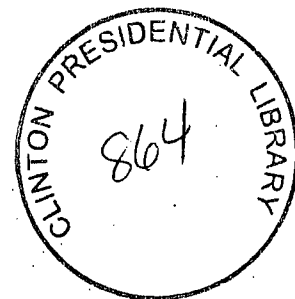
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The problem with making this point is that there of course haven't been a lot of suits like this. There seem to be several ways of dealing with this problem. First, there is language in *Fitzgerald* that will help us (about "the sheer prominence of the President's office" and how he is "an easily identifiable target for suits for civil damages" (457 U.S. at 752-53; footnote omitted)). Second, *Fitzgerald* itself recognized that "there is no historical record of numerous suits against the President" (457 U.S. at 753 n.33). *Fitzgerald* thought that was because the *Bivens* remedy was of recent vintage, but public officials were sued in tort before *Bivens*. Third, there may be material we can cite about the abuses of civil litigation generally—how it's used to harass CEOs and celebrities, for example. Finally, the reason Presidents have not been sued often may be that it's simply been assumed—as the Framers assumed—that you can't do it. If it now becomes clear that you can, why wouldn't we expect to see such suits with some frequency.

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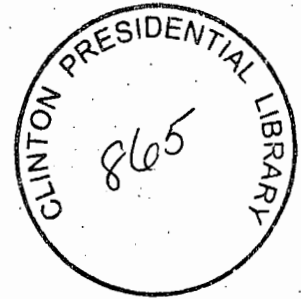
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THE UNIVERSITY OF CHICAGO

THE LAW SCHOOL

MEMORANDUM



Friday, April 26, 1996

To: Bob Bennett
Amy Sabrin

From: Geof Stone
David Strauss

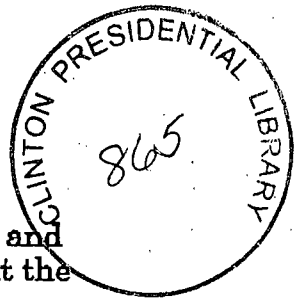
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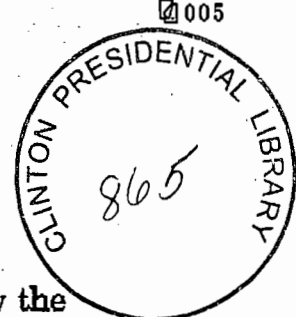
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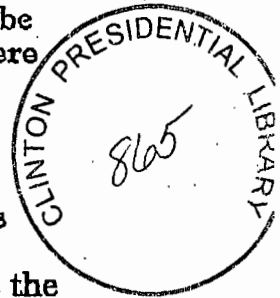
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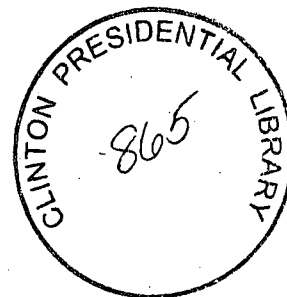
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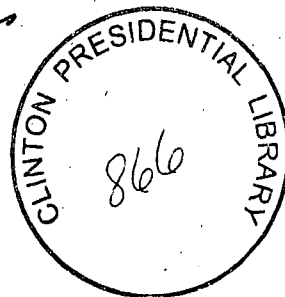
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file
Paula Jones

THE WHITE HOUSE

WASHINGTON
April 5, 1996



MEMORANDUM FOR JACK QUINN
BRUCE LINDSEY
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: SUPREME COURT PROCEDURES

1. There are no limits on the ability of a party to change counsel, even after the filing of a brief on the merits.
2. Conferences to consider cert petitions will be held weekly between now and **June 21**.
3. This Term's calendar is entirely full. So far, the Court has granted cert in 15 cases to be argued next Term. The Court rarely hears more than 20 cases in a single session (and sometimes considerably less); thus, assuming the Court fills up the calendar in order (which it usually though not invariably does), the October session (October 7, 8, 9, 15, 16) is nearly full already. The Court also will hear argument on November 4 and 5 -- that is, the day before and the day of the election.f

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	To Elena Kagan from Terry Henry re: documents (1 page)	07/09/1996	P5	922
002. letter	To President Bill Clinton from M. Larry Lawrence re: resume (partial) (1 page)	03/15/1993	P6/b(6)	
003a. memo	To Bruce Lindsey from John Emerson re: ambassadors (4 pages)	04/04/1993	P5, b(6)	923
003b. memo	To Bruce Lindsey from John Emerson re: ambassadors (4 pages)	04/04/1993	P5, b(6)	924
003c. memo	To Bruce Lindsey from John Emerson re: ambassadors (4 pages)	04/04/1993	P5, b(6)	925
003d. memo	To Bruce Lindsey from John Emerson re: ambassadors (4 pages)	04/15/1993	P5, b(6)	926
003e. memo	For the President from Jan Piercy, Margaret Carpenter re: candidates (4 pages)	03/18/1993	P5, b(6)	927
003f. memo	For the President from Jan Piercy, Margaret Carpenter re: candidates (4 pages)	03/18/1993	P5, b(6)	928
003g. memo	For the President from Bruce Lindsey re: candidates (4 pages)	04/12/1993	P5, b(6)	929
003h. memo	For the President from Bruce Lindsey re: candidates (4 pages)	04/12/1993	P5, b(6)	930
003i. letter	To M. Larry Lawrence from Bill Clinton re: recommendation (1 page)	04/06/1993	P5, b(6)	931

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8291

FOLDER TITLE:

Lawrence Suit [1]

2009-1006-F

ry927

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).

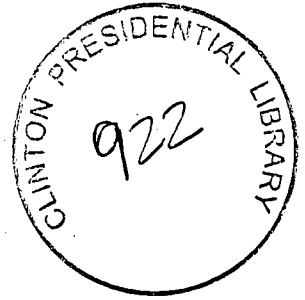
RR. Document will be reviewed upon request.

