Volume II: Appendix

REFERRAL

TO THE

UNITED STATES HOUSE OF REPRESENTATIVES

PURSUANT TO

TITLE 28, UNITED STATES CODE, § 595(C)

APPENDIX

SUBMITTED BY

THE OFFICE OF THE INDEPENDENT COUNSEL

SEPTEMBER 9, 1998

Appendix
Table of Contents

Tab A

Statement of the OIC's Jurisdiction

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

In re: Madison Guaranty Savings & Loan Association — Division No. 94-1

Before: Sentelle, Presiding, Butzner and Fay, Senior Circuit Judges

UNDER SEAL

ORDER

Upon consideration of an oral application for the expansion of jurisdiction of an Independent Counsel provided to this Court on behalf of the Attorney General on January 16, 1998, it is hereby

ORDERED that the investigative and prosecutorial jurisdiction over the following matters be referred to Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel as an expansion of prosecutorial jurisdiction in lieu of the appointment of another Independent Counsel pursuant to 593(c)(1):

> (1) The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon him as a result of the August 5, 1994, order of the Special Division of the Court and all subsequent orders concerning jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:
>
> (2) The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses,

attorneys, or others concerning the civil case Jones v. Clinton.

(3) The Independent Counsel shall have jurisdiction and authority to investigate related violations of federal criminal law, other than a Class B or C misdemeanor or infraction, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

(4) The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

(5) The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

It is further ORDERED that this document and its contents be and remain UNDER SEAL absent further Order of this Court.

This the 16th day of January, 1998.

Per Curiam
For the Court:

Marilyn Sargent
Chief Deputy Clerk

Tab B

Order Permitting Disclosure of Grand Jury Material

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Special Division

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In Re: Madison Guaranty Savings & Loan Association

Division No. 94-1

FILED UNDER SEAL

Before: SENTELLE, *Presiding Judge*, and BUTZNER and FAY, *Senior Circuit Judges*.

ORDER

Upon consideration of the "Ex Parte Motion for Approval of Disclosure of Matters Occurring Before a Grand Jury" filed by Independent Counsel Kenneth W. Starr on July 2, 1998, the Court finds that it is appropriate for the Independent Counsel to convey the materials described in that motion to the House of Representatives. Accordingly, it is

ORDERED that the motion be granted. The Court hereby authorizes the Independent Counsel to deliver to the House of Representatives materials that the Independent Counsel determines constitute information of the type described in 28 U.S.C. § 595(c). This authorization constitutes an order for purposes of Federal Rule of Criminal Procedure 6(e)(3)(C)(i) permitting disclosure of all grand jury material that the independent counsel deems necessary to comply with the requirements of § 595(c). This order may be disclosed as required in connection with the Independent Counsel's compliance with his statutory mandate.

Per Curiam

For the Court:
Mark J. Langer, Clerk

by

Marilyn R. Sargent
Chief Deputy Clerk

Tab C

Procedural Background and History of *Jones v. Clinton*

Procedural History and Background of the *Jones v. Clinton* Litigation

TABLE OF CONTENTS

CHRONOLOGY

May 1991	Alleged Hotel Incident (Governor Bill Clinton allegedly summons Paula Jones to his room at the Excelsior Hotel in Little Rock).
May 1994	Paula Jones files suit in federal district court in Arkansas.
December 1994	Judge Susan Webber Wright orders discovery to proceed, but says that she won't let the case go to trial until Bill Clinton's presidency is over.
January 1996	The U.S. Court of Appeals for the Eighth Circuit orders the case to proceed with no stay of the trial.
January 1997	The Supreme Court hears oral argument in Clinton v. Jones.
May 1997	The Supreme Court unanimously affirms the Eighth Circuit and remands the case to the district court for discovery and trial.
June 1997	Ms. Jones's lawyers serve their first set of interrogatories to the President, asking about the alleged Hotel Incident.
August 1997	Judge Wright grants President's motion to dismiss two counts of the complaint, denies the motion for the remaining two counts, and orders discovery to proceed
September 22, 1997	The President answers the first set of interrogatories, denying that he harassed Ms. Jones.
September 30, 1997	The President verifies under "penalty of perjury" that his interrogatory answers are true.
October 1, 1997	• The new Jones lawyers serve a second set of interrogatories to the President; #10-11 asks whether he had had, or had proposed having, sexual relations with any woman (other than Hillary Rodham Clinton) while he was Attorney General of Arkansas, Governor of Arkansas, or President of the United States. • Ms. Jones's lawyers also serve the President with their first set of requests for documents and things related to other women.

October 8, 1997	Ms. Jones's attorneys serve the President with their first set of requests for admissions; #51-65 ask about "sexual relations" with other women.
October 13, 1997	Ms. Jones's lawyers serve the President with a third set of interrogatories, asking him to name any person with discoverable information.
October 28, 1997	• The President's lawyers seek a protective order limiting discovery to instances of nonconsensual conduct in the AIDC (Ms. Jones's state agency) workplace and prohibiting general questions about other women. • Dolly Kyle Browning testifies at a deposition.
October 29, 1997	Ms. Jones's lawyers issue a subpoena to Jane Doe #1 commanding her to appear for a deposition on Nov. 18, bringing documents and things related to her meetings with the President.
October 30, 1997	• Judge Wright orders that discovery be confidential. • Ms. Jones's lawyers serve Jane Doe #2 with a subpoena commanding her to appear for a deposition, and serve a copy of this subpoena to the President's lawyers.
November 3, 1997	The President answers part of the second set of interrogatories under "penalty of perjury," but the President objects to and does not answer Interrogatories #10-11 (about "other women").
November 10, 1997	• The President responds to the first set of requests for admissions; he denies that he asked Ms. Jones to have sexual relations with him, but objects to and does not answer "other women" questions. • State troopers begin testifying.
November 12, 1997	• The President answers the third set of interrogatories, but fails to include Ms. Lewinsky on the list of those with discoverable information; he reserves the right to add more names. • Ms. Jones's attorneys ask Judge Wright to order the President to answer Interrogatories #10-11 from the second set of interrogatories. • Ms. Jones testifies at a deposition which continues the next day.
November 13, 1997	Jane Doe #3 receives a subpoena.

November 14, 1997	• Gennifer Flowers testifies at a deposition. • Jane Doe #7 receives a subpoena.
November 17, 1997	The President responds to the first request for documents and things, objecting to the requests insofar as they seek items related to "other women," but then asserts that he "has no documents responsive to" the request.
November 18, 1997	• Jane Doe #1 begins her deposition but immediately asserts a "privacy" privilege; Judge Wright holds a hearing but decides only that, because Jane Doe #1 is ill, the deposition will not continue that day. • Jane Doe #7 signs an affidavit claiming no pertinent knowledge, and moves to quash her deposition.
November 19, 1997	• Judge Wright denies Jane Doe #7's motion to quash her subpoena. • Judge Merhige denies Kathleen Willey's motion to quash her subpoena.
November 20, 1997	• The President's lawyers file a memorandum in support of the motions to quash filed by Jane Does #1-3. • Jane Doe #1 asks that her deposition (begun on Nov. 18) be terminated. • Ms. Jones's lawyers issue a subpoena to Jane Doe #5 (who received it Nov. 22).
November 21, 1997	• Jane Doe #2 moves to quash her subpoena. • Ms. Jones's lawyers serve the President's lawyers with an amended notice about the deposition of Jane Doe #3. • Jane Doe #7 testifies at a deposition.
November 24, 1997	Judge Wright conducts a hearing on Jane Doe #1's privacy objection to a deposition and overrules the objection.
December 2, 1997	Judge Wright denies Jane Doe #2's motion to quash.
December 3, 1997	• Jane Doe #2's second deposition begins but she refuses to answer sex-related questions. • Kathleen Willey suddenly cancels her deposition because of neck surgery.
December 4, 1997	Jane Doe #3 moves to quash her subpoena; Judge Wright denies the motion.

December 5, 1997	• Ms. Jones's lawyers serve the President's lawyers with their witness list for trial; Monica Lewinsky's name is on the list. • Ms. Jones's lawyers file an amended complaint adding the allegation that the President discriminated against Ms. Jones by granting employment benefits only to women who acceded to his requests for sex.
December 6, 1997	• The President meets with his lawyers. • The President verifies under "penalty of perjury" his supplemental responses to the second set of interrogatories (containing certain medical information about himself); he continues to fail to answer Interrogatories #10-11.
December 10, 1997	• Ms. Jones's lawyers move to compel Jane Does #1-3 to answer their deposition questions. • Jane Doe #2 files an opposition to this motion, arguing that Ms. Jones's lawyers have not established a sufficient predicate for delving into her privacy. • Danny Ferguson testifies at a deposition about the President's meetings with Jane Doe #1 and with Paula Jones.
December 11, 1997	• Judge Wright partially grants Ms. Jones's motion of Nov. 12; using a "meticulous" standard of materiality, she orders the President to answer Interrogatory #10-11 if (i) encounter was later than May 7, 1986; and (ii) either state troopers facilitated encounter, or the woman was a present or prospective government employee.
December 12, 1997	The President's lawyers file their opposition to Ms. Jones's motion (of Dec. 10) to compel the Jane Does.
December 15, 1997	• Ms. Jones's lawyers notify the President's lawyers that they will depose Jane Doe #5 on Jan. 9. • Ms. Jones's lawyers depose Onie E. "Betsey" Wright, who had been responsible for responding to "other women" accusations during the 1992 campaign.

December 16, 1997	• Ms. Jones's lawyers move to compel the President to answer the remaining questions in their first set of requests for admissions (#51-65) and their third set of interrogatories (asking for names of those with discoverable information). • Ms. Jones's lawyers serve their second request that the President produce documents and things, this time asking for those that concerned Ms. Lewinsky. • At 2:00 a.m. that night (on 12/17/97), the President calls Ms. Lewinsky and tells her that she is on the witness list.
December 18, 1997	Holding the testimony of Jane Does #1-3 "discoverable," Judge Wright grants Ms. Jones's motion to compel their testimony but requires that Ms. Jones establish a "factual predicate" and meet certain other conditions.
December 19, 1997	• Ms. Lewinsky receives a subpoena then meets with Vernon Jordan.
December 22, 1997	Vernon Jordan introduces Ms. Lewinsky to Frank Carter.
December 23, 1997	• The President serves supplemental responses to the second set of interrogatories, answering #10-11 (asking for names of women with whom he has had or proposed having "sexual relations") with "none." The President verifies "under penalty of perjury" that this answer is true and correct. • Mr. Carter meets with the President's lawyers.
December 24, 1997	Ms. Jones's lawyers move for reconsideration of Judge Wright's Dec. 18 order establishing the "factual predicate" requirement.
December 30, 1997	• The President's lawyer, Robert Bennett, concede during a hearing before Judge Wright that questions related to "sex-for-jobs" would be "fair game." • Ms. Jones's lawyers move to sanction the President's lawyers for making argumentative and suggestive objections to deposition questions.
January 2, 1998	• Jane Doe #2 testifies at a deposition. • Jane Doe #5 signs an affidavit denying any "sexual activity" with the President.
January 5, 1998	• Ms. Lewinsky meets with her attorney. • Ms. Jones's lawyers notify the President's lawyers that they plan to depose Jane Doe #5; Jane Doe #5 moves to quash, attaching her affidavit.

January 7, 1998	• Ms. Lewinsky prepares and signs an affidavit denying sexual relations with the President. • The President's lawyers file an opposition to Ms. Jones's motion for reconsideration of the Dec. 18 order.
January 8, 1998	• Judge Wright orders the President to answer the as-yet-unanswered questions from the third set of interrogatories and the first set of requests for admission (#51-65), holding that such answers were "relevant to the case." • Judge Wright denies Jane Doe #5's motion to quash.
January 9, 1998	• Judge Wright partly grants Ms. Jones's motion for reconsideration of her Dec. 18 order, allowing more questions than she has before. • Jane Doe #5 testifies at a deposition.
January 11, 1998	Kathleen Willey testifies at a deposition.
January 12, 1998	• Judge Wright holds a hearing discussing the President's deposition and what evidence she might permit at trial, but encourages the parties to settle.
January 15, 1998	• The President serves supplemental answers to the first and second sets of requests for documents and things, asserting that he has no documents or tangible things related to Ms. Lewinsky or Ms. Willy. • The President serves supplemental responses to the first set of requests for admissions, objecting to but then denying requests #51-65 (which ask him to name other women with whom he has had "sexual relations"). • The President serves supplemental responses to the third set of interrogatories, naming two other people with discoverable information (but not naming Ms. Lewinsky). • The President verifies all these supplemental answers "under penalty of perjury."
January 16, 1998	• Ms. Jones's lawyers notifies the President's lawyers that Jane Doe #3 would be deposed on Jan. 28. • Mr. Carter moves to quash Ms. Lewinsky's subpoena.
January 17, 1998	The President testified, in a videotaped deposition, that he had not had sexual relations (as defined) with Ms. Lewinsky.

January 22, 1998	• Judge Wright conducts a hearing on Ms. Lewinsky's motion to quash, then directs Ms. Lewinsky's deposition to proceed but grants a motion to reschedule.
January 27, 1998	The Office of the Independent Counsel ("OIC") moves to intervene in the Jones case.
January 29, 1998	• The OIC asks Judge Wright to postpone the deposition of Ms. Lewinsky until the completion of its criminal investigation. • After a hearing, Judge Wright decides to exclude the Lewinsky evidence altogether, because (i) waiting would frustrate timely resolution of the Jones case; and (ii) the Lewinsky evidence, though it "might be relevant to the issues in this case," is "not essential to the core issues in this case.
January 30, 1998	• Another "other woman" testifies at a deposition, denying any "sexual activity" with the President. • Ms. Jones's lawyers move to compel the President to produce as-yet-unproduced documents, arguing that his claims of privilege are meritless.
February 10, 1998	Ms. Jones's lawyers move for reconsideration of the order excluding the Lewinsky evidence.
February 17, 1998	The President's lawyers move for summary judgment. (Mr. Ferguson's lawyers do likewise on March 4.)
March 9, 1998	Judge Wright denies Ms. Jones's motion for reconsideration of her order excluding the Lewinsky evidence, stating that although "such evidence might have helped [Jones] establish . . . intent, absence of mistake, motive, and habit . . . . it simply is not essential to the core issues in this case."
April 1998	Judge Wright dismisses the Jones case on the ground that Ms. Jones has not presented sufficient evidence to put the case before a jury. Ms. Jones appeals.

BACKGROUND

A. Introduction

Paula Corbin Jones sued President Clinton (and former Arkansas State Police officer Danny Ferguson) in May 1994, seeking civil damages in relation to an incident that allegedly took place in the Excelsior Hotel in Arkansas in 1991.[1] The discovery period, however, did not begin until 1997, when the Supreme Court held unanimously that the case could go forward while President Clinton was still serving as President.

In May 1997, federal district judge Susan Webber Wright began managing the civil discovery process -- a procedure in which both sides exchange relevant information in order to prepare for the next stage of the case. The specifics of the discovery period are described in the next section.

After the close of discovery, the President and Mr. Ferguson both filed motions for summary judgment. Judge Wright granted these motions on April 1, 1998, holding that Ms. Jones had "failed to demonstrate that she has a case worthy of submitting to a jury."[2] Ms. Jones has appealed, and the case is currently pending before the United States Court of Appeals for the Eighth Circuit.

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[1] The case is captioned Jones v. Clinton, LR-C-94-290.

[2] Jones v. Clinton, 990 F. Supp. 657, 679 (E.D. Ark. 1998).

B. Scope of Discovery

During the discovery period, the parties exchanged interrogatories, requests for admissions of fact, and requests for documents; they also took 56 depositions.[3] As with all federal civil cases, the scope of discovery was governed by the Federal Rules of Civil Procedure. These general rules were supplemented by several orders of Judge Wright. This section briefly describes these rules and orders.

1. The Types and Scope of Civil Discovery. Federal Rule of Civil Procedure 26(b)(1) provides the general standard for discoverable material:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[4]

Such material can be provided in response to interrogatories, requests for documents or tangible things, or testimony in depositions.

Interrogatories -- lists of written questions exchanged by the parties and answered in writing -- are governed by Federal

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[3] A list of the 56 deponents in Jones can be found at 1292-DC-00000647 (List of Depositions).

[4] Fed. R. Civ. P. 26(b)(1) (emphases added)

Rule of Civil Procedure 33, which states that interrogatories "may relate to any matters which can be inquired into under Rule 26(b)(1)."[5] In other words, an interrogatory may ask about any information that is "relevant to the subject matter" and "reasonably calculated to lead to the discovery of admissible evidence." Ms. Jones's lawyers served the President with three sets of interrogatories, as described below.

Requests for production of documents and tangible things in the "possession, custody or control of the party upon whom the request is served"[6] are permitted pursuant to Federal Rule of Civil Procedure 34. Rule 34(a) permits discovery of matters within the scope of Rule 26(b), which allows discovery of information "reasonably calculated to lead to the discovery of admissible evidence."[7]

Requests for admissions may be served upon parties under Rule 36, to the extent they request the verification of the "truth of any matters within the scope of Rule 26(b)(1)."[8] If a party makes a admission, the matter admitted is considered conclusively established absent a court order.[9]

Depositions -- statements made under oath -- are governed by Rule 30. Although Rule 30 does not explicitly limit the

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[5] Fed. R. Civ. P. 33(c).

[6] Fed. R. Civ. P. 34(a).

[7] Fed. R. Civ. P. 34(a), 26(b)(1).

[8] Fed. R. Civ. P. 36(a).

[9] Fed. R. Civ. P. 36(b).

permissible scope of deposition questioning, all discovery is limited by Rule 26(b)(1) and must be reasonably calculated to lead to admissible evidence.[10]

When a party receives an interrogatory, request for production of documents, or request for admissions, or is asked a question in a deposition, he must either answer truthfully or object. If the judge overrules the objection, the party must answer truthfully or be held in contempt. In addition, Rule 26(e) requires every party to supplement or correct a response to an interrogatory, production request, or request for admission if "the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."[11]

Special rules apply to sexual harassment cases. Principally, Federal Rule of Evidence 412 -- which was amended in 1994 "to expand the protection afforded alleged victims of sexual misconduct" -- is intended to "protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and . . . to encourage victims to come forward when they have been sexually molested."[12] Toward that end, Rule 412(a) restricts the admissibility of "[e]vidence

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[10] Fed. R. Civ. P. 30, 26(b)(1).

[11] Fed. R. Civ. P. 26(e)(2).

[12] Fed. R. Evid. 412, advisory committee's notes, 1994 amendments.

offered to prove that any alleged victim engaged in other sexual behavior."[13] Rule 412(a) also restricts the admissibility of "[e]vidence offered to prove any alleged victim's sexual predisposition."[14] Rule 412(b)(2) defines the exceptions to Rule 412(a)'s prohibitions:

> In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.[15]

There is no comparable rule for the accused, other than the generally applicable evidence rules.

2. The Scope of Discovery in Jones v. Clinton. Within the general framework set out by these rules, discovery in Jones was subject to the oversight of Judge Wright. Throughout the discovery period, the President, through his lawyers, repeatedly attempted to limit the amount of information Ms. Jones and her attorneys could discover about "other women" (women other than Hillary Rodham Clinton with whom the President had allegedly engaged in sexual relations).[16] Some of these "other women" who

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[13] Fed. R. Evid. 412(a)(1).

[14] Fed. R. Evid. 412(a)(2).

[15] Fed. R. Evid. 412(b)(2).

[16] Monica Lewinsky was referred to in court papers as "Jane Doe #6." The "other women" at issue during discovery in Jones included Gennifer Flowers, Dolly Kyle Browning, and several women identified in court papers only as "Jane Does #1-7." It is common for courts to refer to persons as "Jane Doe" or "John Doe" when necessary to protect their anonymity. This memorandum

were identified, as well as Ms. Jones herself, also objected to some of the attempts to discover information about them.

The key events in this discovery dispute occurred between August 22, 1997, and January 30, 1998. In four different orders, Judge Wright decided and emphasized that information related to the President's relationships with Monica Lewinsky and other women was properly discoverable because it was "reasonably likely to lead to admissible evidence."

Out of respect for the office of the Presidency, Judge Wright applied a "meticulous standard" of materiality (higher than the normal standard) in determining the scope of the questioning she would allow for discovery directed at the President.[17] Applying this standard, the judge limited the questioning on this subject: The Jones lawyers could ask only about encounters the President may have had after May 7, 1986, that involved state or federal employees and those whose liaisons were facilitated by state troopers. Within these restrictions, however, the judge held that Ms. Jones was entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations.[18]

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attempts to protect the confidentiality of the Jane Does wherever possible.

[17] 1414-DC-00000901 (Order of Dec. 11, 1997, at 5) (quoting United States v. Poindexter, 732 F. Supp. 142, 147 (D.D.C. 1990)).

[18] 1414-DC-00000899 (Order of Dec. 11, 1997, at 3).

In a later order, issued December 18, 1997, in which she directed Jane Does #1-3 to testify at depositions, the judge made clear that in determining the scope of discovery,

> the issue [at hand was] one of discovery, not admissibility of evidence at trial. Discovery, as all counsel know, by its very nature takes unforeseen twists and turns and goes down numerous paths, and whether those paths lead to the discovery of admissible evidence often simply cannot be predetermined.[19]

On December 30, 1997, at a telephone conference regarding the scope of discovery, Judge Wright explained that at trial Ms. Jones's attorneys would have to limit their evidence regarding "other women," but that some such evidence might be admissible: "I will not permit you to spend a lot of court time on this business about of [sic] other women. I do believe it is relevant and I will let you get some evidence in on that, but you're going to have to pick your evidence carefully."[20] Judge Wright further explained that, although she would "require the President's deposition to be tailored," she would not limit it to "stuff that's not embarrassing."[21] The judge recognized that certain information that was discoverable might be embarrassing and intrusive, but stated, "I can't protect the parties from embarrassment."[22]

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[19] 1414-DC-00001012-13 (Order of Dec. 18, 1997, at 7-8).

[20] 1414-DC-00001491 (Telephone Conference 12/30/97 Tr. at 47).

[21] 1414-DC-00001493 (Telephone Conference 12/30/97 Tr. at 49).

[22] 1414-DC-00001493 (Telephone Conference 12/30/97 Tr. at 47).

Judge Wright returned to this theme at the President's January 17, 1998, deposition, where she rejected the President's counsel's attempt to place new limits on the scope of questioning. In so ruling, Judge Wright again commented: "Unfortunately, the nature of this case is such that people will be embarrassed. I have never had a sexual harassment case where there was not some embarrassment."[23]

DISCOVERY

1994 - 1997 — Prelude to discovery: the Complaint, the attempt to stay the case until after the President's Term, and the motion to dismiss

At the time of the alleged Excelsior Hotel incident, Ms. Jones was employed by the Arkansas Industrial Development Commission ("AIDC"), a state government agency.[24] According to Ms. Jones's allegations, then-Governor Clinton made unwelcome sexual advances toward her, and she rejected the Governor's advances.[25] Ms. Jones further alleged that the advances, and subsequent lack of job advancement, had violated several laws and constitutional provisions.[26]

The four counts of the complaint alleged, respectively:

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[23] 849-DC-00000360 (Clinton 1/17/98 Depo. at 9).

[24] Jones v. Clinton, 990 F. Supp. 657, 662-64 (E.D. Ark. 1998).

[25] Id. at 663-64.

[26] Id. at 665-66.

(1) that then-Governor Clinton, acting under color of state law, deprived [Ms. Jones] of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution by sexually harassing and assaulting her;

(2) that Governor Clinton and Ferguson conspired to deprive [Ms. Jones] of her rights to equal protection of the laws and of equal privileges and immunities under the laws;

(3) intentional infliction of emotional distress [by] the President, based primarily on the alleged incident at the hotel but also encompassing subsequent alleged acts; and

(4) that the President, through his press aides and attorney, defamed [Ms. Jones] by denying the allegations that underlie [her] lawsuit and by questioning her motives, and that Ferguson defamed her by making comments to the press suggesting that she willingly participated in a sexual encounter.[27]

On August 10, 1994, the President moved to dismiss Ms. Jones's complaint,[28] arguing that he was immune from suit until after he completed his service as President.[29] Judge Wright denied the President's motion and ruled that discovery in the case could proceed, but that any trial would not occur until the President left office.[30] Both parties appealed, and in January 1996, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed Judge Wright's decision

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[27] Jones v. Clinton, 974 F. Supp. 712, 718 (E.D. Ark. 1997).

[28] Id. at 715 n.1.

[29] Jones v. Clinton, 869 F. Supp. 690, 692 (E.D. Ark. 1994).

[30] Id. at 699-700.

to order discovery, but reversed her decision to postpone any trial until after the President left office.[31]

The case then went to the Supreme Court, which heard oral argument in Jones in January 1997.[32] During oral argument, the President's attorney, Robert Bennett, warned that permitting a case like Jones to go forward could embarrass the Presidency, in part because the trial court might permit inquiry into contacts between the President and members of the opposite sex.[33] In May 1997 the Supreme Court unanimously affirmed the Eighth Circuit's decision and remanded the case to the district court so that discovery (and any further proceedings such as trial) could proceed.[34]

The President's lawyers then moved, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for dismissal of the complaint for failure to state a claim.[35] Granting in part and denying in part, Judge Wright in August 1997 dismissed Ms. Jones's due process claim in Count I and her defamation claim against the President in Count IV. As to the other claims (the

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[31] Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996).

[32] Clinton v. Jones, 117 S. Ct. 1636, 1636 (1997).

[33] 1414-DC-00000690-91 (Official Transcript, Proceedings before the Supreme Court of the United States, Clinton v. Jones, No. 95-1853, at 13-14 (Jan. 13, 1997)).

[34] Clinton v. Jones, 117 S. Ct. 1636, 1651 (1997).

[35] In other words, they argued that even if every factual allegation made by Ms. Jones were true, the law did not authorize the court to grant her a remedy.

intentional infliction of emotional distress, the equal protection claim, and the defamation claim against Trooper Ferguson), Judge Wright held that discovery could proceed.[36]

Sept.-Oct. 1997: Discovery begins with interrogatories

Attorneys for Ms. Jones had submitted her first set of interrogatories to the President on June 19, 1997. The six interrogatories asked the President about his alleged encounter with Paula Jones on May 8, 1991.[37] On September 22, 1997, the President served his responses to those interrogatories,[38] and on September 30, the President declared "under penalty of perjury" that these responses were "true and correct to the best of my knowledge and belief."[39]

The next day -- Wednesday, October 1, 1997 -- Ms. Jones's new law firm (Rader, Campbell, Fisher & Pyke)[40] served the President's counsel with a second set of interrogatories.[41] Interrogatory No. 10 stated:

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[36] Jones v. Clinton, 974 F. Supp. 712, 732 (E.D. Ark. 1997).

[37] 849-DC-00000002-10 (Plaintiff's First Set of Interrogatories to Defendant William Jefferson Clinton).

[38] 849-DC-00000011-17 (President Clinton's Responses to Plaintiff's First Set of Interrogatories).

[39] 849-DC-00000018 (Verification).

[40] 921-DC-00000048 (Plaintiff's Motion for Protective Order (Concerning Plaintiff's Deposition)).

[41] 921-DC-00000101-18 (Second Set of Interrogatories from Plaintiff to Defendant Clinton).

> Please state the name, address, and telephone number of each and every individual (other than Hillary Rodham Clinton) with whom you had sexual relations when you held any of the following positions:
>
> a. Attorney General of the State of Arkansas;
> b. Governor of the State of Arkansas;
> c. President of the United States.[42]

Interrogatory No. 11 stated:

> Please state the name, address, and telephone number of each and every individual (other than Hillary Rodham Clinton) with whom you proposed having sexual relations, or with whom you sought to have sexual relations, when you held any of the following positions:
>
> a. Attorney General of the States of Arkansas;
> b. Governor of the States of Arkansas;
> c. President of the United States.[43]

The phrase "sexual relations" was not defined.

Also on October 1, 1997, Ms. Jones's attorneys asked the President to provide certain categories of documents and tangible things -- if they were in the President's "immediate possession" or under his "custody or control"[44] -- that related to Ms. Jones, several other individuals, the President's sexual activities, the President's legal fees, and various other subjects.[45] The request defined "document" to mean "any tangible thing on which appears, or in which is stored or contained, any words, numbers,

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[42] 921-DC-00000107 (Second Set of Interrogatories from Plaintiff to Defendant Clinton at 7).

[43] 921-DC-00000108 (Second Set of Interrogatories from Plaintiff to Defendant Clinton at 8).

[44] 1414-DC-00001510 (First Set of Requests from Plaintiff to Defendant Clinton for Production of Documents and Things at 3).

[45] 1414-DC-00001508-33 (First Set of Requests from Plaintiff to Defendant Clinton for Production of Documents and Things).

symbols, or images," as well as "any and all writings, drawings, graphs, charts, photographs, phono records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices, into reasonably usable form."[46]

Early Oct. 1997: **Requests for admissions served on the President**

On Wednesday, October 8, 1997, Ms. Jones's lawyers served the President's lawyers with their first set of requests for admissions.[47] These requests asked the President to admit or deny issues related to Ms. Jones and other women. In particular, Requests #51-65 asked the President about "sexual relations" he had with "other women."[48] The requests did not define "sexual relations."

Mid-Oct. 1997: **Depositions begin; Dolly Kyle Browning subpoenaed**

On Monday, October 13, 1997, Ms. Jones's attorneys served the President's lawyers with a third set of interrogatories. The interrogatories asked the President about any person who may have discoverable information; any conversation the President may have

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[46] 1414-DC-00001509 (First Set of Requests from Plaintiff to Defendant Clinton for Production of Documents and Things at 2).

[47] 1414-DC-00000002-23 (First Set of Requests from Plaintiff to Defendant Clinton for Admissions).

[48] 1414-DC-000000015-19 (First Set of Requests from Plaintiff to Defendant Clinton for Admissions at 14-18). These requests were filed with the District Court on October 14, 1997. 1414-DC-00000002 (First Set of Requests from Plaintiff to Defendant Clinton for Admissions at 1).

had with Mr. Ferguson; and any conversation the President had had with anyone about the alleged May 8, 1991, Excelsior Hotel incident.[49]

On Tuesday, October 14, the President's lawyers and Mr. Ferguson's lawyers deposed Lydia Cathey (Ms. Jones's sister). They asked Ms. Cathey about Ms. Jones's description of her alleged encounter with the President.[50]

On Monday, October 20, 1997, Ms. Jones's lawyers filed a deposition notice for Dolly Kyle Browning, stating that Ms. Browning's deposition would commence in Dallas, Texas on Tuesday, October 28, 1997.[51]

Two days later, on Wednesday, October 22, 1997, two investigators visited an alleged "other woman," Jane Doe #7, and asked her, in her words, "highly embarrassing, suggestive and vile questions concerning my private life."[52]

Meanwhile, one of the President's lawyers, Mitchell S. Ettinger, sent a letter dated October 23, 1997, and a draft pleading to Dolly Kyle Browning's lawyer, Dorcy Corbin. The letter described an earlier conversation in which Ms. Corbin told

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[49] 1414-DC-00000984-92 (Third Set of Interrogatories from Plaintiff to Defendant Clinton).

[50] 1414-DC-00000543-48 (Cathey 10/14/97 Depo. at 165-70).

[51] 921-DC-00000043-46 (Plaintiff's Notice Duces Tecum of the Deposition upon Oral Examination of Dolly Kyle Browning).

[52] 920-DC-00000895 (Jane Doe #7 11/18/97 Aff. at 3). (Jane Doe #7 received a subpoena from Ms. Jones's attorneys on November 14, 1997, and testified at a deposition on November 21, 1997. See infra.)

the President's lawyer that Ms. Browning "does not possess any information relevant to the Paula Jones matter and therefore does not wish to be deposed."[53] The attachments to the letter were a draft motion to quash the subpoena and an accompanying draft of a supporting memorandum of points and authorities.[54]

Oct. 28-29, 1997: **The President's attorneys move to limit discovery of "other women"; Dolly Kyle Browning testifies; Ms. Jones's attorneys move to limit discovery of her sexual history; Jane Doe #1 subpoenaed**

On Tuesday, October 28, 1997, the President through his attorneys moved for a protective order to limit the scope of discovery regarding "other women."[55] Specifically, the President's lawyers requested that discovery be limited to non-consensual conduct occurring close in time, and in the same work place as the alleged incident with Ms. Jones.[56]

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[53] DE-DC-00000081 (Letter from Mitchell S. Ettinger to Dorcy Corbin (Oct. 23, 1997)).

[54] DE-DC-00000082-82 (Motion for a Protective Order and Motion to Quash Subpoena Duces Tecum and Notice of Deposition); DE-DC-00000083-87 (Dolly Kyle Browning's Memorandum of Points and Authorities in Support of Motion for Protective Order and Motion to Quash).

[55] 1414-DC-00000627-30 (President Clinton's Motion for Protective Order); 1414-DC-00000631-51 (Memorandum in Support of President Clinton's Motion for a Protective Order). This motion was file-stamped on November 5. 1414-DC-00000627 (President Clinton's Motion for Protective Order at 1).

[56] 1414-DC-00000628 (President Clinton's Motion for Protective Order at 2).