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]

****PROTECTED BY ATTORNEY-CLIENT PRIVILEGE****

To: Elena Kagen
Associate Counsel to the President
OEOB Rm. 125
Fm: Terry Henry
Da: 09 July 96



As you may recall, Larry Sharp, local counsel for DeCastro West, agreed to limit his request for documents to those created on or before May 4, 1993, which indicate a timeline of when the Lawrences asked to be considered for Administration positions, when they were considered for such positions, and when they were aware that they were being considered. My proposed letter response to Sharp is attached.

As we discussed earlier in the spring, the letter turns over several pieces of correspondence from Mr. Lawrence to the transition team, Bruce Lindsey, or the President in which Lawrence asks to be considered for a position, as well as an acknowledgement letter from Warren Christopher. Those documents are attached for your information. Areas that will be redacted from the copies sent to Sharp are indicated by mark-outs.

I have also included for your information copies of responsive documents that we will not produce for reasons stated in the letter. I am a little reluctant to claim privilege with respect to the April 6, 1993 letter from the President to Mr. Lawrence, but given your prior concerns and the fact that it is a communication from the President, I am willing to withhold it. If the matter were ever litigated, however, I am not sure we could protect it.

Let me know if the letter, etc. is o.k. As I mentioned, Sharp hoped to hear from us on this matter this week, if possible. If it would be helpful for me to come to your office to discuss, I am glad to do it, just let me know. My phone number is 514-4107. Thanks.

Attachments

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	To Elena Kagan from Terry Henry re: documents (3 pages)	04/08/1996	P5, b(6)	932
002. memo	To Bruce Lindsey from John Emerson re: candidates (4 pages)	04/04/1993	P5, b(6)	933
003. letter	To M. Larry Lawrence from Bill Clinton re: recommendation (1 page)	04/06/1993	P5, b(6)	934
004. memo	For the President from Jan Piercy, Margaret Carpenter re: candidates (4 pages)	03/18/1993	P5, b(6)	935
005. memo	For the President from Jan Piercy, Margaret Carpenter re: candidates (4 pages)	03/18/1993	P5, b(6)	936
006. memo	For the President from Bruce Lindsey re: candidates (4 pages)	04/12/1993	P5, b(6)	937
007. memo	For the President from Bruce Lindsey re: candidates (4 pages)	04/12/1993	P5, b(6)	938
008. memo	For the President from Jan Piercy, Margaret Carpenter re: candidates (6 pages)	05/11/1993	P5, b(6)	939
009. letter	To Terry Henry from Larry Sharp re: documents (1 page)	03/13/1996	P5	940
010. letter	To Larry Sharp from Terry Henry re: documents (2 pages)	02/13/1996	P5	941
011. draft	To Larry Sharp from Terry Henry re: documents (2 pages)	02/1996	P5	942

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8291

FOLDER TITLE:

Lawrence Suit [2]

2009-1006-F

ry928

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).

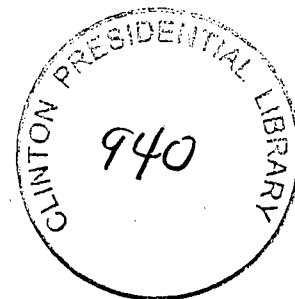
RR. Document will be reviewed upon request.

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]

**McGUIRE WOODS
BATTLE & BOOTH LLP**

The Army and Navy Club Building
1627 Eye Street, N.W.
Washington, DC 20006-4007
Telephone/TDD (202) 857-1700 • Fax (202) 857-1737



Larry D. Sharp

Direct Dial: (202) 857-1726

March 13, 1996

Terry M. Henry, Esquire
Federal Programs Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Initial Amalgamation, Ltd., et al. v. DeCastro, West, Chadrow & Burns, Inc., et al.

Dear Mr. Henry:

In response to your letter of February 13, I am providing the following information concerning our need for documents from the Office of the Director of Presidential Personnel and from Bruce Lindsey.

We can limit our request to documents prepared on or before May 4, 1993, the date of the settlement of the arbitration that is at issue in the litigation with the estate of Mr. Lawrence.

After receiving your letter of February 13, I reviewed the discovery pleadings in this case, as well as the documents produced by Mr. Lawrence. Although Mr. Lawrence was required to produce his copies of the documents we are requesting from the White House, Mr. Lawrence apparently did not retain any copies of the documents, and had none to produce.

I hope this information meets your needs. If you wish any additional information please let me know.

Sincerely yours,

Larry D. Sharp

LDS/cij

cc: William McDonald Miller, III, Esquire



U.S. Department of Justice

Civil Division

Elena Kagan



Washington, D.C. 20530

Terry M. Henry

Ph. (202) 514-4107

Fax (202) 616-8202

February 13, 1996

BY FAX & FIRST-CLASS MAIL

Larry D. Sharp, Esq.
McGuire, Woods, Battle & Boothe, L.L.P.
1627 I Street, N.W. Suite 1000
Washington, D.C. 20006

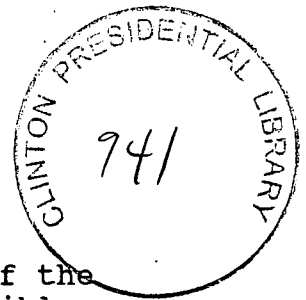
Re: Subpoenas directed to White House in
Initial Amalgamation, Ltd., et al. v. DeCastro,
West, et al., No. BC 083 447 (Calif. Super. Ct.),
No. 95 Misc. 315 (D.C. Super. Ct.)

Dear Mr. Sharp:

The Government has considered your proposal that the White House produce redacted versions of responsive documents that may establish a timeline of when Mr. and Mrs. Lawrence sought consideration of positions in the Administration, when they were considered for positions, and when they were aware they were being considered. During deliberations on the matter, some questions have arisen, answers to which will be helpful in reaching a decision on your proposal. We seek this additional information given the extraordinary step you are asking the White House to take in opening its files concerning appointments and the potential effect opening the files, even in redacted form, could have.

First, as to correspondence contained in category (1) of my August 7, 1995 letter to Mary Anne Silvestri (correspondence from the Lawrences concerning possible service in the Administration), since such correspondence was sent by or to the Lawrences, why are such documents not available directly from the Lawrences or their representatives via discovery?

Second, could you provide additional information concerning the precise dates that concern you and what you think the White House documents may contribute regarding those dates? By way of explanation, as I understand the situation, your clients desire

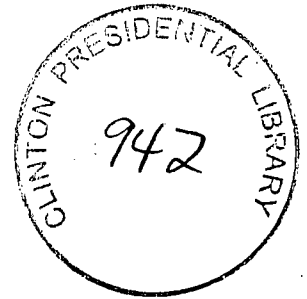


to argue that Mr. Lawrence settled the arbitration matter underlying plaintiffs' claim in this lawsuit not because of the misfeasance alleged by plaintiffs, but because of the possible consideration of the Lawrences for positions in the Administration. If the arbitration was settled on date X, for example, why would your client need any White House documents generated after that date? Also, for example, if you are able to determine when the Lawrences first corresponded concerning possible service in the Administration, and, in addition, know the date of Mr. Lawrence's nomination as Ambassador, why would any more specific information that may be reflected in White House documents be needed for your timeline and argument?

Thank you for your cooperation in this matter.

Sincerely yours,

TERRY M. HENRY
Trial Attorney
Federal Programs Branch
Civil Division



Terry M. Henry

Ph. (202) 514-4107
Fax (202) 616-8202

DRAFT-DRAFT

February ***, 1996

BY FAX & FIRST-CLASS MAIL

Larry D. Sharp, Esq.
McGuire, Woods, Battle & Boothe, L.L.P.
1627 I Street, N.W. Suite 1000
Washington, D.C. 20006

Re: Subpoenas directed to White House in
Initial Amalgamation, Ltd., et al. v. DeCastro,
West, et al., No. BC 083 447 (Calif. Super. Ct.),
No. 95 Misc. 315 (D.C. Super. Ct.)

Dear Mr. Sharp:

The Government has considered your proposal that the White House produce redacted versions of responsive documents that may establish a timeline of when Mr. and Mrs. Lawrence sought consideration of positions in the Administration, when they were considered for positions, and when they were aware they were being considered. During deliberations on the matter, some questions have arisen, answers to which will be helpful in reaching a decision on your proposal. We seek this additional information given the extraordinary step you are asking the White House to take in opening its files concerning appointments and the potential effect opening the files, even in redacted form, could have.

First, as to correspondence contained in category (1) of my August 7, 1995 letter to Mary Anne Silvestri (correspondence from the Lawrences concerning possible service in the Administration), since such correspondence was sent by or to the Lawrences, why are such documents not available directly from the Lawrences or their representatives via discovery?

Second, could you provide additional information concerning the precise dates that concern you and what you think the White House documents may contribute regarding those dates? By way of

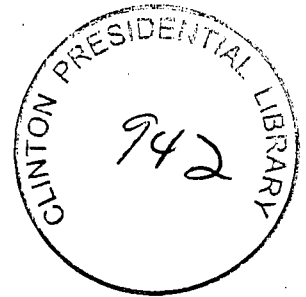
2

explanation, as I understand the situation, your clients desire to argue that Mr. Lawrence settled the arbitration matter underlying plaintiffs' claim in this lawsuit not because of the misfeasance alleged by plaintiffs, but because of the possible consideration of the Lawrences for positions in the Administration. If the arbitration was settled on date X, for example, why would your client need any White House documents generated after that date? Also, for example, if you are able to determine when the Lawrences first corresponded concerning possible service in the Administration, and, in addition, know the date of Mr. Lawrence's nomination as Ambassador, why would any more specific information that may be reflected in White House documents be needed for your timeline and argument?

Thank you for your cooperation in this matter.

Sincerely yours,

TERRY M. HENRY
Trial Attorney
Federal Programs Branch
Civil Division



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	To Elena Kagan from Bruce Lindsey re: document request (1 page)	08/04/1995	P5	955
002. memo	To Howard Paster, et al, from John Emerson re: Larry Lawrence (1 page)	11/29	P5	956
003. memo	To Bruce Lindsey from John Emerson re: candidates (4 pages)	04/04/1993	P5, b(6)	957
004. memo	To Bruce Lindsey from John Emerson re: appointments (4 pages)	06/02/1993	P5, b(6)	958
005. memo	To Bruce Lindsey from John Emerson re: appointments (4 pages)	05/06/1993	P5, b(6)	959
006. memo	To Bruce Lindsey from John Emerson re: candidates (4 pages)	04/15/1993	P5, b(6)	960
007. memo	To Bruce Lindsey from John Emerson re: candidates (4 pages)	04/04/1993	P5, b(6)	961
008. memo	To Bruce Lindsey from John Emerson re: candidates (4 pages)	04/04/1993	P5, b(6)	962
009. memo	For the President from Bruce Lindsey, John Emerson re: appointments (4 pages)	02/22/1994	P5, b(6)	963
010. memo	For the President from Bruce Lindsey, John Emerson re: candidates (4 pages)	02/22/1994	P5, b(6)	964

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8291

FOLDER TITLE:

Lawrence Suit [4]