Also on October 28, 1997, Dolly Kyle Browning testified at a deposition. She was questioned by Ms. Jones's attorneys about an alleged sexual relationship with President Clinton.[57]

Also on October 28, 1997, Ms. Jones's attorneys served an emergency motion asking Judge Wright to limit the President's attempted discovery of alleged "other men" (that is, men who allegedly had sexual relations with Ms. Jones), arguing that the discovery was "conducted solely to annoy and oppress Plaintiff."[58]

The next day, Wednesday, October 29, 1997, Ms. Jones's attorneys issued a subpoena to a woman anonymously identified as Jane Doe #1, requiring her to appear for a deposition on November 18, 1997.[59] The subpoena also commanded Jane Doe #1 to produce documents and other tangible things that referenced her communications and meetings with the President.[60]

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[57] DE-DC-00000028 (Browning 10/28/97 Depo. at 29-30).

[58] 1414-DC-00000518-33 (Emergency Motion of Plaintiff under Rule 30(d)(3) and Rule 26(c) for Protection against Defendants' Bad-Faith Deposition Campaign Orchestrated and Conducted Solely to Annoy and Oppress Plaintiff and Brief Thereon). The motion was file-stamped on November 3, 1997. 1414-DC-00000518 (Emergency Motion of Plaintiff under Rule 30(d)(3) and Rule 26(c) for Protection against Defendants' Bad-Faith Deposition Campaign Orchestrated and Conducted Solely to Annoy and Oppress Plaintiff and Brief Thereon at 1)

[59] 921-DC-00000165-67 (Subpoena in a Civil Case to [Jane Doe #1]).

[60] 921-DC-00000167 (Requests for Production).

Oct. 30-Nov. 5, 1997: Jane Doe #2 subpoenaed; the President objects to "other women" interrogatories; investigators visit Jane Doe #5

On Thursday, October 30, 1997, Judge Wright entered an order that set forth restrictions and conditions on all discovery in the Jones case.[61] Also on October 30, 1997, a process server gave Jane Doe #2 a subpoena, albeit with some difficulty.[62] Ms. Jones's attorneys on this day served the President's lawyers with a copy of the subpoena given to Jane Doe #2.[63]

On Monday, November 3, 1997, the President's attorneys served Ms. Jones's attorneys with responses to her second set of interrogatories.[64] The President "declare[d] under penalty of perjury" that the responses given were "true and correct to the best of my knowledge and belief."[65] The President objected to and refused to answer several of the interrogatories, including Interrogatories #10 & 11[66] (which asked the President about his "sexual relations" he had had or proposed having with "other women.")

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[61] Confidentiality Order on Consent of All Parties, Jones v. Clinton, No. LR-C-94-290 (Oct. 31, 1997)).

[62] The subpoena scheduled the deposition for November 7, 1997. 920-DC-00000654 (Subpoena in a Civil Case).

[63] 920-DC-00000660-64 (Plaintiff's Notice Duces Tecum of the Deposition upon Oral Examination of [Jane Doe #2]).

[64] 849-DC-00000037-53 (President Clinton's Responses To Plaintiff's Second Set of Interrogatories).

[65] 849-DC-00000052 (Verification).

[66] 849-DC-00000041-42 (President Clinton's Responses To Plaintiff's Second Set of Interrogatories at 5-6).

In Arkansas, investigators for Ms. Jones continued their work. At some point in November, "two private investigators retained by Paula Corbin Jones approached [Jane Doe #5] at [her] residence. [She] declined to speak with them, but provided the name of [her] family attorney. [She] subsequently was served with a subpoena seeking the production of documents and purporting to require [her] testimony at a deposition . . . ."[67]

On November 5, 1997, Ms. Jones's lawyers filed a motion asking that Ms. Jones's deposition -- scheduled for November 20, 1997 -- occur at a location other than the Little Rock law firm of Wright, Lindsey & Jennings, so that Ms. Jones and her lawyers could avoid a "media sideshow."[68]

Nov. 6, 1997: **The parties discuss the President's deposition**

On Thursday, November 6, 1997, Judge Wright conducted a hearing on L.D. Brown's request for a protective order and denied it. Judge Wright also denied Ms. Jones's motion for a protective order for her deposition, and then determined that the deposition of the President would occur on January 17, 1998.[69] Counsel for

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[67] 920-DC-00000962 (Jane Doe #5 1/2/98 Aff. at 1). The date of Jane Doe #5's first subpoena was November 20, 1997. 920-DC-00000967 (Subpoena in a Civil Case). She was served with that subpoena on November 22, 1997. 920-DC-00000969 (Affidavit of Service). Her second subpoena was dated December 11, 1997, and she was served with the second subpoena on December 18, 1997. 920-DC-00000972 (Affidavit of Service).

[68] 921-DC-00000050 (Plaintiff's Motion for Protective Order (Concerning Plaintiff's Deposition) at 4).

[69] 921-DC-00000061-62 (Clerk's Minutes). According to the minutes, one of Ms. Jones's counsel "state[d] a date is needed

the parties then discussed the President's deposition, at least with respect to witnesses with "knowledge concerning events," and Judge Wright explained that Ms. Jones and her attorneys "will have names of potential witnesses in earlier discovery."[70]

Nov. 7, 1997: **Jane Doe #2 fails to appear for a deposition**

On Friday, November 7, 1997, attorneys for Ms. Jones traveled to Little Rock for the scheduled deposition of Jane Doe #2. Jane Doe #2 failed to appear.[71] (Attorneys for Ms. Jones re-noticed the deposition for November 24, 1997. The attorney for Jane Doe #2 then re-scheduled the deposition for December 5, 1997, and then filed a motion asking Judge Wright for a protective order and to quash the subpoena.)[72]

Nov. 10-12, 1997: **The President answers requests for admissions and third set of interrogatories; troopers testify; Jane Does #2-3 subpoenaed; deposition of Paula Jones begins**

On Monday, November 10, 1997, the President through his counsel responded to Ms. Jones's first set of requests for

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for [President] Clinton's discovery deposition. Bennett respond[ed] that they would like it to be Saturday, January 17th." 921-DC-00000062 (Clerk's Minutes at 2).

[70] 921-DC-00000062 (Clerk's Minutes at 2).

[71] 921-DC-00000293 (Plaintiff's Memorandum in Opposition to the Motion of "Jane Doe No. 2" for Protective Order and Motion to Quash Subpoena Dues [sic] Tecum and Notice of Deposition at 1).

[72] 921-DC-00000294 (Plaintiff's Memorandum in Opposition to the Motion of "Jane Doe No. 2" for Protective Order and Motion to Quash Subpoena Dues [sic] Tecum and Notice of Deposition at 2).

admissions (served on October 8, 1997).[73] The President answered some of the questions. For example, he denied that he had asked Ms. Jones to have "sexual relations" with him.[74] The President objected to and refused to answer other questions. For example, Request for Admission #51, and the President's response, stated:

> Please admit or deny the following: While he was Governor of the State of Arkansas, Defendant Clinton had sexual relations with at least one woman (other than Hillary Rodham Clinton), and at least one member of the Arkansas State Police arranged at least one meeting between Defendant Clinton and the woman.
>
> **RESPONSE:** President Clinton objects to this Request for Admission in that it is intended solely to harass, embarrass and humiliate the President and the Office he occupies. President Clinton also objects to this Request for Admission in that it pertains to subject matter beyond the reasonable scope of discovery in this proceeding.[75]

Also on November 10, 1997, former Arkansas state trooper L.D. Brown testified at a deposition in Little Rock.[76] The next morning, Arkansas state trooper Larry Patterson testified at a deposition in Little Rock.[77] Both troopers were questioned about

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[73] 921-DC-00000067-95 (President Clinton's Responses to Plaintiff's First Set of Requests for Admissions).

[74] 921-DC-00000081-82 (President Clinton's Responses to Plaintiff's First Set of Requests for Admissions at 15-16).

[75] 921-DC-00000083-84 (President Clinton's Responses to Plaintiff's First Set of Requests for Admissions at 17-18).

[76] 1292-DC-00000255-377 (Brown 11/10/97 Depo.).

[77] 1292-DC-00000407-585 (Perry 11/11/98 Depo.).

whether they had arranged private meetings for Governor Clinton and other women.[78]

On Wednesday, November 12, 1997, the President through his attorneys served Ms. Jones's attorneys with the President's responses to Ms. Jones's third set of interrogatories (those served on October 13).[79] In response to an interrogatory that asked the President to state the name, address, and telephone numbers of "each and every person who has, or who is likely to have, discoverable information relevant to one or more disputed facts alleged with particularity in the pleadings in this case," the President provided a list of names that did not include Ms. Lewinsky.[80] The President then stated, "I have read the foregoing responses to Plaintiff's Third Set of Interrogatories and declare under penalty of perjury that they are true and correct to the best of my knowledge and belief."[81] The President did, however, "reserve[] the right to supplement this response with additional names."[82]

Also on November 12, 1997, Ms. Jones through her counsel filed a motion (with accompanying memorandum) seeking to compel

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[78] See, e.g., 1292-DC-00000272 (Brown 11/10/97 Depo. at 17); 1292-DC-00000417 (Patterson Depo. at 10).

[79] 849-DC-00000090-102 (President Clinton's Responses to Plaintiff's Third Set of Interrogatories).

[80] 849-DC-00000090-92 (President Clinton's Responses to Plaintiff's Third Set of Interrogatories at 1-3).

[81] 849-DC-00000096 (Verification).

[82] 849-DC-00000091-92 (President Clinton's Responses to Plaintiff's Third Set of Interrogatories at 2-3).

the President to respond to those questions in her second set of interrogatories that he had refused to answer in his answer of November 3, 1997 (Interrogatories #10, 11).[83] In the motion, counsel for Ms. Jones argued that the President ought to be required to answer these two interrogatories -- the "other women" interrogatories -- and asserted that "discovery . . . is governed by very liberal standards that give Plaintiff a wide berth."[84] Counsel for Ms. Jones observed that the President "has made it clear in the past, and confirms in the Responses, that he disagrees with the Court's statements that there are at least some situations, in cases such as this, in which evidence of the defendant's extramarital sexual activity, is not only relevant and discoverable, but admissible."[85] Ms. Jones's counsel then argued that it was important for Ms. Jones to obtain this information prior to the President's deposition because Judge

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[83] 921-DC-00000096-151 (Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories to Defendant Clinton); 921-DC-00000152-61 (Memorandum in Support of Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories to Defendant Clinton).

[84] 921-DC-00000155 (Memorandum in Support of Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories to Defendant Clinton at 4).

[85] 921-DC-00000156 (Memorandum in Support of Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories to Defendant Clinton at 5) (emphasis in original). Admissibility in this context apparently refers to evidence that would be admissible at a trial, a much narrower category of information than is available to parties during discovery in civil cases. For example, a hearsay question that would be plainly inadmissible at trial would be discoverable, because it would allow a party to learn the identity of a witness.

Wright had indicated that the President's deposition would be of limited duration because of the respect due his office.[86]

Also on November 12, 1997, Ms. Jones's counsel notified the President's counsel of a second deposition notice issued to Jane Doe #2[87] and issued a subpoena to Jane Doe #3, which she received the next day.[88]

And, still on November 12, 1997, the President's attorneys deposed Paula Jones. Ms. Jones testified about what she claimed was sexually unwelcome "disgusting" conduct by the President.[89] The President's lawyer, Robert Bennett, asked Ms. Jones about the alleged May 8, 1991, Excelsior Hotel incident.[90] The lawyer for Defendant Ferguson, Mr. Bristow, asked Ms. Jones about Ms. Jones's pre-marital sexual relations with her husband and other men.[91]

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[86] 921-DC-00000157 (Memorandum in Support of Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories to Defendant Clinton at 6).

[87] 920-DC-00000665-69 (Plaintiff's Amended Notice Duces Tecum of the Deposition upon Oral Examination of [Jane Doe#2]).

[88] 920-DC-00000796-800 (Subpoena in a Civil Case).

[89] 1414-DC-00000130(Jones 11/12/97 Depo. at 108).

[90] 1414-DC-00000102-20 (Jones 11/12/97 Depo. at 79-97).

[91] 1414-DC-00000196-200 (Jones 11/12/97 Depo. at 174-78).

Nov. 13-14, 1997: **Deposition of Paula Jones finishes; Jane Doe #7 served with a subpoena; deposition of Gennifer Flowers**

On Thursday, November 13, 1997, Ms. Jones completed her deposition testimony.[92] The next day, Jane Doe #7 received a subpoena directing her to appear for a deposition on November 19, 1997, and to produce documents.[93] And in Dallas, Texas, Gennifer Flowers was asked about her alleged sexual relationship with President Clinton.[94]

Nov. 17, 1997: **The President responds to plaintiff's first request for documents and things**

On November 17, 1997, the President responded to Ms. Jones's first request for documents and things (which he had received on October 1, 1997). The President's lawyers raised numerous objections to the requests. In particular, the President, through his attorneys, objected to the requests but stated that he had no documents or other things that related to other women.[95] For example, one request and the President's response state:

> **REQUEST FOR PRODUCTION NO. 30:** Please produce each and every document (including but not limited to letters, memoranda, postcards, and e-mails) sent at any time to

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[92] 1414-DC-00000290-510 (Jones 11/13/97 Depo. at 486-87).

[93] 920-DC-00000895 (Jane Doe #7 11/18/97 Aff. at 3); 920-DC-00000898 (Affidavit Of Service).

[94] 1292-DC-00000586-645 (Flowers 11/14/97 Depo.).

[95] V002-DC-00000056-92 (President Clinton's Responses to Plaintiff's First Set of Requests for Production of Documents and Things).

> Defendant Clinton by any woman (other than Hillary Rodham Clinton) with whom Defendant Clinton had sexual relations when he held any of the following positions:
>
> a. Attorney General of the State of Arkansas;
> b. Governor of the State of Arkansas;
> c. President of the United States.
>
> **RESPONSE:** President Clinton objects to this Request for Production as it is intended solely to harass, embarrass, and humiliate the President and the Office he occupies. President Clinton also objects to this Request for Production in that it pertains to subject matter beyond the reasonable scope of discovery in this proceeding, is overbroad, redundant and not likely to lead to the discovery of admissible evidence. Notwithstanding the above objections, and General Objection 4, President Clinton has no documents responsive to this Request.[96]

General Objection 4 states:

> President Clinton objects to the First Set of Requests for Production of Documents and Things to the extent it is designed to elicit production of materials from President Clinton's campaigns for public office, including the 1996 Presidential Election Campaign, that were created merely for the purpose of responding to the rumors, speculation and innuendo generated by the tabloid press and political opponents of the President. Notwithstanding this objection, President Clinton personally has no such documents. Nonetheless, we are inquiring of other persons or entities who may have possession, custody or control of campaign materials as to whether any such materials are responsive.[97]

Nov. 18-19, 1997: Objections of alleged "other women" Jane Doe #1 and Jane Doe #7; Jane Doe #7 ordered to testify

On Tuesday, November 18, 1997, counsel for Ms. Jones deposed Jane Doe #1, but the deposition ended after less than an hour

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[96] V002-DC-00000075 (President Clinton's Responses to Plaintiff's First Set of Requests for Production of Documents and Things at 20) (emphasis added).

[97] V002-DC-00000057 (President Clinton's Responses to Plaintiff's First Set of Requests for Production of Documents and Things at 2) (emphasis added).

when Jane Doe #1 asserted a "constitutional privilege of privacy."[98] Judge Wright conducted two hearings to address this issue, but decided that the deposition would "not go on today," because Jane Doe #1 was ill.[99]

Also on November 18, 1997, Jane Doe #1 filed objections to the subpoenas she had received.[100] Jane Doe #7 signed an affidavit in which she asserted that she "simply do[es] not have any knowledge that is pertinent to the lawsuit filed by Paula Jones."[101] Her attorneys also moved to quash her subpoena and sought a protective order.[102]

The next day, Wednesday, November 19, 1997, Judge Wright conducted a brief hearing to consider Jane Doe #7's motion to quash her subpoena, denied the motion, and indicated that "it is appropriate for [the] deposition to go forward."[103] Judge Wright explained that she had to "treat [this case] as a sexual harassment case as other such cases and state[d] reasons for

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[98] 921-DC-00000204-29 (Jane Doe #1 11/18/97 Depo.).

[99] 921-DC-00000265 (Clerk's Minutes).

[100] 921-DC-00000162-67 (Objection of Jane Doe [#1] to Subpoena Duces Tecum).

[101] 920-DC-00000896 (Jane Doe #7 11/18/97 Aff. at 4).

[102] 921-DC-00000168-75 (Motion to Quash Subpoena and for Protective Order); 921-DC-00000176-85 (Brief in Support of Motion to Quash Subpoena and for Protective Order).