2009-1006-F
ry930

RESTRICTION CODES

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

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

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

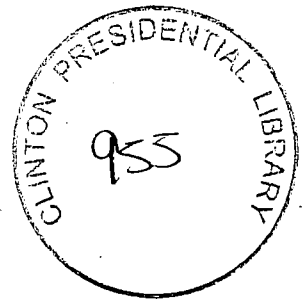
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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

THE WHITE HOUSE
WASHINGTON



August 4, 1995

MEMORANDUM FOR ELENA KAGEN

FROM:

BRUCE LINDSEY 

SUBJECT:

LAWRENCE DOCUMENT REQUEST

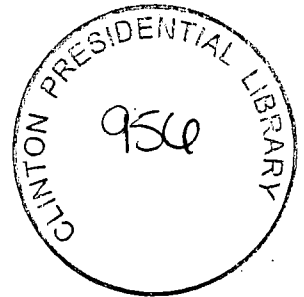
I have attached copies of documents relating to the Lawrences. In addition to letters and miscellaneous notes, I have included a June 3, 1993 binder that includes a tentative list of ambassadors, discussion memos and other candidate information. I have several other such binders dating back to April 24, 1993 and going through June 7, 1993. Each of these binders are very similar in nature to the June 3 one. Please let me know if you need the other binders.

After reviewing all attached documents, I feel strongly that we can claim executive privilege with each. Please call me after you have had a chance to examine them.

To: Howard Paster, Bruce Lindsey and John Podesta
Fr: John Emerson
Dt: Nov. 29
Re: Larry Lawrence

Wendy Sherman called today after spending several hours with the Lawrences, who are very concerned about Larry's nomination as ambassador to Switzerland. Wendy is confident that Larry will be confirmed, but the Lawrences have heard that the Foreign Service Association will be approaching Senators during the recess to build further opposition to Larry's candidacy; he also feels that the White House hasn't focused on this, understandably, because of pressing issues such as NAFTA.

Wendy suggests that we convene a meeting at the White House with the Lawrences, and those of us on this memo to discuss strategy. The Lawrences leave town on December 12, so the meeting needs to take place soon. I'll pull it together if you agree. Please advise.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	To Mary Anne Silvestri from Terry Henry re: lawsuit (6 pages)	08/07/1995	P5 968
002. letter	To Mary Anne Silvestri from Terry Henry re: lawsuit (6 pages)	08/07/1995	P5 969
003a. memo	To Elena Kagan from Terry Henry re: letter (1 page)	08/07/1995	P5 970
003b. letter	To Mary Anne Silvestri from Terry Henry re: lawsuit (6 pages)	08/07/1995	P5 971
004a. memo	To Elena from Terry re: draft letter (1 page)	08/07/1995	P5 972
004b. draft	Draft letter to Mary Ann Silvestri from Terry Henry re: lawsuit (6 pages)	08/07/1995	P5 973
005. resume	re: Joseph B. Gildenhorn (partial) (1 page)	03/1989	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8291

FOLDER TITLE:

Lawrence Suit: Larry Lawrence [1]

Rhonda Young
2009-1006-F
ry932

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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- 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).

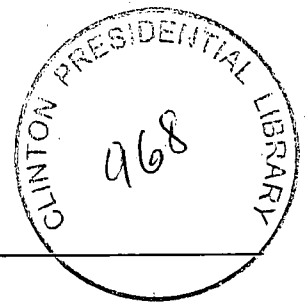
RR. Document will be reviewed upon request.

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

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- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



U.S. Department of Justice
Civil Division



Washington, D.C. 20530

Terry M. Henry

Ph: (202) 514-4107
Fax (202) 616-8202

August 7, 1995

BY FAX & FIRST-CLASS MAIL

Mary Anne Silvestri, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd. Suite 2200
Los Angeles, California 90017

Re: Initial Amalgamation, Ltd., et al. v. DeCastro,
West, et al., No. BC 083 447 (Calif. Super. Ct.),
No. 95 Misc. 315 (D.C. Super. Ct.)

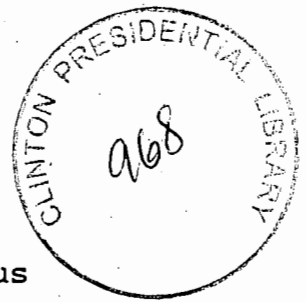
Dear Ms. Silvestri:

I am writing with respect to the subpoenas in this case directed to (1) the "Custodian of Records, Office of the Assistant to the President and Senior Advisor, Bruce Lindsay;" (2) the "Custodian of Records, Office of the Director of Presidential Personnel;" and (3) "Bruce Lindsay, in his former capacity as Director of Presidential Personnel and his current capacity as Assistant to the President and Senior Advisor." I represent respondents in this matter. The subpoenas were served upon me on July 26, 1995, and call for the production, on August 8, 1995, of

Any and all documents relating to any proposed or current appointment for M. Larry Lawrence and Sheila [sic] Lawrence by the U.S. Government during the time period 1991 through 1995, including, but not limited to, any lists of potential candidates for appointment by the U.S. Government; any documentation regarding Mr. Lawrence's nomination and appointment as the U.S. Ambassador to Switzerland; and any documentation regarding Mrs. Lawrence's nomination and appointment as U.S. Representative to the World Conservation Union.

I am writing to state objections, pursuant to D.C. Superior Court Rule 45, on behalf of respondents to production as called for by the subpoenas.

DOCUMENTS



A search of responsive documents¹ has revealed various categories of documents described below:

(1) Correspondence from M. Larry Lawrence ("MLL") and/or Shelia Davis Lawrence ("SDL") to President Clinton, members of the President's staff, and the head and/or members of President's transition team concerning possible service of MLL or SDL in the Administration. One of these documents includes handwritten notes of the President. In addition, many of these letters include resumes or personal/confidential information submitted by MLL and SDL. This category of documents also includes an acknowledgement by Warren Christopher of one of the letters.

(2) Correspondence from MLL and/or SDL to members of Congress concerning possible service of MLL or SDL in the Administration. Many of these letters include resumes or personal/confidential information submitted by MLL and SDL.

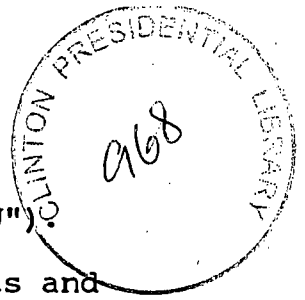
(3) Correspondence from individuals and members of Congress to the President, the head or members of the transition team, the President's Chief of Staff, Bruce Lindsay (as Advisor and Director of Presidential Personnel), or other members of the President's staff, concerning possible service of MLL and/or SDL in the Administration. Some of these letters include resumes or personal/confidential information of MLL and SDL. This category of documents also includes letters from Mack McLarty and the office of Warren Christopher acknowledging receipt of certain of the letters.

(4) A file of news articles, clippings, or summaries thereof concerning the nomination of MLL as Ambassador to Switzerland.

(5) Correspondence from various individuals and organizations to various members of the Senate concerning the nomination or confirmation of MLL as Ambassador to Switzerland.

(6) Letter to MLL from the President's Director of Scheduling concerning an invitation from MLL and SDL to a reception celebrating the swearing-in of MLL and SDL, respectively, as Ambassador to Switzerland and Special

¹For your information, correspondence between the President and/or First Lady and Mr. Lawrence in his capacity as Ambassador to Switzerland or Ms. Lawrence in her capacity as Representative to the World Conservation Union was not deemed responsive to the subpoenas.



Representative to the World Conservation Union ("WCU"). This category of documents includes a copy of the invitation. It also includes predecisional documents and notes leading to the decision reflected in the letter from the Director of Scheduling.

(7) SDL's letter of resignation from her position as Special Representative to the WCU, the President's response, and drafts of the President's response and handwritten notes pertaining thereto.

(8) Memoranda reflecting the various stages of clearance or approval of the proposed nomination of MLL for position of Ambassador to Switzerland. These memoranda are to Bruce Lindsay from the State Department, from Bruce Lindsay to John Podesta or other members of the President's staff, to the President from John Podesta, or from the White House Counsel's Office to persons in the Presidential Personnel Office, including Bruce Lindsay.

(9) Memoranda to Bruce Lindsay, and from Bruce Lindsay to the President, concerning persons being considered for various Presidential appointments and to the President, through Bruce Lindsay, recommending Presidential nominations for various positions. This category also includes drafts of these memoranda and working papers pertinent to these documents.

(10) Press release or announcement of nomination of MLL as Ambassador to Switzerland.

(11) Documents used in planning strategy of MLL Senate confirmation process, including information on anticipated action by Senators and recommended actions to be undertaken by MLL and others.

(12) January 24, 1994 White House press release attaching two letters, dated January 20 and 24, 1994, to the Senate Foreign Relations Committee from attorney for MLL, Mark A. Kuller, addressing issues raised by the American Foreign Service Association in opposition to the confirmation of MLL as Ambassador to Switzerland.

(13) Documents released by American Foreign Service Association in opposition to confirmation of MLL as Ambassador to Switzerland.

(14) January 1994 and February 1994 correspondence to MLL, Nestor Davidson (White House Office of Legislative Affairs), and others, from O'Melveny & Myers regarding confirmation of MLL as Ambassador to Switzerland, which often attach documents submitted to the Senate Foreign Relations

Committee regarding the confirmation of MLL. This category of documents also includes drafts of correspondence to the Committee. These documents may also contain personal/confidential information concerning MLL.

OBJECTIONS

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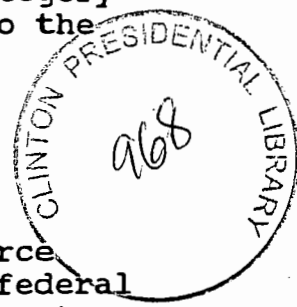
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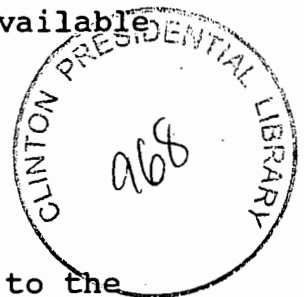
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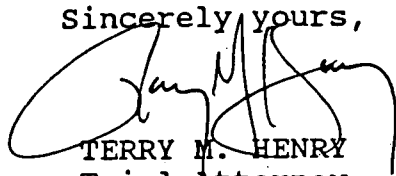
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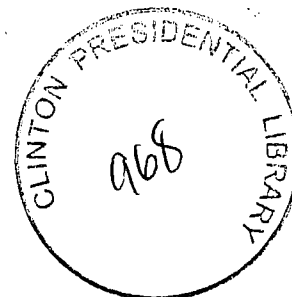
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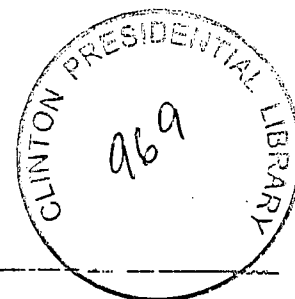
TERRY M. HENRY
Trial Attorney
Federal Programs Branch
Civil Division



cc: Larry D. Sharp, Esq. (by fax)
Robert S. Draper, Esq. (by fax and mail)
Robert G. Stiener, Esq. (by mail)
Alan Goldberg, Esq. (by mail)
Stephen J. Tully, Esq. (by mail)