[103] 921-DC-00000266 (Clerk's Minutes at 1).

allowing [the] discovery process and cannot protect them from this."[104]

Also on November 19, 1997, in Richmond, Virginia, Judge Robert R. Merhige of the United States District Court for the Eastern District of Virginia conducted a closed hearing on a motion filed by Kathleen Willey in which she sought to quash the subpoena commanding her to appear for a deposition on December 4, 1997.[105] Ms. Jones's attorneys had originally subpoenaed Ms. Willey herein for her deposition and document production on July 29, 1997, but, according to Ms. Jones's attorneys, Ms. Willey "vigorously opposed" the subpoena.[106] (On December 16, 1997, Judge Merhige then issued an order requiring Ms. Willey to testify at a deposition, which Ms. Willey eventually did on January 11, 1998.)[107]

Nov. 20, 1997: **The President supports Jane Does' motions; Jane Doe #1 moves to terminate her deposition; Jane Doe #5 subpoenaed**

On November 20, 1997, the President through his counsel filed a pleading supporting the Jane Does' motions to quash. The President's memorandum complained that "plaintiff's discovery in this matter . . . has improperly invaded the rights of privacy of

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[104] 921-DC-00000266 (Clerk's Minutes at 1).

[105] 1414-DC-00001150-68 (Sealed Hearing 11/19/97 Tr.).

[106] DE-DC-00000204 (Plaintiff's Motion to Compel Further Deposition Testimony from Kathleen Willey at 1).

[107] DE-DC-00000215-16 (Order Regarding Kathleen Willey Deposition Date).

innocent third parties whose only connection to this matter is that they may have worked for or been a friend of President Clinton."[108] The President's memorandum charged that "plaintiff's entire discovery plan is designed to harass and cause embarrassment to the President and others, not to obtain relevant information or information that is likely to lead to the discovery of admissible evidence."[109]

Also on November 20, 1997, Jane Doe #1 filed a motion and an accompanying memorandum with Judge Wright.[110] Her motion requested that Judge Wright order her deposition "terminate[d] or eliminate[d]."[111] And, on November 20, 1997, Ms. Jones's attorneys issued a subpoena for Jane Doe #5, which she received the subpoena on November 22, 1997.[112]

Nov. 21, 1997: **Ms. Jones's lawyers file a response to Jane Doe #1's motion; Jane Doe #2 files a motion to quash; Jane Doe #7 testifies**

On November 21, 1997, Ms. Jones's counsel responded to Jane Doe #1's November 20, 1997, motion seeking to stop her

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[108] 921-DC-00000186 (President Clinton's Memorandum in Support of Third Parties' Motion to Quash at 1).

[109] 921-DC-00000187-88 (President Clinton's Memorandum in Support of Third Parties' Motion to Quash at 2-3).

[110] 921-DC-00000190-92 (Motion of Jane Doe [#1] to Terminate or Limit Examination); 921-DC-00000193-200 (Brief in Support of Motion of Jane Doe [#1] to Terminate or Limit Examination).

[111] 921-DC-00000191 (Motion of Jane Doe [#1] to Terminate or Limit Examination at 2).

[112] 920-DC-00000967-68 (Subpoena in a Civil Case) 920-DC-00000969 (Affidavit of Service).

deposition.[113] In the response, Ms. Jones's counsel explained that the purpose of the deposition was "to discover additional facts establishing a pattern of improper action under color of state law. It concerns the illegal use of state resources to facilitate, and to conceal, Defendant Clinton's predatory sexual activity while he was Governor of the State of Arkansas and in command of those resources."[114] Counsel for Ms. Jones noted that Judge Wright "has already ruled that the discovery of such facts may go forward -- under the strict confidentiality provisions imposed by the Court."[115]

Also on November 21, 1997, Jane Doe #2 filed a motion and accompanying memorandum to quash the subpoena she had received.[116] Ms. Jones's attorneys served another amended deposition notice that day on Jane Doe #2, scheduling her deposition for December 5, 1997.[117]

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[113] 921-DC-00000248-56 (Plaintiff's Memorandum in Opposition to the Motion of [Jane Doe #1] to Terminate or to Limit her Deposition and to Protect Constitutional Privilege).

[114] 921-DC-00000248-49 (Plaintiff's Memorandum in Opposition to the Motion of [Jane Doe #1] to Terminate or to Limit her Deposition and to Protect Constitutional Privilege at 1-2).

[115] 921-DC-00000249 (Plaintiff's Memorandum in Opposition to the Motion of [Jane Doe #1] to Terminate or to Limit her Deposition and to Protect Constitutional Privilege at 2).

[116] 921-DC-00000257-58 (Motion for a Protective Order and Motion to Quash Subpoena Duces Tecum and Notice of Deposition); 921-DC-00000259-63 (Brief in Support of Motion for Protective Order and Motion to Quash).

[117] 920-DC-00000670-74 (Plaintiff's Amended Notice Duces Tecum of the Deposition upon Oral Examination Of [Jane Doe #2]).

Additionally, Ms. Jones's lawyers served the President's lawyers with a notice of their intent to depose Jane Doe #3 on December 5, 1997.[118] (The depositions of both Jane Doe #2 and Jane Doe #3 occurred on December 5, 1997, but both refused to answer questions, as explained below.) Jane Doe #7 testified at a deposition for one hour, stating that the President had never acted in a "sexual manner" in her presence.[119]

Nov. 24-26, 1997: **Judge Wright orders discovery of Jane Doe #1 to proceed; Jane Doe #1 claims that her name was leaked to the media; the President argues that he has a constitutional privacy interest in not responding to interrogatories**

In Little Rock on November 24, 1997, Judge Wright considered the objection of Jane Doe #1 to her deposition. Judge Wright overruled Jane Doe #1's objection, explaining:

> [Plaintiff] is entitled to ask questions that are calculated to lead to admissible evidence; Court states areas that would be discoverable material.
>
> [Robert] Bennett [the President's lawyer] argues that he does not agree with the Court. . . .
>
> * * * *
>
> In response to Bennett's concerns, Court states that [counsel for Ms. Jones] has to lay predicate for certain questions but she can't claim privacy for address and where she works.
>
> In response to Bennett's concerns that pleadings will become public and do damage to institution of presidency, Court states questions have to be related to this cause of action and believes the Rules of

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[118] 920-DC-00000806-10 (Plaintiff's Amended Notice Duces Tecum of the Deposition upon Oral Examination of [Jane Doe #3]).

[119] 921-DC-00000837 (Jane Doe #7 11/21/97 Depo. at 31-32).

> Evidence and rules governing sexual harassment require Court to permit the questions.[120]

Judge Wright also issued an order allowing Ms. Jones's attorneys to amend her complaint, but she indicated that the amendments would not be construed as new causes of action.[121]

The next day, Tuesday, November 25, 1997, Judge Wright conducted a brief hearing to address the President's efforts to obtain discovery of matters that related to the Paula Jones Legal Fund and the importance of keeping discovery matters under seal.[122] She then ruled that the identity of donors was protected but other legal fund information was not protected, except to the extent that attorney-client privilege applied.[123]

That same day, the President's lawyers served Ms. Jones's lawyers with the President's opposition to Ms. Jones's motion to compel the President to finish responding to her second set of interrogatories (those served on October 1, 1997).[124] The President's lawyers complained about the "obnoxious and intrusive interrogatories," and argued that the President had a

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[120] 921-DC-00000268-69 (Clerk's Minutes at 1-2).

[121] 1414-DC-00001190 (Order of Jan. 9, 1998, at 3) (discussing the Order of Nov. 24, 1997).

[122] 921-DC-00000280 (Clerk's Minutes).

[123] 921-DC-00000270-79 (Order of Nov. 25, 1997).

[124] 1414-DC-00000753-80 (President Clinton's Opposition to Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories).

"constitutionally-protected privacy interest" that protected his "intimate personal conduct."[125]

One day later, Wednesday, November 26, 1997, Jane Doe #1 filed a motion requesting sanctions in which she alleged, among other things, that someone affiliated with Ms. Jones had improperly leaked her name to the media in violation of a confidentiality order issued by Judge Wright.[126]

Dec. 1-3, 1997: **Ms. Jones's attorneys oppose Jane Doe #2's efforts to avoid a deposition; Judge Wright rules that discovery of Jane Doe #2 could proceed; Judge Wright permits the videotaping of Jane Doe #1's deposition; Jane Doe #1 testifies; Kathleen Willey's neck surgery delays her deposition**

On Monday, December 1, 1997, Ms. Jones's attorneys filed a response to Jane Doe #2's November 21, 1997, motion to quash her subpoena.[127] Ms. Jones's attorneys cited the deposition testimony of two Arkansas state troopers, L.D. Brown and Larry Patterson, and argued that this testimony provided evidence in support of Ms. Jones's claim.[128]

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[125] 1414-DC-00000754 (President Clinton's Opposition to Plaintiff's Motion to Compel Responses to Plaintiff's Second Set of Interrogatories at 2).

[126] 921-DC-00000284-86 (Jane Doe #1's Motion to Show Cause at 4-6).

[127] 921-DC-00000293-316 (Plaintiff's Memorandum in Opposition to the Motion of "Jane Doe No. 2" for Protective Order and Motion to Quash Subpoena Duces Tecum and Notice of Deposition).

[128] 921-DC-00000294-95 (Plaintiff's Memorandum in Opposition to the Motion of "Jane Doe No. 2" for Protective Order and Motion to Quash Subpoena Duces Tecum and Notice of Deposition at 2-3).

The next day, Tuesday, December 2, 1997, counsel for the Jones parties and counsel for Jane Does #1 and #2 participated in a hearing with Judge Wright about Jane Doe #2's motion to quash and Jane Doe #1's motion objecting to a videotape deposition.[129] Judge Wright denied Jane Doe #2's motion to quash because Jane Doe #2 "might have testimony that could lead to admissible evidence."[130]

The next day, Wednesday, December 3, 1997, Judge Wright entered a protective order that allowed Ms. Jones's attorneys to videotape Jane Doe #1's deposition subject to the restrictions set forth in Judge Wright's October 30, 1997, order and additional confidentiality safeguards.[131] That same day, Ms. Jones's attorneys began questioning Jane Doe #1 at a deposition. Ms. Jones's attorneys asked Jane Doe #1 about her contacts with the President. Jane Doe #1 refused to answer sexually-related questions pursuant to instructions she received from her lawyer.[132]

Also on December 3, 1997, Ms. Jones's "counsel was en route to Richmond[, Virginia] from Dallas in order to take the deposition of Ms. Willey when [Ms. Willey's attorney] Mr. Gecker suddenly formally notified the Court and Plaintiff that Ms. Willey allegedly required 'neck surgery' that just

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[129] 921-DC-00000329-30 (Clerk's Minutes).

[130] 921-DC-00000330 (Clerk's Minutes at 2).

[131] 921-DC-00000317 (Protective Order, Dec. 3, 1997).

[132] 1414-DC-00000840-48 (Jane Doe #1 12/3/97 Depo.).

coincidentally was precipitously scheduled for December 4, 1997."[133] On Thursday, December 4, 1997, the district court in Richmond "held an in-chambers hearing regarding the situation, signed Plaintiff's version of the Protective Order Regarding Kathleen Willey Deposition, and, after personally talking with Ms. Willey's attending physician, ordered Ms. Willey to appear for her deposition in early January."[134]

Dec. 4, 1997: **Jane Doe #3 moves to quash her subpoena**

On Thursday, December 4, 1997, Jane Doe #3 moved to quash the subpoena she had received.[135] That afternoon Judge Wright conducted a brief hearing on this motion and denied it. Judge Wright also directed the parties not to file witness lists but rather to exchange the lists with each other.[136]

Dec. 5, 1997: **Ms. Lewinsky appears on the witness list; Jane Doe #2 and Jane Doe #3 refuses to answer deposition questions**

On Friday, December 5, 1997, Ms. Jones's lawyers served the President's lawyers with their witness list. Monica Lewinsky's

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[133] DE-DC-00000205 (Plaintiff's Motion to Compel Further Deposition Testimony from Kathleen Willey at 2).

[134] DE-DC-00000205 (Plaintiff's Motion to Compel Further Deposition Testimony from Kathleen Willey at 2).

[135] 921-DC-00000321-22 (Motion for Protective order and Motion to Quash Subpoena Duces Tecum and Notice of Deposition); 921-DC-00000323-27 (Brief in Support of Motion for Protective order and Motion to Quash Subpoena Duces Tecum and Notice of Deposition).

[136] 921-DC-00000331 (Clerk's Minutes).

name was on it.[137] Ms. Jones's attorneys also that day filed and served an amended complaint[138] (pursuant to Judge Wright's permission granted on November 24, 1997). The amended complaint repeated the allegations of Ms. Jones's original complaint and added more accusations against the President and Mr. Ferguson, including that the President had

> discriminated against Plaintiff because of her sex by systematically granting, directly and indirectly, governmental and employment benefits . . . to other women who succumbed to Defendant Clinton's . . . pattern, and practice of using State . . . resources to solicit sexual favors . . . while continually denying . . . any such . . . benefits . . . to Plaintiff because she would not accede to Defendant Clinton's repeated solicitations of sex from her.[139]

Also on Friday, December 5, 1998, Ms. Jones's attorneys attempted to depose Jane Doe #2 and Jane Doe #3. Both refused to answer questions asked by Ms. Jones's attorneys.[140]

Dec. 6-7, 1997: **The President meets with his lawyers; the President verifies supplemental interrogatory responses**

On Saturday, December 6, 1997, the President met with his personal attorneys and Deputy White House counsel Bruce Lindsey. The subject of the meeting was the Jones case in general and the

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[137] 849-DC-00000121-37 (Plaintiff's Witness List).

[138] Plaintiff's First Amended Complaint, Jones v. Clinton, No. LR-C-94-290.

[139] Id. at 14.

[140] 921-DC-00000340 (Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions, and Motion to Prevent Further Obstruction of Depositions at 1); 920-DC-00000551-626 (Jane Doe #2 12/5/98 Depo.); 920-DC-00000740-95 (Jane Doe #3 12/5/98 Depo.).

witness list in particular.[141] That same day, the President verified supplemental responses (and continued objections) to Ms. Jones's second set of interrogatories, declaring "under penalty of perjury [that his responses were] . . . true and correct to the best of [his] knowledge and belief."[142] These supplemental responses (which would be served to Ms. Jones's lawyers the following Wednesday, December 10) still did not provide an answer to Interrogatories #10 & 11.

Dec. 8-10, 1997: **Ms. Jones's attorneys move to compel Jane Does; Danny Ferguson testifies**

On Monday, December 8, 1997, Ms. Jones's attorneys responded to Jane Doe #1's November 26, 1997, motion for sanctions, asserting that there was "no evidence before the Court that Plaintiff [Ms. Jones] or her counsel violated [Judge Wright's] Confidentiality Order."[143]

On Wednesday, December 10, 1997, Ms. Jones's attorneys filed a motion to compel Jane Does #1-3 to answer deposition questions.[144] Ms. Jones's attorneys asserted in their motion that the Jane Does and the defendants "are obstructing legitimate

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[141] Lindsey 3/12/98 GJ at 64-66; Lindsey 2/19/98 GJ at 9-10.

[142] V002-DC-00000046-51 (President Clinton's Supplemental Responses and Objections to Plaintiff's Second Set of Interrogatories); V002-DC-00000050 (Verification).

[143] 921-DC-00000332 (Plaintiff's Statement in Opposition to Jane Doe #1's Motion to Show Cause at 1).

[144] 921-DC-00000340-440 (Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions, and Motion to Prevent Further Obstruction of Depositions).

discovery when they have tried and failed to obtain an order limiting the scope of the depositions."[145] Citing the Violence Against Women Act, Ms. Jones's attorneys asserted that "a defendant's sexual propensity . . . is not only to be considered discoverable under the new law, but is indeed admissible at trial -- yet Defendants continue to forestall even the discovery of facts relevant to Defendant Clinton's sexual propensities. . . . It is time for the games and stonewalling to end."[146]

Also on December 10, 1997, Jane Doe #2's attorney filed a response (and supporting memorandum) to Ms. Jones's December 10 motion to compel.[147] The response claimed that Ms. Jones's counsel had not established a sufficient predicate for "delving into Jane Doe #2's private life."[148]

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[145] 921-DC-00000341 ((Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions, and Motion to Prevent Further Obstruction of Depositions at 2).

[146] 921-DC-00000351-52 (Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions, and Motion to Prevent Further Obstruction of Depositions at 12-13) (emphasis in original).

[147] 921-DC-00000441-49 (Response of Jane Doe #2 to Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions and Motion to Prevent Further Obstruction of Depositions); 921-DC-00000450-59 (Brief in Support of Response of Jane Doe #2 to Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions and Motion to Prevent Further Obstruction of Depositions).