U.S. Department of Justice
Civil Division



Washington, D.C. 20530

Terry M. Henry

Ph. (202) 514-4107

Fax (202) 616-8202

DRAFT

August 7, 1995

BY FAX & FIRST-CLASS MAIL

Mary Anne Silvestri, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd. Suite 2200
Los Angeles, California 90017

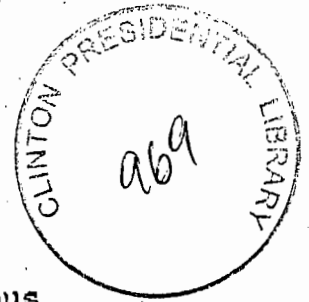
Re: Initial Amalgamation, Ltd., et al. v. DeCastro,
West, et al., No. BC 083 447 (Calif. Super. Ct.),
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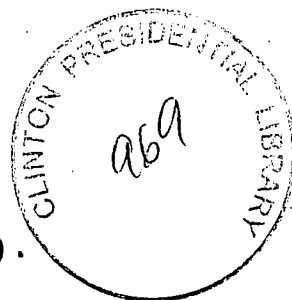
- 2 -

DOCUMENTS

A search of responsive documents¹ has revealed various categories of documents described below:

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- (4) A file of news articles, clippings, or summaries thereof concerning the nomination of MLL as Ambassador to Switzerland.
- (5) Correspondence from various individuals and organizations to various members of the Senate concerning the nomination or confirmation of MLL as Ambassador to Switzerland.
- (6) Letter to MLL from the President's Director of Scheduling concerning an invitation from MLL and SDL to a reception celebrating the swearing-in of MLL and SDL, respectively, as Ambassador to Switzerland and Special

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- 3 -

Representative to the World Conservation Union ("WCU"). This category of documents includes a copy of the invitation. It also includes predecisional documents and notes leading to the decision reflected in the letter from the Director of Scheduling.

(7) SDL's letter of resignation from her position as Special Representative to the WCU, the President's response, and drafts of the President's response and handwritten notes pertaining thereto.

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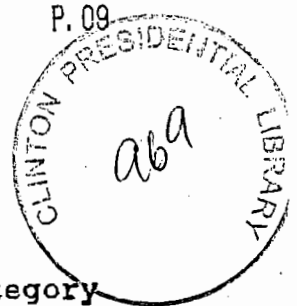
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- 4 -

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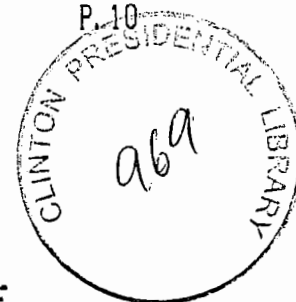
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- 5 -

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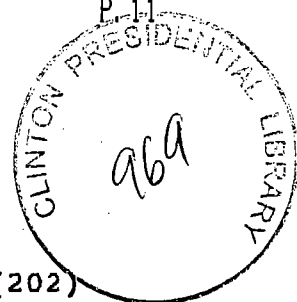
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- 6 -

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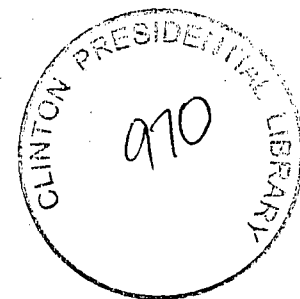
TERRY M. HENRY
Trial Attorney
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U. S. Department of Justice

Civil Division



August 7, 1995
3:26 pm
7 Pages

TO : Elena Kagan
White House Counsel's Office

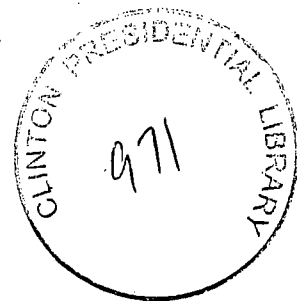
Fax No : 9-456-1647

From : Terry Henry

Subject :

Comments :

Here's a revised draft of the letter. I looked at the O'Melveny & Myers stuff again, and I agree that we should lump it all together as you suggested, except that I ran across a White House Press release that made a couple of the letters public. (I'll fax you a copy, separately.) --Terry



Terry M. Henry

Ph. (202) 514-4107
Fax (202) 616-8202

DRAFT

August 7, 1995

BY FAX & FIRST-CLASS MAIL

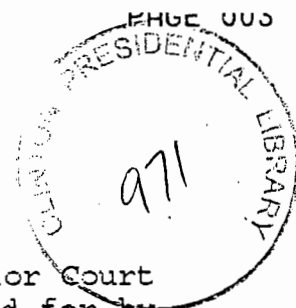
Mary Anne Silvestri, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd. Suite 2200
Los Angeles, California 90017

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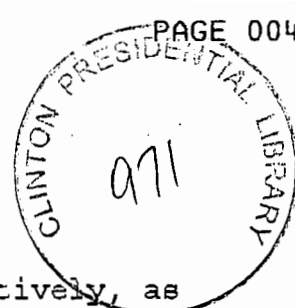
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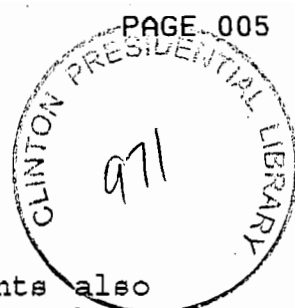
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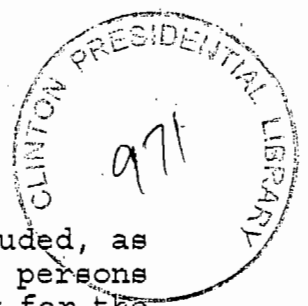
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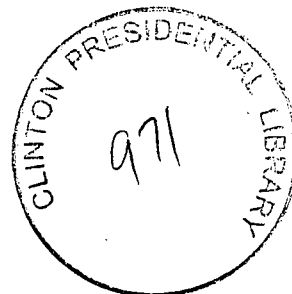
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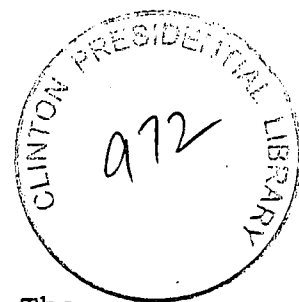
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Trial Attorney
Federal Programs Branch
Civil Division



cc: Larry D. Sharp, Esq. (by fax and mail)
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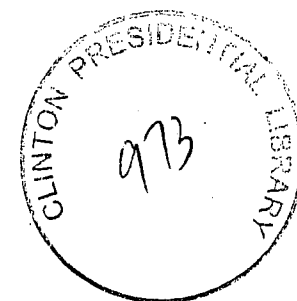
Elena,