[148] 921-DC-00000442 (Response of Jane Doe #2 to Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions and Motion to Prevent Further Obstruction of Depositions at 2); 921-DC-00000450 (Brief in Support of Response of Jane Doe #2 to Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions and Motion to Prevent Further Obstruction of

In Little Rock, the President's co-defendant, Danny Ferguson, testified at a deposition.[149] Mr. Ferguson was asked about alleged meetings between the Governor and certain Jane Does, as well as about the alleged incident with Paula Jones in Governor Clinton's room at the Excelsior Hotel.[150]

Dec. 11, 1997: **Judge Wright issues an order allowing "other women" discovery to proceed and establishes a "meticulous" materiality standard**

The next day, Thursday, December 11, 1997 -- the same day Ms. Lewinsky met Mr. Jordan for the second time[151] -- Judge Wright issued an order partially granting Ms. Jones's November 12, 1997, motion to compel the President to respond to her second set of interrogatories.[152] With regard to Interrogatories #10 & 11, Judge Wright ordered the President to provide answers subject to limitations:

> [T]he Court will establish a time frame that spans 5 years prior to May 8, 1991 (the date of the alleged incident that is the primary subject of this lawsuit), up to the present. Second, the Court will limit the class of individuals within this time frame to two categories, those who were state or federal employees, and those whose liaisons with Governor Clinton were

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Depositions at 1).

[149] 1292-DC-00000937-1075 (Ferguson 12/10/97 Depo.).

[150] 1292-DC-00000937-1075 (Ferguson 12/10/97 Depo. at 16-42, 45-69, 73-76, 92-99, 102-03).

[151] V004-DC-00000171 (Akin, Gump production; visitor records).

[152] 921-DC-00000459-66 (Order of Dec. 11, 1997). The motion sought to compel responses to Ms. Jones's second set of interrogatories.

> procured, protected, concealed, and/or facilitated by State Troopers assigned to the Governor.
>
> The Court finds, therefore, that the plaintiff is entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees. Plaintiff is also entitled to information regarding every person whom the President asked, during the relevant time frame, to arrange a private meeting between himself and any female state or federal employee which was attended by no one else and was held at any location other than his office. The Court cannot say that such information is not reasonably calculated to lead to the discovery of admissible evidence.
>
> The Court further finds that plaintiff is entitled to information regarding any individuals, whether or not state or federal employees, whose liaisons with Governor Clinton were procured, protected, concealed, and/or facilitated by State Troopers assigned to the Governor. Such information may bear on plaintiff's efforts at establishing a pattern or practice of conduct.[153]

Judge Wright added:

> [A]ny alleged relationships and/or arranged meetings with a federal employee that occurred when the President was not in a position to directly affect that individual's employment, i.e., when he was still Governor and was not President-elect, would fall outside of the guidelines the Court today establishes. Likewise, any alleged relationships and/or arranged meetings with a state employee that occurred when the President was no longer in a position to directly affect that individual's state employment would also fall outside of the Court's guidelines.[154]

As to materiality of the President's testimony, Judge Wright explained:

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[153] 921-DC-00000461 (Order of Dec. 11, 1997, at 3) (emphasis added).

[154] 921-DC-00000461 n.2 (Order of Dec. 11, 1997, at 3 n.2).

> The standard that this Court will utilize in addressing any questions regarding the necessity and scope of the President's testimony at any deposition or trial will be "if the Court is satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested."[155]

Judge Wright added that "[t]his was the standard utilized by this Court in determining the necessity of the President's videotaped testimony in United States v. Branscum, No. 96-CR-49 (E.D. Ark. June 7, 1996)."[156]

Dec. 12-15, 1997: **The President's lawyers oppose efforts to compel Jane Does #1-3 to testify; Judge Merhige orders Kathleen Willey deposition to proceed; the President tells Ms. Lewinsky that she is on the witness list; Judge Wright compels Jane Does #1-3 to testify and clarifies the necessary factual predicate; Jane Doe #5 subpoenaed**

On Friday, December 12, 1997, the President's attorneys filed a brief opposing Ms. Jones's motion to compel the testimony of Jane Does #1-3.[157] In that brief, the President's attorneys asserted that "[p]laintiff has failed to establish the appropriate predicate with each deponent before prying into her private affairs, as the Court has required. Each of these women

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[155] 921-DC-00000463 (Order of Dec. 11, 1997, at 5) (quoting United States v. Poindexter, 732 F. Supp. 142, 147 (D.D.C. 1990)) (emphases added).

[156] 921-DC-00000463 (Order of Dec. 11, 1997, at 5). This Office prosecuted the Branscum case.

[157] 920-DC-00000405-26 (President Clinton's Opposition to Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions).

has testified on the record, under oath, that she was never sexually harassed or subjected to unwelcomed sexual advances by Governor Clinton."[158] Therefore, the President's attorneys argued, Ms. Jones's motion to compel testimony should be denied. That same day, December 12, 1997, Judge Wright issued an order permitting Ms. Jones's attorneys to videotape the deposition of Jane Doe #2.[159]

On December 15, 1997, Ms. Jones's attorneys notified the President's attorneys that they would depose Jane Doe #5 on January 9, 1998.[160] And, in New York City, Ms. Jones's attorneys deposed Onie E. "Betsey" Wright.[161] Ms. Jones's attorneys asked Ms. Wright several questions about her "other women" discussions with the President.[162]

On Tuesday, December 16, 1997, Judge Robert R. Merhige, Jr., of the United States District Court for the Eastern District of Virginia, issued an order -- the result of his November 19 hearing -- requiring Kathleen Willey to "present herself for her

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[158] 920-DC-00000405 (President Clinton's Opposition to Plaintiff's Motion to Compel Jane Doe #1, Jane Doe #2, and Jane Doe #3 to Answer Deposition Questions at 1).

[159] 920-DC-00000721-22 (Agreed Protection Order of Dec. 12, 1997).

[160] 920-DC-00000978-82 (Plaintiff's Notice Duces Tecum of the Deposition upon Oral Examination of [Jane Doe #5]).

[161] Ms. Wright was the political supporter of President Clinton who was responsible for responding to "other women" allegations during the 1992 campaign. See Lois Romano, On the Warpath for Clinton, Wash. Post, Sept. 21, 1992, at D3.

[162] 1414-DC-00001099-102, 104-08, 112-13 (Wright 12/15/97 Depo. at 91-101, 112-26, 143-46).

previously ordered deposition."[163] In the order, Judge Merhige ordered the deposition to proceed on January 2, 1998. (As explained below, however, Ms. Willey's deposition actually occurred on January 11, 1998.)

That same day, December 16, 1997, Ms. Jones's attorneys served the President's lawyers with a motion to compel the President to answer Ms. Jones's first set of requests for admissions and her third set of interrogatories, and another motion to compel him to respond to her first set of requests for the production of documents.[164] (The first set of requests for admissions had been served on the President on October 8, 1997; he had answered in part on November 10, 1997, but had objected to Requests #51-65 (having to do with "other women"). The third set of interrogatories had been served on the President on October 13, 1997, and partially answered by him on November 12, 1997. The first set of requests for the production of documents was served on the President on October 1, 1997, and partially answered by him on November 17, 1997.)

Meanwhile, in New York City, the President's lawyers deposed two book publishers who had contacts with affiliates of Ms. Jones: Judith T. Regan, the president and publisher of Regan Books,[165] and Adrian Z. Zackheim, an employee of publisher

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[163] DE-DC-00000215-16 (Order of Dec. 16, 1997, at 1).

[164] 1414-DC-00001237-43 (Plaintiff's Motion to Compel Production of Documents or, in the Alternative, Motion for In Camera Inspection).

[165] 1414-DC-00001224-35 (Regan 12/1/6/97 Depo.).

HarperCollins.[166] (The next day, December 17, 1998, they deposed literary agent Scott Waxman, asking him about his contacts with affiliates of Ms. Jones and about his involvement in a possible book about Ms. Jones.[167])

Also on December 16, Mitchell S. Ettinger, one of the President's lawyers, received Ms. Jones's second request for documents and items.[168] The Requests commanded the President to produce documents that concerned "Monica Lewisky [sic]" and others.[169]

According to Monica Lewinsky, that night at about 2:00 a.m., (now Wednesday, December 17, 1997), the President called and suggested the possibility that she could avoid a deposition by filing an affidavit.[170] Ms. Lewinsky testified that the President advised her that she could always say that she was delivering papers or visiting Betty Currie when she came to the White House.[171]

On Thursday, December 18, 1997, Judge Wright granted Ms. Jones's motion to compel Jane Does #1-3 to testify at

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[166] 1414-DC-00001214-23 (Zackheim 12/16/97 Depo.).

[167] 1414-DC-00001131-49 (Waxman 12/17/97 Depo.).

[168] 1414-DC-00001534-46 (Second Set of Requests from Plaintiff to Defendant Clinton for Production of Documents and Things).

[169] 1414-DC-00001539 (Second Set of Requests from Plaintiff to Defendant Clinton for Production of Documents and Things at 6).

[170] Lewinsky 8/6/98 GJ at 123.

[171] Id. at 124.

depositions.[172] The order "clarif[ied] the factual predicate that [Ms. Jones] must . . . establish[] with each deponent prior to inquiring into alleged sexual activity."[173] This factual predicate could be established by a showing that the deponents had an existing or potential employment nexus to the President.[174] The order stated, however, that in the absence of any state employment connection, Ms. Jones's attorneys' ability to establish a nexus to state troopers did not itself permit Ms. Jones's attorneys to ask questions about any sexual activity between the President and the Jane Does.[175] Rather, Ms. Jones's attorneys could ask the Jane Does

> whether they have ever discussed with Governor or President Clinton the possibility of employment with either state or federal government or whether they have ever applied for such employment or whether he ever offered such employment. If the answer to any of these questions is in the affirmative, then counsel may continue the deposition by asking the personal and potentially embarrassing questions concerning their alleged sexual relationship with President Clinton.[176]

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[172] 920-DC-00000517-25 (Order of Dec. 18, 1997).

[173] 920-DC-00000518 (Order of Dec. 18, 1997, at 2).

[174] 920-DC-00000520 (Order of Dec. 18, 1997, at 4). Judge Wright's December 18, 1997, Order referred only to state employment, because it considered only discovery of women the President allegedly had sexual relations with before he became President. Judge Wright's December 11, 1997, Order, however, had established that information about alleged "other women" who were federal employees since Mr. Clinton became President would also be discoverable.

[175] 920-DC-00000521 (Order of Dec. 18, 1997, at 5).

[176] 920-DC-00000522 (Order of Dec. 18, 1997, at 6).

In this same order, Judge Wright indicated that not all discoverable evidence was necessarily admissible, and that if the case went to trial, Judge Wright "anticipate[d] limiting the amount of time and number of witnesses that will be spent on issues of alleged sexual activity of both the President and the plaintiff (should such matters otherwise be deemed admissible)."[177] Judge Wright made clear, however, that "the issue [at hand was] one of discovery, not admissibility of evidence at trial. Discovery, as all counsel know, by its very nature takes unforseen twists and turns and goes down numerous paths, and whether those paths lead to the discovery of admissible evidence often simply cannot be predetermined."[178]

On this same date, December 18, 1997, Jane Doe #5 received a subpoena.[179]

Dec. 19-24, 1997: **Ms. Lewinsky subpoenaed, then meets with Vernon Jordan and Frank Carter; Mr. Carter informs the President's lawyers of his plan to file a motion to quash Ms. Lewinsky's subpoena; the President answers interrogatories #10-11**

Ms. Lewinsky was served with a subpoena duces tecum in the Jones case on Friday, December 19, 1997,[180] which required her to

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[177] 920-DC-00000523 (Order of Dec. 18, 1997, at 7).

[178] 920-DC-00000523-24 (Order of Dec. 18, 1997, at 7-8).

[179] 920-DC-00000970-72 (Subpoena in a Civil Case). The subpoena was issued on December 11, 1997. 920-DC-00000970 (Subpoena in a Civil Case)

[180] Lewinsky 8/6/98 GJ at 128; Harte 4/17/98 Int. at 1. The subpoena was signed and dated on Wednesday, December 17, 1997.

appear, and be deposed, on January 23, 1998. The subpoena also required Ms. Lewinsky to produce a number of items, including all gifts she had received from the President. After she received the subpoena, Ms. Lewinsky met with Vernon Jordan.[181]

On Monday, December 22, 1997, Ms. Lewinsky met Mr. Jordan at his office, and together they went to Frank Carter's office.[182] Ms. Lewinsky retained Frank Carter as her attorney to represent her in the Jones matter.[183]

The following day, Tuesday, December 23, 1997, Mr. Carter met with the President's personal attorneys. The President's attorneys informed Mr. Carter that other witnesses had filed motions to quash and offered to provide him with assistance.[184]

That same day, December 23, 1997, in obedience to Judge Wright's order of December 11, 1997, the President through his lawyers served a second set of supplemental responses to Ms. Jones's second set of interrogatories (those originally served on him on October 1, 1997) and the President verified that he had "read the . . . supplemental responses to Plaintiff's Second Set of Interrogatories and declare[d] under penalty of

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921-DC-00000792-95 (Subpoena in a Civil Case).

[181] Lewinsky 8/6/98 GJ at 129; V004-DC-00000172 (Akin, Gump visitor logs).

[182] Lewinsky 8/6/98 GJ at 138-39.

[183] Carter 6/18/98 GJ at 12, 14.

[184] Carter 6/18/98 GJ at 39-42.

perjury that they are true and correct to the best of my knowledge and belief."[185]

The President's responses were limited in scope to the information required by Judge Wright in that order, in that they related only to events since May 8, 1986, and individuals who were state or federal employees, or whose liaisons with then-Governor Clinton were facilitated by State Troopers assigned to his security detail.[186]

Within these limits, however, the President answered Interrogatories #10 & 11, which asked about his actual, and proposed, sexual relations with other women. The President answered "None" to both.[187] With regard to Interrogatory #17, which asked the President to name each and every person whom he asked to arrange a private meeting with another woman at a location other than his office at any time, the President stated that he "has attended literally hundred of meetings . . . and cannot recall which, if any, meetings were attended only by himself and a federal or state female employee at a location other than his office."[188]

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[185] 849-DC-00000066-70(President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories); 849-DC-00000069 (Verification).

[186] 849-DC-00000066 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories at 1).

[187] 849-DC-00000067 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories at 2).

[188] 849-DC-00000067 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories at 2).

The next day, Wednesday, December 24, 1997, Ms. Jones's attorneys filed a motion asking Judge Wright to reconsider her December 18, 1997, ruling ordering the Jane Does to testify but placing certain limits upon the scope of the questioning by requiring the Jones attorneys to establish a "factual predicate" for their questions and placing certain other restrictions on discovery.[189] The motion also complained of "dilatory, obstructionist tactics" used by lawyers for the President and Mr. Ferguson, including coaching of witnesses as to what other witnesses have said and making inappropriate "speaking objections" during depositions.[190]

Dec. 30-31, 1997: **Mr. Bennett concedes that "sex-for-jobs" is "fair game"; Ms. Jones's attorneys ask for sanctions.**

On Tuesday, December 30, 1997, Judge Wright held a hearing with counsel for all parties.[191] During the hearing, Judge Wright discussed Ms. Jones's motion December 24, 1997, motion for reconsideration of her ruling limiting the scope of the depositions of Jane Doe #1-3, but indicated that she was not yet ready to rule on the motion. Judge Wright also warned Mr. Bennett and Mr. Ferguson's lawyer (Bill Bristow) about their interrupting and disrupting depositions, and threatened to lift

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[189] 1414-DC-00001015-62 (Plaintiff's Motion to Reconsider Court's December 18, 1997 Order).

[190] 1414-DC-00001024 (Plaintiff's Motion to Reconsider Court's December 18, 1997 Order at 10).

[191] 921-DC-00000711 (Clerk's Minutes); 1414-DC-00001445-1505 (Telephone Conference 12/30/97 Tr.).

the restrictions on "other women" discovery if their behavior did not improve.[192]

Mr. Bennett in turn warned that he was ready for a "free-for-all" consisting of 30-40 rebuttal witnesses if Ms. Jones's attorneys opposed "a ruling from the Court that the probative value of the sex life of Mr. Clinton and the sex life of Ms. Jones is far out weighed by other considerations."[193]

Mr. Bennett asserted that he would "really oppose" the efforts of Ms. Jones's attorneys attempts to "show that Bill Clinton is not a faithful husband. And I think we have to have a conference devoted to how far you're going to let them go on some of this stuff."[194] Mr. Bennett did concede, however, that questions related to sex-for-jobs would be "fair game."[195] Mr. Bennett also commented about Ms. Jones's sexual history compared to the President's sexual history: "Frankly, . . . if you unleash every deposition that's been taken to date, Paula Jones makes Bill Clinton look like a choir boy."[196]

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[192] 1414-DC-00001450, 66 (Telephone Conference 12/30/97 Tr. at 6, 22).