Here's the revised draft of the objection letter. The format is different, but the substance is the same (except that your revisions we discussed on Friday have been incorporated).

Also attached, fyi, are the documents that are described in category (5). I originally thought these might be releaseable, but we decided to withhold them as stated in the letter.

Also, did you receive the package on Friday? My secretary says that it was delivered to the OEOB mailroom. Did it make its way to you?

Thanks--Terry



Terry M. Henry

Ph. (202) 514-4107
Fax (202) 616-8202

DRAFT

August 7, 1995

BY FAX & FIRST-CLASS MAIL

Mary Anne Silvestri, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd. Suite 2200
Los Angeles, California 90017

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Any and all documents relating to any proposed or current appointment for M. Larry Lawrence and Sheila [sic] Lawrence by the U.S. Government during the time period 1991 through 1995, including, but not limited to, any lists of potential candidates for appointment by the U.S. Government; any documentation regarding Mr. Lawrence's nomination and appointment as the U.S. Ambassador to Switzerland; and any documentation regarding Mrs. Lawrence's nomination and appointment as U.S. Representative to the World Conservation Union.

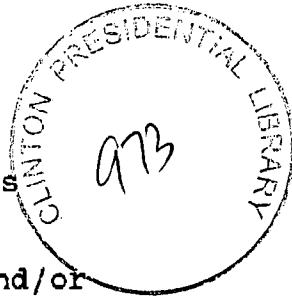
I am writing to state objections, pursuant to D.C. Superior Court Rule 45, on behalf of respondents to production as called for by the subpoenas.

What happened to
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- 2 -

DOCUMENTS

A search of responsive documents¹ has revealed various categories of documents described below:



(1) Correspondence from M. Larry Lawrence ("MLL") and/or Shelia Davis Lawrence ("SDL") to President Clinton, members of the President's staff, and the head and/or members of President's transition team concerning possible service of MLL or SDL in the Administration. One of these documents includes handwritten notes of the President. In addition, many of these letters include resumes or personal/confidential information submitted by MLL and SDL. This category of documents also includes an acknowledgement by Warren Christopher of one of the letters.

(2) Correspondence from MLL and/or SDL to members of Congress concerning possible service of MLL or SDL in the Administration. Many of these letters include resumes or personal/confidential information submitted by MLL and SDL.

(3) Correspondence from individuals and members of Congress to the President, the head or members of the transition team, the President's Chief of Staff, Bruce Lindsay (as Advisor and Director of Presidential Personnel), or other members of the President's staff, concerning possible service of MLL and/or SDL in the Administration. Some of these letters include resumes or personal/confidential information of MLL and SDL. This category of documents also includes letters from Mack McLarty and the office of Warren Christopher acknowledging receipt of certain of the letters.

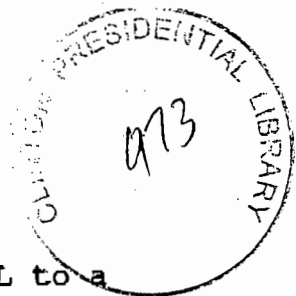
(4) A file of news articles, clippings, or summaries thereof concerning the nomination of MLL as Ambassador to Switzerland.

Post-nomination (?)
(5) Correspondence to the President regarding the nomination of MLL as Ambassador to Switzerland (i.e., post-nomination correspondence concerning the nomination). ?

(6) Correspondence from various individuals and organizations to various members of the Senate concerning the nomination or confirmation of MLL as Ambassador to Switzerland.

¹For your information, correspondence between the President and/or First Lady and Mr. Lawrence in his capacity as Ambassador to Switzerland or Ms. Lawrence in her capacity as Representative to the World Conservation Union was not deemed responsive to the subpoenas.

No - Don't
need -
included
in (3)



(7) Letter to MLL from the President's Director of Scheduling concerning an invitation from MLL and SDL to a reception celebrating the swearing-in of MLL and SDL, respectively, as Ambassador to Switzerland and Special Representative to the World Conservation Union ("WCU"). This category of documents includes a copy of the invitation. It also includes predecisional documents and notes leading to the decision reflected in the letter from the Director of Scheduling.

What of the letter of resign + response?

(8) SDL's letter of resignation from her position as Special Representative to the WCU, the President's response, and drafts of the President's response and handwritten notes pertaining thereto.

(9) Memoranda reflecting the various stages of clearance or approval of the proposed nomination of MLL for position of Ambassador to Switzerland. These memoranda are to Bruce Lindsay from the State Department, from Bruce Lindsay to John Podesta or other members of the President's staff, to the President from John Podesta, or from the White House Counsel's Office to persons in the Presidential Personnel Office, including Bruce Lindsay.

(10) Memoranda to Bruce Lindsay, and from Bruce Lindsay to the President, concerning persons being considered for various Presidential appointments and to the President, through Bruce Lindsay, recommending Presidential nominations for various positions. This category also includes drafts of these memoranda and working papers pertinent to these documents.