[193] 1414-DC-00001473 (Telephone Conference 12/30/97 Tr. at 29).

[194] 1414-DC-00001480 (Telephone Conference 12/30/97 Tr. at 36).

[195] 1414-DC-00001494 (Telephone Conference 12/30/97 Tr. at 50).

[196] 1414-DC-00001496 (Telephone Conference 12/30/97 Tr. at 52).

Judge Wright explained that Ms. Jones's attorneys would at trial have to limit their evidence regarding "other women," but that some such evidence might be admissible: "I will not permit you to spend a lot of court time on this business about of [sic] other women. I do believe it is relevant and I will let you get some evidence in on that, but you're going to have to pick your evidence carefully."[197] Judge Wright also explained that although she had "permitted in the answers to interrogatories some pretty embarrassing questions," she would "require the President's deposition to be tailored"; nonetheless, she made clear that she would not limit it to "stuff that's not embarrassing."[198]

Also on December 30, 1997, Ms. Jones's attorneys moved to sanction the President's attorneys for leaks and for violating Rule 30(d)(1), which provides that "[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive answer."[199] The attorneys argued that "[c]ounsel for Defendant Clinton has, during the depositions, frequently used their prerogative to object as an excuse to make arguments, 'coaching' non-party deponents and

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[197] 1414-DC-00001491 (Telephone Conference 12/30/97 Tr. at 47) (emphasis added).

[198] 1414-DC-00001493 (Telephone Conference 12/30/97 Tr. at 49).

[199] Fed. R. Civ. P. 30(d)(1); 1414-DC-00001063-1168 (Plaintiff's Motion for a Protective Order and Sanctions Based on Violations of the Confidentiality Order and Rule 30(d)(1)).

their counsel to answer evasively and suggesting grounds for refusing to answer."[200]

Jan. 2-7, 1998: **Jane Doe #2 testifies; Jane Doe #5 signs an affidavit; Ms. Lewinsky meets with Frank Carter; Jane Doe #5 files a motion to quash her subpoena; Ms. Lewinsky signs her affidavit.**

On Friday, January 2, 1998, Jane Doe #2 testified at a deposition. Jane Doe #2 denied that she ever engaged in any "sexual activity" with the President.[201]

On the same day, Jane Doe #5 signed an affidavit in which she denied that the President made "unwelcome sexual advances toward me in the late seventies."[202] (On April 8, 1998, however, Jane Doe #5 stated to OIC investigators that this affidavit was false.[203])

On Monday, January 5, 1998, Ms. Lewinsky met with her attorney, Francis Carter, to discuss her subpoena in the Jones case.[204] That same day, Ms. Jones's attorneys served the President's attorneys with notice that the deposition of Jane Doe

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[200] 1414-DC-00001069 (Plaintiff's Motion for a Protective Order and Sanctions Based on Violations of the Confidentiality Order and Rule 30(d)(1) at 7).

[201] 920-DC-00000629-53 (Jane Doe #2 1/2/98 Depo. at 59).

[202] 920-DC-00000962-63 (Jane Doe #5 1/2/98 Aff.).

[203] Jane Doe #5 4/8/98 Int. at 6.

[204] 902-DC-00000232 (Mr. Carter's diary); 902-DC-00000037 (Mr. Carter's bill).

#3 was scheduled for Tuesday, January 20, 1998.[205] Jane Doe #5, by her attorneys, moved for a protective order and to quash the subpoena.[206] Jane Doe #5's counsel attached to the motion an affidavit in which Jane Doe #5 attested that she did not "possess any information that could possibly be relevant to the allegations advanced by Paula Corbin Jones or which could lead to admissible evidence in her case."[207]

Ms. Lewinsky signed her affidavit the next day, Wednesday, January 7, 1998.[208] That same day, January 7, 1998, the President's attorneys served and filed an opposition to Ms. Jones's attorneys' December 24, 1997, motion to reconsider Judge Wright's December 18, 1997, order requiring a "factual predicate" in order to question the Jane Does.[209] The President's lawyers also asked Judge Wright not to limit discovery of Ms. Jones's sexual history.[210]

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[205] 920-DC-00000818-822 (Plaintiff's Second Amended Notice Duces Tecum of the Deposition upon Oral Examination of [Jane Doe #3]).

[206] 920-DC-00000983-93 (Motion for a Protective Order and to Quash Subpoena Duces Tecum and Deposition Subpoena).

[207] 920-DC-00000992 (Motion for a Protective Order and to Quash Subpoena Duces Tecum and Deposition Subpoena at exhibit B).

[208] 849-DC-00000314-16 (Lewinsky 1/7/98 Aff.).

[209] 1414-DC-00001169-87 (President Clinton's Opposition to Plaintiff's Motion to Reconsider the Court's December 18, 1997 Order).

[210] 1414-DC-00001183-84 (President Clinton's Opposition to Plaintiff's Motion to Reconsider the Court's December 18, 1997 Order at 15-16).

Jan. 8, 1998: **Judge Wright orders the President to answer "other women" interrogatories; Judge Wright denies Jane Doe #5's motion to quash**

On Thursday, January 8, 1998 Judge Wright issued an order addressing outstanding discovery motions in the case, including the President's motion to compel Ms. Jones to answer certain interrogatories and document requests, and Ms. Jones's motion[211] to compel the President to finish answering her third set of interrogatories, and first set of requests for admissions, and to produce certain documents and things.[212] (Ms. Jones's motion of December 17 had, among other things, complained that the President had not yet answered her requests for admission -- numbered 51-65[213] -- as to whether, as Governor, he ever "had sexual relations with certain women (other than his wife) in meetings that were arranged, facilitated, concealed, and/or assisted by at least one member of the Arkansas State Police and that some of these women were or became employees of the State of Arkansas (or an agency thereof)."[214])

Judge Wright's order partially granted Ms. Jones's motion to compel, explaining:

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[211] 1414-DC-0000926-32 (Plaintiff's Motion to Compel Answers to Plaintiff's First Set of Requests for Admissions and Third Set of Interrogatories to Defendant Clinton).

[212] 921-DC-00000736-44 (Order of Jan. 8, 1998).

[213] 1414-DC-0000927 (Plaintiff's Motion to Compel Answers to Plaintiff's First Set of Requests for Admissions and Third Set of Interrogatories to Defendant Clinton at 2).

[214] 921-DC-00000738 (Order of Jan. 8, 1998, at 3).

> The Court has already ruled that questions regarding whether the President, as Governor of Arkansas, had sexual relations with certain women (other than his wife) in meetings that were arranged, facilitated, concealed, and/or assisted by at least one member of the Arkansas State Police and whether some of these women were or became employees of the State of Arkansas (or an agency thereof) are within the scope of the issues in this case. To the extent the President denies these allegations, he can so state without any undue burden. To the extent answers to such question [sic] require something other than an outright denial, the Court finds that such answers may not necessarily be redundant to any previous answers the President has given to such questions and, further, that such answers may be relevant to the issues in this case and may lead to the discovery of admissible evidence. Accordingly, the Court finds that plaintiff's motion to compel on this point should be granted.[215]

Judge Wright also held that "the President should answer interrogatories requesting full identifying information (names, addresses, and telephone numbers) concerning every person who has discoverable information relevant to this case and of every person to whom the President has made statements concerning plaintiff's allegations."[216] Judge Wright therefore directed the President "to answer plaintiff's first set of requests for admissions and third set of interrogatories on or before January 15, 1998."[217]

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[215] 921-DC-00000739 (Order of Jan. 8, 1998, at 4) (emphasis added).

[216] 921-DC-00000739-40 (Order of Jan. 8, 1998, at 4-5).

[217] 921-DC-00000740 (Order of Jan. 8, 1998, at 5). The court also ordered the President to respond to Ms. Jones's first set of requests for production of documents to the extent of revealing the total amount of legal fees he had so far incurred. 921-DC-00000741 (Order of Jan. 8, 1998, at 6).

This same order of January 8, 1998, also required Ms. Jones to respond to interrogatories and to produce documents to the President by January 15, 1997.[218]

Later this same day, January 8, 1998, Judge Wright conducted a hearing at which counsel from all parties participated by phone. During the hearing, Judge Wright informed all counsel about the order described in first paragraph of this subsection.[219] Judge Wright also denied Jane Doe #5's motion to quash her subpoena for a deposition.[220]

During this same hearing, Judge Wright also expressed general concern about how the depositions had proceeded. As the Clerk put it, Judge Wright "again discusse[d] with counsel [her] concern of excess objections and advantage taken by [defendants'] counsel on Court's ruling on limitations of scope of deposition; [the Court] believes it should enforce Rule 30(d)(1)."[221]

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[218] 921-DC-00000736-38 (Order of Jan. 8, 1998, at 1-3).

[219] 921-DC-00000751-52 (Clerk's Minutes). The clerk of the court then mailed a copy of the order to all parties. 921-DC-00000743 (Mailing Certificate of Clerk)

[220] 921-DC-00000751 (Clerk's Minutes at 1).

[221] 921-DC-00000752 (Clerk's Minutes at 2). Federal Rule of Civil Procedure 30(d)(1) states:

> Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

Fed. R. Civ. P. 30(d)(3) governs depositions "conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party" and directs parties or deponents

Jan. 9-12, 1998: **Judge Wright modifies the required factual predicate for "other women" questions; Jane Doe #5 testifies; Kathleen Willey testifies.**

On Friday, January 9, 1998, Judge Wright issued an order granting in part and denying in part Ms. Jones's motion to reconsider the December 18, 1997 Order.[222] Judge Wright granted the part of Ms. Jones's motion regarding questioning Jane Does #1-3 about potential state employment, holding that if the Jane Does admitted whether they had ever applied for a state job, ever discussed employment with President Clinton, or had reason to believe that President Clinton knew of their interest in such employment, then Ms. Jones could ask about sexual activities with the President.[223]

Judge Wright denied the portion of Ms. Jones's attorneys' motion with regard to the "trooper nexus." (Ms. Jones's attorneys had sought reconsideration of Judge Wright's ruling that "the state trooper nexus is insufficient alone to permit the sexual activities question because the depositions, as they now read, do not support plaintiff's allegations of a pattern or practice of sexual harassment."[224]) Ms. Jones's attorneys claimed that the trooper ruling would preclude her from establishing her claim for sex discrimination. Judge Wright disagreed, and found

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to file a motion with the district court if a part conducts such an improper deposition.

[222] 1414-DC-00001188-92 (Order of Jan. 9, 1998).

[223] 1414-DC-00001189 (Order of Jan. 9, 1998 at 2).

[224] 1414-DC-00001189 (Order of Jan. 9, 1998 at 2).

that Ms. Jones did not have a viable sex discrimination claim, only a sexual harassment claim. Judge Wright ruled that the use of troopers did not establish an adequate nexus absent an unwelcome sexual contact.[225]

Finally, Judge Wright warned the parties about improper deposition objections and witness coaching: "any objection to evidence during a deposition 'shall be stated concisely and in a non-argumentative and non-suggestive manner,' and without any coaching of the witness as to what previous discovery may or may not have disclosed."[226]

On January 9, 1998, Jane Doe #5 testified at a deposition.[227] She testified that if she previously had said that the President had sexually assaulted her, "it was untrue."[228] Jane Doe #5 also testified that an affidavit she had signed was true and correct.[229] The affidavit denied that "Mr. Clinton had made unwelcome sexual advances toward me in the late seventies."[230] On Sunday, January 11, 1998, Kathleen Willey testified at a

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[225] 1414-DC-00001191 (Order of Jan. 9, 1998, at 4).

[226] 1414-DC-00001192 (Order of Jan. 9, 1998, at 5) (quoting Fed. R. Civ. P. 30(d)(1)).

[227] 920-DC-00000922-29 (Jane Doe #5 1/9/98 Depo.).

[228] 920-DC-00000926 (Jane Doe #5 1/9/98 Depo. at 15-16).

[229] 920-DC-00000928 (Jane Doe #5 1/9/98 Depo. at 22-23).

[230] 920-DC-00000962 (Jane Doe #5 1/2/98 Aff. at 1).

deposition in the United States District Court in Richmond, Virginia.[231]

Jan. 12, 1998: **Hearing about discovery, evidence at trial, deposition of the President; Frank Carter speaks with Ms. Jones's attorney; Judge Wright urges the parties to settle.**

On Monday, January 12, 1998 -- as Frank Carter spoke to Mr. Pyke, one of Ms. Jones's attorneys, and attempted to persuade him not to depose Ms. Lewinsky -- Judge Wright held a lengthy hearing to discuss witness issues, the President's upcoming January 17, 1998, deposition, and the evidence that the parties planned to put on at trial.[232] During the hearing, which lasted almost the entire day, Judge Wright asked the parties to discuss the proof they each planned to introduce at trial.[233]

Ms. Jones's counsel went first, and explained that there were several different categories of witnesses that they intended to call at trial. Ms. Jones's counsel told Judge Wright that some of these witnesses "relate to the pattern and practice issue, the habit evidence. And that, obviously, is focused on his harassment of other women. And there are witnesses that relate to the issue that I will generally describe as the cover-up, the suppression of evidence, the intimidation of witnesses in

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[231] DE-DC-00000217-27 (Willey 1/11/98 Depo. excerpts).

[232] 921-DC-00000770-72 (Clerk's Minutes); 1414-DC-00001291-1444 (Hearing 1/12/98 Tr.).

[233] The hearing began at 10:25 a.m. and ended at 4:05 p.m. (with breaks throughout the day). 1414-DC-00001291-1444 (Hearing 1/12/98 Tr.).

a concerted, systematic effort to prevent our client and others like her from developing cases that they might bring."[234]

Ms. Jones's counsel then named the "other women" he planned to call at trial:

MR FISHER: They would include . . . [Jane Doe #2], Monica Lewinsky . . . .

THE COURT: Can you tell me who she is?

MR. FISHER: Yes, your Honor.

THE COURT: I never heard of her.

MR. FISHER: She's the young woman who worked in the White House for a period of time and was later transferred to a job in the Pentagon. . . . [And the other women are Jane Doe #7, Jane Doe #5] . . . Gennifer Flowers . . . [and there] are three other women who are possibilities in our thinking at this point . . . .

* * * *

THE COURT: Well, I'm going to have something to say about all of this stuff. But I'm going -- I'm letting you put on -- tell me what evidence you want to put on. Go ahead . . . .

* * * *

THE COURT: . . . . I'm literally asking the plaintiff and you to put out what evidence you've got. In other words, this is a civil case. I don't want to be -- I'm not -- I'm not going -- counting surprise, and I don't want the President's precious time to be occupied in a discovery deposition with a lot of stuff that either is a dead end street or I'm not going to let it in. . . .

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[234] 1414-DC-00001326 (Hearing 1/12/98 Tr. at 36).

> Now, I have repeatedly said that the plaintiff will not be able to put on all the evidence that she has about what -- about Mr. Clinton's sexual proclivities. I've also said that she can put on some. . . .
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> * * * *
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> [Addressing the plaintiff] It would make me very happy if you just stuck to . . . the direct knowledge witnesses. And I know that the Rules of Evidence don't require you to do that, and in fact, the Rules of Evidence in harassment cases -- and I'm not citing any authority right now for it, but I know in harassment cases, frequently, court's [sic] permit other bad acts, other volatile acts, that kind of thing. And I'm also aware that in sexual assault cases, the Rules of Evidence promulgated by the Violence Against Women Act has certainly opened it up. So I can't say that you can't call any of the witnesses in group B [the pattern and practice issue witnesses].[235]

Judge Wright then explained why she was concerned about certain witnesses Ms. Jones's attorneys planned to call, such as a trooper with a memory of only assisting the President with visits with "nameless" women,[236] "other women" who did not have an employment nexus to the President,[237] and Jane Doe #5.[238] Judge Wright indicated that Ms. Jones's attorneys proposed to use "just too many witnesses," and told Ms. Jones's attorneys that she was planning on limiting the number of witnesses at trial.[239] For

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[235] 1414-DC-00001327-33 (Hearing 1/12/98 Tr. at 37-43).

[236] 1414-DC-00001334 (Hearing 1/12/98 Tr. at 44).

[237] 1414-DC-00001335 (Hearing 1/12/98 Tr. at 45).

[238] 1414-DC-00001339 (Hearing 1/12/98 Tr. at 49).

[239] 1414-DC-00001335 (Hearing 1/12/98 Tr. at 45).

purposes of discovery, however, Judge Wright permitted Ms. Jones's attorneys to ask the President "about people whose -- you know, whose names have been given you or people whom you have, you know, a reasonable basis for asking about."[240] Judge Wright also expressed concern about leaks to "Mr. Drudge" and the "Drudge report."[241]

During the hearing, Judge Wright encouraged the parties to settle the case, and she offered to speak directly with Ms. Jones about this prospect. Judge Wright made several comments to Ms. Jones's counsel about the strength of Ms. Jones's case. Judge Wright warned Ms. Jones's lawyers that she thought "it's unlikely that a jury will find for [Ms. Jones] if this matter goes to trial."[242]

Judge Wright also cautioned that settlement might be in the President's best interests, in part because "if this thing does go to trial, some of the Jane Does will be mentioned not as Jane Doe but as someone else, and some of the people who have been his friends will be very embarrassed and tainted for life as a result of embarrassing testimony about them."[243] Judge Wright reminded the parties that "I have repeatedly said that the plaintiff will not be able to put on all the evidence that she has about what --

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[240] 1414-DC-00001336 (Hearing 1/12/98 Tr. at 46).

[241] 1414-DC-00001299-300 (Hearing 1/12/98 Tr. at 9-10).

[242] 1414-DC-00001314 (Hearing 1/12/98 Tr. at 24).

[243] 1414-DC-00001315 (Hearing 1/12/98 Tr. at 25).

about Mr. Clinton's sexual proclivities. I've also said that she can put on some."[244]

Judge Wright discussed the President's deposition. She informed defense counsel that she was "not limiting the President's deposition" in the way that she limited the deposition of Jane Does #1-3.[245] Judge Wright also cautioned counsel about the matter and method of objections during the deposition:

> I do not want the President's deposition to read like Jane Doe 1's first deposition or Jane Doe 3's deposition or the Betsey Wright deposition.
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> * * * *
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> If you have an objection, you are to state your objection. And you're not going to be misleading in any way or coach the witness in any way following your objection . . . . And I don't want you, you know, holding up the Jane Doe 1, 2 and 3 depositions and pointing to some sentence in there and reading it out of context, because that's -- I've been burned on that, Mr. Ettinger. And I'm not going to have it from you anymore.
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> * * * *
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> I'm talking about from your side, from the defense side and the witnesses' lawyers.[246]

The hearing also involved discussion about the potential use of the President's deposition. Judge Wright asked defense

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[244] 1414-DC-00001332 (Hearing 1/12/98 Tr. at 42).

[245] 1414-DC-00001407 (Hearing 1/12/98 Tr. at 117).

[246] 1414-DC-00001407-08 (Hearing 1/12/98 Tr. at 117-18). When Mr. Ettinger, one of the President's lawyers, objected to this characterization, Judge Wright stated that counsel for the witnesses were as culpable as other counsel for the defense, "if not more so." 1414-DC-00001408 (Hearing 1/12/98 Tr. at 118).

counsel whether the deposition would be a discovery deposition, rather than an evidence deposition:

THE COURT: And the President's deposition, I assume is a discovery one and will not be used as an evidentiary deposition; is that correct?

MR. BENNETT: Well, I don't know. I mean, that remains to be seen. I mean, what if on the date of the trial there's a world war? I mean, he --

THE COURT: Let me suggest this. I want you to conduct this deposition with one thing in mind. I don't want anyone to make any strategic moves and later tell me that this is in reliance on what I'm about --

MR. BENNETT: No.

THE COURT: -- to say. But keep in mind that because it is possible that -- because he is the President, he might not be here.

MR. BENNETT: And the Supreme Court said he didn't have to be.

THE COURT: That's right. And I would never require him to be here -- that you might have to use his deposition as evidence.

MR. BENNETT: That's correct.

MR. FISHER: Exactly, Your Honor. We -- we intend to.[247]

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[247] 1414-DC-00001425-26 (Hearing 1/12/98 Tr. at 135-36); see also Fed. R. Civ. P. 32(a)(3) (use of a deposition at a trial as substantive evidence).

Jan. 15, 1998: **The President serves responses to document requests, interrogatories, and requests for admissions**

On January 15, 1998, the President's attorneys served Ms. Jones's attorneys with the President's response to Ms. Jones's second set of document requests.[248] Requests #5-7 had asked the President to produce all documents and tangible things that related to "Monica Lewisky [sic]," and others.[249] In his response, the President objected to those requests, but stated that, notwithstanding his objections, he had "no documents" that would be responsive to the requests.[250]

The President's lawyers also served Ms. Jones's lawyers with the President's supplemental responses to Ms. Jones's first set of requests for admissions.[251] (Among these requests were Requests for Admissions 51-65, which had asked the President to admit or deny sexual relations with women other than Hillary Rodham Clinton and to admit or deny the use of state troopers for Governor Clinton's sexually-related encounters with "other

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[248] V002-DC-00000093-116 (President Clinton's Responses to Plaintiff's Second Set of Document Requests).

[249] V002-DC-00000102-05 (President Clinton's Responses to Plaintiff's Second Set of Document Requests at 10-13)

[250] V002-DC-00000103-05 (President Clinton's Responses to Plaintiff's Second Set of Document Requests at 11-13).

[251] 849-DC-00000283-86 (President Clinton's Supplemental Responses to Plaintiff's First Set of Requests for Admissions).

women."[252]) The President objected to these requests, but then denied the suggested sexual activity.[253]

Finally, also on January 15, 1998, the President's lawyers served President Clinton's supplemental responses to Ms. Jones's third set of interrogatories and her first request for documents.[254] That same day, January 15, 1998, the President verified "under penalty of perjury" that these supplemental interrogatory responses were "true and correct to the best of my knowledge and belief."[255] The supplemental responses identified: (1) two individuals not previously identified who had discoverable information (Diane Evans of the AIDC and Linus Raines of the Excelsior Hotel); and (2) persons to whom the President had denied the May 1991 Excelsior Hotel-related allegations, including Vernon Jordan, Bruce Lindsey, George Stephanopoulos, Dee Dee Myers, and James Carville.[256] With respect to the documents sought -- namely, those concerning legal

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[252] 849-DC-00000283-86 (President Clinton's Supplemental Responses to Plaintiff's First Set of Requests for Admissions); 849-DC-00000158-162 (First Set of Requests from Plaintiff to Defendant Clinton at 14-18).

[253] 849-DC-00000284 (President Clinton's Supplemental Response to Plaintiff's First Set of Requests for Admissions at 2).

[254] 849-DC-00000103-10 (President Clinton's Supplemental Responses to Plaintiff's Third Set of Interrogatories and Plaintiff's First Request for the Production Of Documents).

[255] 849-DC-00000109 (Verification).

[256] 849-DC-00000103-06 (President Clinton's Supplemental Responses to Plaintiff's Third Set of Interrogatories and Plaintiff's First Request for the Production Of Documents at 3-4).

fees -- the President objected to the request, but pursuant to court order revealed that his counsel had billed over $2.3 million as of January 15.[257]

Jan. 16, 1998: **President's lawyers notified of Jane Doe #3's deposition; Ms. Lewinsky moves to quash subpoena**

On Friday, January 16, 1998, Ms. Jones's attorneys served the President's lawyers with a notice scheduling Jane Doe #3's deposition for January 28, 1998.[258]

Also on Friday, January 16, 1998, Frank Carter, counsel for Ms. Lewinsky, filed a motion for a protective order and sought to quash her subpoena.[259] Mr. Carter indicated that he had spoken with Ms. Jones's counsel on January 12, 1998, and again on January 15, 1998, in an unsuccessful attempt to persuade Ms. Jones's counsel not to proceed with the Lewinsky deposition. Mr. Carter explained: "I sent [Ms. Jones's counsel] a letter emphasizing my former arguments for not going forward with the deposition and enclosing an Affidavit from Jane Doe #6 [Monica Lewinsky] about her lack of knowledge of relevant evidence for

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[257] 849-DC-00000107 (President Clinton's Supplemental Responses to Plaintiff's Third Set of Interrogatories and Plaintiff's First Request for the Production Of Documents at 5).

[258] 920-DC-00000823-27 (Plaintiff's Third Amended Notice Duces Tecum Of The Deposition Upon Oral Examination Of [Jane Doe #3]).

[259] 1292-DC-00000657-60 (Motion of Jane Doe #6 for Protective Order and Motion to Quash); 1292-DC-00000661-86 (Memorandum in Support of Motion of Jane Doe #6 for Protective Order and Motion to Quash). The motion is file-stamped Tuesday, January 20, 1998. 850-DC-0000082 (Docket Sheet).

this case."[260] Because Ms. Jones's counsel had not acceded to this request, the motion asked Judge Wright to quash the subpoena and cancel Ms. Lewinsky's deposition because "[t]he deposition will not produce any relevant information and will be unreasonable and oppressive for Jane Doe #6."[261]

Jan. 17, 1998: **The President's deposition**

On Saturday, January 17, 1998, the President testified at a sworn deposition attended by Judge Wright.[262] As the deposition started, Judge Wright addressed the President's counsel's concerns regarding the scope of the President's deposition testimony. Judge Wright rejected the President's counsel's attempt to place new limits on the scope of deposition questioning. In so ruling, Judge Wright commented about the nature of the questions that the President would be asked: "Unfortunately, the nature of this case is such that people will be embarrassed."[263]

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[260] 1292-DC-00000658-59 (Motion of Jane Doe #6 for Protective Order and Motion to Quash at 2-3).

[261] 1292-DC-00000657-58 (Motion of Jane Doe #6 for Protective Order and Motion to Quash at 1-2).

[262] 849-DC-00000351-585 (Clinton 1/17/98 Depo.).

[263] 849-DC-00000360 (Clinton 1/17/98 Depo. at 9).

Jan. 21-30, 1998: Nathaniel Speights appears; OIC intervenes; Judge Wright excludes evidence about Ms. Lewinsky; another "other woman" testifies; discovery ends

On Wednesday, January 21, 1998, Nate Speights entered his appearance as counsel for Monica Lewinsky, and requested that Mr. Carter withdraw as counsel.[264]

The next day, Thursday, January 22, 1998, Ms. Jones's attorneys served an opposition to Ms. Lewinsky's motion for a protective order.[265] Ms. Jones's counsel argued that "[t]he parties and the various Jane Does have briefed extensively the law governing discovery of 'other women' in this case and Plaintiff will not burden the record by repeating that briefing."[266] Ms. Jones's counsel asserted that "Plaintiff believes that many statements in [Monica Lewinsky]'s affidavit are not true and that Mr. Clinton or those acting on his behalf encouraged her to lie. Plaintiff is entitled to discovery to pursue these theories, including the deposition of [Monica Lewinsky]."[267]

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[264] 921-DC-00000805 (Notice of Appearance for Nathaniel H. Speights).

[265] 921-DC-00000807-26 (Plaintiff's Statement in Opposition to Motion of Jane Doe #6 for Protective Order and Motion to Quash).

[266] 921-DC-00000807 (Plaintiff's Statement in Opposition to Motion of Jane Doe #6 for Protective Order and Motion to Quash at 1).

[267] 921-DC-00000807 (Plaintiff's Statement in Opposition to Motion of Jane Doe #6 for Protective Order and Motion to Quash at 1).

Later that day, Judge Wright conducted a hearing with counsel from all parties, and during part of the hearing, counsel for Monica Lewinsky. The Clerk's minutes reveal that during the hearing, Judge Wright denied Ms. Lewinsky's motion to quash. With regard to whether Ms. Lewinsky's deposition would proceed, the Clerk's minutes state:

> Court states same rule will apply as to other Jane Does with respect to deposition and questions to be asked of her. . . . Court takes up supplemental motion of whether Court should continue deposition pending resolution of criminal investigation and advises counsel it would deny and Jane Doe would have to attend deposition and tell truth and could invoke 5th if about to incriminate herself.
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> * * * *
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> After additional discussions, Court directs that deposition should go forth but grants motion to reschedule . . . .[268]

In connection with the permission to reschedule, on Thursday, January 22, 1998, Judge Wright issued an order that "indefinitely continued" Ms. Lewinsky's deposition.[269]

On Monday, January 26, 1998, the President's attorneys issued a subpoena to the Office of the Independent Counsel ("OIC") that requested that the OIC to produce all documents it had that related to Monica Lewinsky, Linda Tripp, and Lucianne S. Goldberg.[270]

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[268] 921-DC-00000982 (Clerk's Minutes).

[269] 921-DC-00000827 (Order of Jan. 23, 1998).

[270] Letter from Robert S. Bennett to Kenneth W. Starr and attached subpoena, dated January 26, 1998.

The next day, Tuesday, January 27, 1998, the OIC filed a motion requesting a limited intervention in the Jones case so that the OIC could conduct its criminal investigation without interference.[271] Two days later, on Thursday, January 29, 1998, the OIC filed a motion to stay discovery in the Jones case, requesting Judge Wright to stay discovery pending resolution of the related criminal investigation.[272]

That same day, Thursday, January 29, 1998, Judge Wright held a hearing at which counsel for the parties and the OIC were present. Judge Wright issued an order later that day in which she observed that "OIC's motion comes with less than 48 hours left in the period for conducting discovery, the cutoff date being January 30, 1998." For this reason, Judge Wright stated that she was required to rule on the admissibility of the Monica Lewinsky evidence at that time. Citing Federal Rule of Evidence 403, which requires a judge to weigh the probative value of evidence against the prejudice it may cause, Judge Wright concluded:

> [Rule 403']s weighing process compels the conclusion that evidence concerning Monica Lewinsky should be excluded from the trial of this matter.
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> The Court acknowledges that evidence concerning Monica Lewinsky might be relevant to the issues in this case. This Court would await resolution of the criminal investigation currently underway if the Lewinsky evidence were essential to the plaintiff's

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[271] See Motion of the United States for Limited Intervention and for Modification of October 30, 1997 Protective Order.

[272] See Motion of the United States for Limited Intervention and a Stay of Discovery.

> case. The Court determines, however, that it is not essential to the core issues in this case. In fact, some of this evidence might even be inadmissable as extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. Admitting any evidence of the Lewinsky matter would frustrate the timely resolution of this case and would undoubtedly cause undue expense and delay.[273]

Judge Wright held, however, that her "ruling today does not preclude admission of any other evidence of alleged improper conduct occurring in the White House."[274]

As discovery closed, Ms. Jones's attorneys deposed another "other woman" on Friday, January 30, 1998.[275] She denied that she ever engaged in "sexual activity" with the President.[276]

Finally, Ms. Jones's attorneys filed another motion to compel discovery from the President on January 30, 1998. This last motion to compel argued that the President was withholding documents by using privilege claims.[277] The documents in question related to the 1992 Clinton presidential campaign, James Lyons, Betsey Wright, Gennifer Flowers, Jane Doe #4, "J. Palladino," and others.[278] Ms. Jones's lawyers alleged that Mr. Palladino's

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[273] Order of Jan. 29, 1998, at 2 Jones v. Clinton, No. LR-C-94-290 (emphasis in original).

[274] Id.

[275] 920-DC-00001001-26 ("Other Woman" 1/30/98 Depo.).

[276] 920-DC-00001014 ("Other Woman" 1/30/98 Depo. at 76-77)

[277] 1414-DC-00001237-61 (Plaintiff's Motion to Compel Production of Documents or, in the Alternative, Motion for In Camera Inspection).

[278] 1414-DC-00001237-55 (Plaintiff's Motion to Compel Production of Documents or, in the Alternative, Motion for In

"assignment was to 'dig up dirt' on various women and to induce them not to disclose their sexual relationships with Defendant Clinton."[279]

Feb.-Apr. 1998: **Ms. Jones's lawyers fail to persuade Judge Wright to reconsider the exclusion of evidence about Ms. Lewinsky; Judge Wright grants summary judgment for the defendants**

On Tuesday, February 10, 1998, attorneys for Ms. Jones moved for reconsideration of Judge Wright's January 29, 1998, Order excluding testimony about Monica Lewinsky. Counsel for Ms. Jones argued that Judge Wright had erred in excluding the Monica Lewinsky testimony at this stage of the proceedings because, among other reasons, Rule 403 determinations should not be made before trial, Ms. Lewinsky's testimony was relevant to show a pattern and practice of behavior, and Ms. Lewinsky's testimony was relevant to demonstrate a pattern of suppressing evidence in the Jones case.[280]

A week later, on Tuesday, February 17, 1998, the President's attorneys filed a motion for summary judgment, with supporting

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Camera Inspection).

[279] 1414-DC-00001239 (Plaintiff's Motion to Compel Production of Documents or, in the Alternative, Motion for In Camera Inspection at 3).