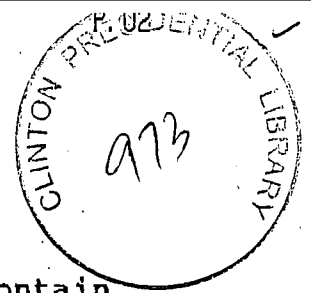
(11) Press release or announcement of nomination of MLL as Ambassador to Switzerland.

12, 14, 16

(12) Letter from Harold H. Henderson for O'Melveny & Myers to Nestor Davidson (White House Office of Legislative Affairs) submitting drafts of correspondence to members of Congress concerning possible confirmation of MLL as Ambassador to Switzerland. These documents may contain personal/confidential information concerning MLL.

(13) Documents used in planning strategy of MLL Senate confirmation process, including information on anticipated action by Senators and recommended actions to be undertaken by MLL and others.

(14) January 1994 correspondence to Senate Foreign Relations Committee from attorneys for MLL, including Mark A. Kuller, addressing issues raised by the American Foreign Service Association in opposition to the confirmation of MLL



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as Ambassador to Switzerland. These documents may contain personal/confidential information concerning MLL.

(15) Documents released by American Foreign Service Association in opposition to confirmation of MLL as Ambassador to Switzerland.

(16) January 1994 and February 1994 correspondence to MLL, Nestor Davidson (White House Office of Legislative Affairs), and others, from O'Melveny & Myers regarding confirmation of MLL as Ambassador to Switzerland, which often attach documents submitted to the Senate Foreign Relations Committee regarding the confirmation of MLL. This category of documents also includes some drafts of correspondence to the Committee. These documents may also contain personal/confidential information concerning MLL.

(what is
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between
this
12?)

OBJECTIONS

At the outset, it must be noted that the District of Columbia Superior Court does not have jurisdiction to enforce subpoenas compelling the production of documents by these federal officials. Enforcement of subpoenas pertaining to state court proceedings, which require federal officials to produce documents obtained or generated in the course of their official duties, are proceedings against the United States for which the United States has not waived its sovereign immunity. See, e.g., Louisiana v. Sparks, 978 F.2d 226, 234-36 (5th Cir. 1992); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989); Environmental Enterprises, Inc. v. United States Environmental Protection Agency, 664 F. Supp. 585 (D.D.C. 1987).

In addition, many of the responsive documents are privileged or disclosure of them is otherwise not appropriate, as explained below.

Disclosure of the documents contained in categories (1), (3), (5), and (6) (except for the acknowledgement letters noted in categories (1) and (3)) is not appropriate because such disclosure might inhibit the candor of correspondence of this type in the future and adversely impact the process under which the President receives information concerning potential candidates for appointments.² In addition, the handwritten notes from the President contained in the documents in category (1) are

Also (2)

²Also, the documents in category (6) need not be disclosed because they may be available from the original recipients of the correspondence, if production by them is appropriate. It would be inappropriate for respondents to produce these documents in derogation of any appropriate objection to disclosure that might be asserted by the original recipients of the correspondence.

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protected by the confidential Presidential communications privilege.

Disclosure of the personal/confidential information of MLL and SDL described in categories (1), (2), (3), (12), (14), and (16) is not appropriate because disclosure of such information may constitute an invasion of personal privacy of the Lawrences. Such information also need not be produced because it should be available from the Lawrences, if production by them is appropriate.

The documents described in categories (4), (9), (10), (12), (13), (14), and (16) are protected from disclosure by the deliberative process privilege with respect to either the nomination or confirmation process. The set of documents in category (4) comes within this privilege because the very selection of the articles included, as well as the summaries, may reflect the thought processes of persons involved in the nomination process or in planning strategy for the confirmation process. In addition, the communications to or from the President reflected in categories (9) and (10) are protected by the confidential Presidential communications privilege. *how do we do this for (14)?*

The predecisional documents and notes that are part of the documents in category (7) are protected by the deliberative process privilege with respect to the decision reflected in the letter from the Director of Scheduling. Also, to the extent the predecisional documents and notes are directed to or from the President, they are protected by the confidential Presidential communications privilege.

The drafts and notes that are part of the documents in category (8) are protected by the deliberative process privilege and the confidential Presidential communications privilege.

The documents described in category (15) should be available from the American Foreign Service Association, if production by them is appropriate.

The objections asserted herein are not exclusive, and the Government reserves the right to assert further objections in response to the subpoenas as appropriate.

Because of the overarching nature of the sovereign immunity objection, the fact that many of the documents are privileged or otherwise need not be produced, and ~~the~~ fact that, based upon our previous telephone conversation, you may not be interested in

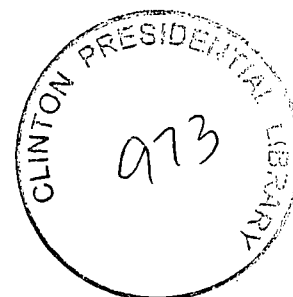
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many of the documents that are not privileged or protected,³ respondents will not produce the documents called for at the date, time, and place specified on the subpoenas. I am available to discuss these matters further, and can be reached at (202) 514-4107.

Sincerely yours,

TERRY M. HENRY
Trial Attorney
Federal Programs Branch
Civil Division



cc: Larry D. Sharp, Esq. (by mail)
Robert S. Draper, Esq. (by fax and mail)
Robert G. Stiener, Esq. (by mail)
Alan Goldberg, Esq. (by mail)
Stephen J. Tully, Esq. (by mail)

→ Do we need This?

③ I understand that you are seeking documents that go to the timing of the consideration of the Lawrences for positions in the Administration and documents that may illuminate the impact of litigation in which Mr. Lawrence may have been involved upon the consideration of the Lawrences for positions.