[280] Plaintiff's Motion for Reconsideration or, in the Alternative, for Section 1292(b) Certification of Order Excluding Evidence Concerning Monica Lewinsky, Jones v. Clinton, No. LR-C-94-290 (Feb. 10, 1998); Memorandum in Support of Plaintiff's Motion for Reconsideration or, in the Alternative, for Section 1292(b) Certification of Order Excluding Evidence Concerning Monica Lewinsky at 7-11, Jones v. Clinton, No. LR-C-94-290 (Feb. 10, 1998).

material.[281] The President's lawyers argued that "Plaintiff's purported 'other acts' evidence concerning other women . . . is irrelevant to resolution of this Motion, because plaintiff cannot establish that she herself suffered a cognizable injury pursuant to a claim for sexual harassment or outrage."[282] The President's lawyers added that "[t]hus, even if plaintiff had evidence with respect to other women that could be said to establish a 'pattern and practice' of sexual harassment -- which we vigorously contend she does not -- such evidence is not material to this summary judgment motion . . . ."[283] On Wednesday, March 4, 1998, Mr. Ferguson filed his motion for summary judgment.[284]

On Monday, March 9, 1998, Judge Wright issued an order denying Ms. Jones's motion for reconsideration of the decision to exclude the Monica Lewinsky evidence. The order provided in relevant part:

> The Court does not take the denial of plaintiff's motion for reconsideration lightly. The Court readily acknowledges that evidence of the Lewinsky matter might have been relevant to plaintiff's case and, as she argues, that such evidence might possibly have helped her establish, among other things, intent, absence of

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[281] President Clinton's Motion for Summary Judgment, Jones v. Clinton, No. LR-C-94-290 (Feb. 17, 1998); Memorandum in Support of President Clinton's Motion for Summary Judgment, Jones v. Clinton, No. LR-C-94-290 (Feb. 17, 1998).

[282] Memorandum in Support of President Clinton's Motion for Summary Judgment at 3, Jones v. Clinton, No. LR-C-94-290 (Feb. 17, 1998).

[283] Id.

[284] Jones v. Clinton, 990 F. Supp. 657, 666 (E.D. Ark. 1998).

> mistake, motive, and habit on the part of the President. . . . Nevertheless, whatever relevance such evidence may otherwise have . . . it simply is not essential to the core issues in this case.[285]

On Friday, March 13, 1998, Ms. Jones's attorneys filed their opposition to the President's summary judgment motion. In the motion, Ms. Jones's attorneys argued that evidence of the President's treatment of other women, and his use of state troopers to facilitate relationships with other women, rendered summary judgment inappropriate and required the case to proceed to trial.[286]

On Wednesday, April 1, 1998, Judge Wright issued an order granting the defendants' motions for summary judgment and dismissed the case.[287] Judge Wright found that the Ms. Jones "failed to demonstrate that she has a case worthy of submitting to a jury."[288] The order concluded: "One final matter concerns alleged suppression of pattern and practice evidence. Whatever relevance such evidence may have to prove other elements of plaintiff's case, it does not have anything to do with the issues

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[285] Jones v. Clinton, 993 F. Supp. 1217, 1222 (E.D. Ark. 1998) (emphases added).

[286] Plaintiff's Opposition to Defendant Clinton's Motion for Summary Judgment, Jones v. Clinton, No. LR-C-94-290 (Mar. 13, 1998).

[287] Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).

[288] Jones v. Clinton, 990 F. Supp. 657, 679 (E.D. Ark. 1998).

presented by the President's and Ferguson's motions for summary judgment."[289]

Ms. Jones appealed. The case is currently pending before the United States Court of Appeals for the Eighth Circuit.

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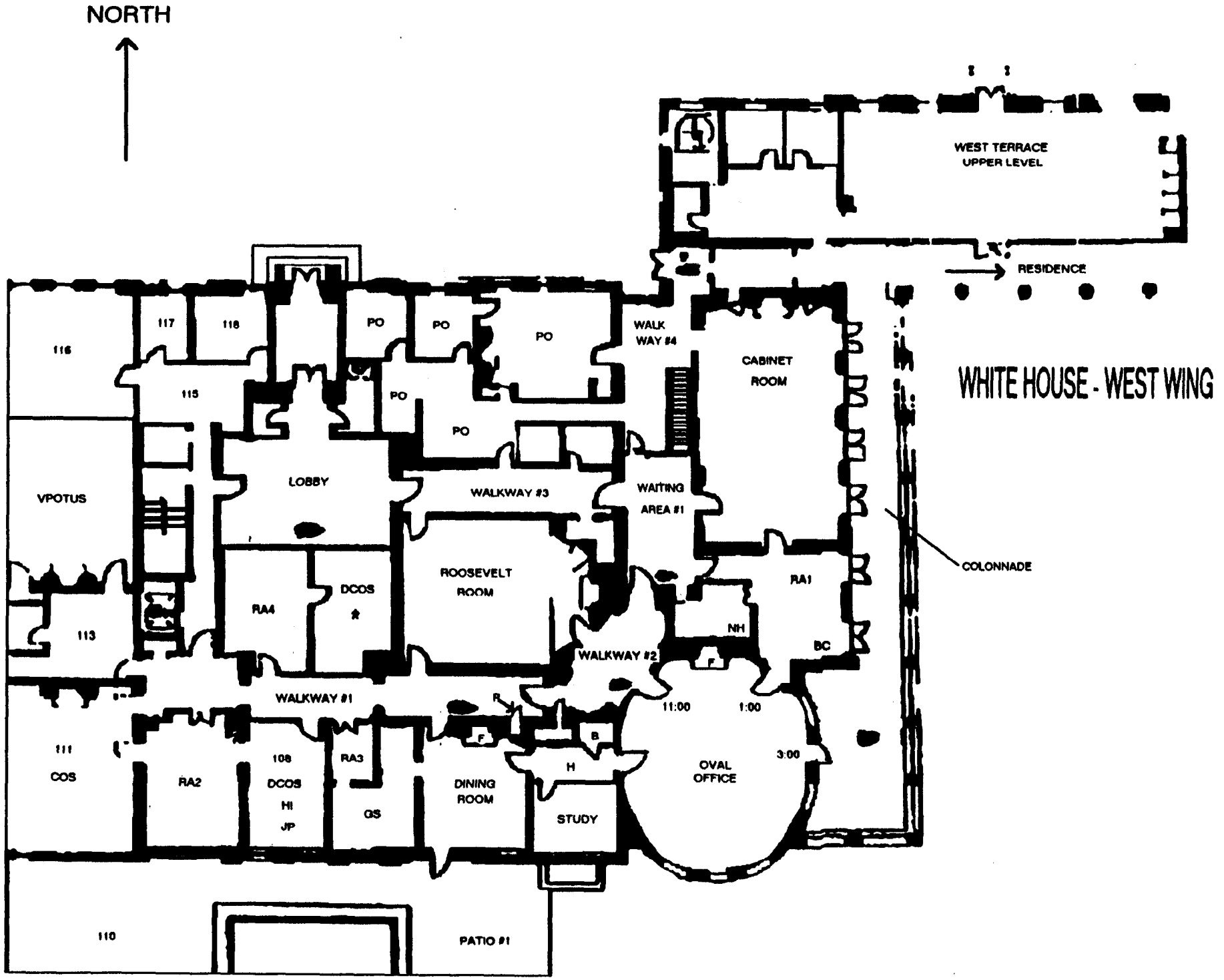
[289] Jones v. Clinton, 990 F. Supp. 657, 678 (E.D. Ark. 1998).

Tab D

Map of the White House, West Wing


NORTH
WEST TERRACE
UPPER LEVEL
RESIDENCE
WHITE HOUSE - WEST WING
116
117
118
PO
PO
PO
WALK
WAY #4
CABINET
ROOM
115
PO
PO
VPOTUS
LOBBY
WALKWAY #3
WAITING
AREA #1
COLONNADE
ROOSEVELT
ROOM
RA4
DCOS
RA1
113
NH
BC
WALKWAY #2
WALKWAY #1
11:00
1:00
111
COS
RA2
108
DCOS
HI
JP
RA3
OS
DINING
ROOM
H
STUDY
OVAL
OFFICE
3:00
110
PATIO #1

KEY TO THE WHITE HOUSE MAP

B	President's bathroom
BC	Betty Currie
DCOS	Deputy Chief of Staff
[redacted]	
F	Fireplace
GS	George Stephanopoulos
H	Hallway #1
HI	Harold Ickes
JP	John Podesta
NH	Nancy Hernreich
P	Pantry
PO	Press Office
RA1	Reception Area #1 (assistants to the President)
RA2	Reception Area #2 (assistants to Chief of Staff and Deputy Chief of Staff)
RA3	Reception Area #3 (assistants to George Stephanopoulos)
RA4	Reception Area #4 (assistants to Nancy Hernreich and others)
VPOTUS	Vice-President Al Gore
*	Erskine Bowles then Evelyn Lieberman then Sylvia Mathews
1:00	Oval Office door at 1:00 (to Reception Area#1)
3:00	Oval Office door at 3:00 (to Colonnade)
11:00	Oval Office door at 11:00 (to Walkway #3)
108	Deputy Chief of Staff (Harold Ickes then John Podesta)
111	Chief of Staff
113	Vice-President's assistants/secretaries
115	National Security Advisor and staff
116	National Security Advisor and staff
117	National Security Advisor and staff
118	National Security Advisor and staff

Tab E

Table of Monica Lewinsky White House Visits

RECORDED[1]
LEWINSKY VISITS TO THE WHITE HOUSE
6/7/96 - 12/28/97

Summary:

- **44 visits.**
- **12 visits in which record shows only the President, and no others, was present.**

No.	DATE	ENTRY TIME	EXIT TIME	REQUESTOR	VISITEE	PRESIDENT'S LOCATION	PURPOSE OF VISIT	REFERENCES
1	06/07/96 (Fri.)	12:51	13:03	Wozniak	Johnson	Oval Office (arrived at 13:05)	Deliver papers from Bacon to Johnson	V006-DC-00000007 (WAVES record) 827-DC-00000016 (Epass Entry Log) 827-DC-00000017 (Epass Exit Log) 968-DC-00000037 (President Notepad Log) Wozniak 3/5/98 Int. at 2
2	06/14/96 (Fri.)	16:51	No exit time logged	Hernreich	President Clinton	Oval Office	Attend radio address with Lewinsky family	V006-DC-00000007 (WAVES record) V006-DC-00002109 (Presidential Movement Log) V006-DC-00000534 (Radio Address Guest List)
3	06/18/96 (Tues.)	17:59	No exit time logged	Widdess	President Clinton	Oval Office Cabinet Room (arrived at 18:27) Oval Office (arrived at 19:29) Residence (arrived at 19:51)	Attend press picnic	V006-DC-00000007 (WAVES record) V006-DC-00002113 (Presidential Movement Log) V006-DC-00000473 (Press Picnic Guest List) Widdess Int. 2/19/98 at 2

[1] There is at least some record of each visit by Ms. Lewinsky to the White House during this time, but in many cases only incomplete information is available from White House personnel and the official White House logs. The information in this chart is derived solely from these logs and personnel. For a comprehensive list of all encounters between Ms. Lewinsky and President Clinton, see Tab F.

KEY: Requestor — The person at whose behest the visitor was cleared into the White House through the WAVES system.
Visitee — The person whom the requestor listed as the person to be visited when requesting clearance for the Ms. Lewinsky.
Purpose — The purpose recalled by the requestor or visitee during an interview with the OIC.
References — The official White House logs that contain the information upon which this chart is based.
Shaded Areas — Visits during which Ms. Lewinsky and the President were in the Oval Office area, and no one else was known to be present.
(See "Understanding the Evidence" section, Tab G, for details.)

4	08/29/96 (Thurs.)	15:06	15:47	Bobowick	Bobowick	Chicago	White House tour or radio address with Lewinsky family[2]	V006-DC-00000007 (WAVES record) 827-DC-00000017 (Epass Entry & Exit Logs) 968-DC-00000045 (Presidential Movement Logs) Bobowick 2/11/98 Int. at 3
5	08/29/96 (Thurs.)	17:15 (scheduled)	No exit time logged	Bobowick	Bobowick	Chicago	White House tour or radio address with Lewinsky family[2]	V006-DC-00000007 (WAVES record) 968-DC-00000045 (Presidential Movement Logs) Bobowick 2/11/98 Int. at 3
6	08/29/96 (Thurs.)	18:22	19:03	Raines	Raines	Chicago	No purpose recalled/known	V006-DC-00000007 (WAVES record) 827-DC-00000017 (Epass Entry & Exit Logs) 968-DC-00000045 (Presidential Movement Logs)
7	10/11/96 (Fri.)	12:49	13:49	Raines	Johnson	Oval Office (arrived at 12:40) South Grounds (arrived at 13:03)	No purpose recalled/known	V006-DC-00000007 (WAVES record) 827-DC-00000017 (Epass Entry & Exit Logs) 968-DC-00000048 (Presidential Movement Log)
8	10/24/96 (Thurs.)	07:42	10:11	Shaddix	Shaddix	Oval Office (arrived at 08:43) South Grounds (arrived at 09:00) Departed White House (at 09:05)	Visit Photo Office	V006-DC-00000007 (WAVES record) 827-DC-00000017 (Epass Entry & Exit Logs) 1234-DC-00000010 (Presidential Movement Log) Shaddix 2/24/98 Int. at 2

[2] Ms. Bobowick remembered clearing Ms. Lewinsky into the White House for a tour with her family and for a radio address with her family. She did not remember specific dates.

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(See "Understanding the Evidence" section, Tab G, for details.)

9	12/17/96 (Tues.)	16:15	No exit time logged	Widdess	President Clinton	Oval Office Second Floor (arrived at 18:56)	Attend Christmas Party	V006-DC-00000007 (WAVES record) 968-DC-00000059 (Presidential Movement Log) 1222-DC-00000231 (Presidential Activity Report) V006-DC-00000505 (Christmas Party Guest List) Widdess 2/19/98 Int. at 2
10	12/17/96 (Tues.)	19:34	20:11	Raines	Raines	Second Floor	No purpose recalled/known	V006-DC-00000007 (WAVES record) 827-DC-00000017 (Epass Entry & Exit Logs) 968-DC-00000060 (Presidential Movement Log) 1222-DC-00000231 (Presidential Activity Report)
11	12/30/96 (Mon.)	13:01	13:43	Currie	Currie	Hilton Head, South Carolina	No purpose recalled/known	V006-DC-00000007 (WAVES record) 827-DC-00000017 (Epass Entry & Exit Logs) 968-DC-00000063 (Presidential Movement Log)
12	02/24/97 (Mon.)	09:38	10:32	Kessinger	Kessinger	Oval Office	Return borrowed photo	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000066 (Presidential Movement Log) Kessinger 2/24/98 Int. at 1-2
13	02/28/97 (Fri.)	17:48	19:07	Currie	Currie	Oval Office	Attend radio address	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000074 (Presidential Movement Log) V006-DC-00000536 (Radio Address Guest List)
14	03/13/97 (Thurs.)	10:01	10:15	Currie	Currie	North Carolina & Florida	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 1222-DC-00000235 (Presidential Activity Report)
15	03/13/97 (Thurs.)	21:21	21:49	Raines	Raines	North Carolina & Florida	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 1222-DC-00000235 (Presidential Activity Report)

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Purpose — The purpose recalled by the requestor or visitee during an interview with the OIC.
References — The official White House logs that contain the information upon which this chart is based.
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(See "Understanding the Evidence" section, Tab G, for details.)

16	03/29/97 (Sat.)	14:03	15:16	Currie	Currie	Oval Office	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) V006-DC-00002130 (Presidential Movement Log)
17	04/15/97 (Tues.)	14:00 (schedule)	No exit time logged	Naplan	Naplan	New York	No purpose recalled/known	V006-DC-00000008 (WAVES record) 968-DC-00002318 (Press Schedule) Naplan 3/3/98 Int. at 2
18	04/16/97 (Wed.)	09:49	09:56	Currie	Currie	Residence	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000096 (Presidential Movement Log)
19	05/01/97 (Thurs.)	17:43	No exit time logged	Stott	Stott	Oval Office Residence (arrived at 18:40)	Press Office job interview	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry Log) 1234-DC-00000029 (Presidential Movement Log) Stott 2/27/98 Int. at 1
)	05/02/97 (Fri.)	19:57	20:21	Raines	Raines	Residence	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000112 (Presidential Movement Log)
21	05/24/97 (Sat.)	12:21	13:54	Currie	Currie	Oval Office (arrived at 11:59) Pool (arrived at 13:47) Oval Office Study (arrived at 13:50)	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 1222-DC-00000242 (Presidential Activity Report)

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Purpose — The purpose recalled by the requestor or visitee during an interview with the OIC.
References — The official White House logs that contain the information upon which this chart is based.
Shaded Areas — Visits during which Ms. Lewinsky and the President were in the Oval Office area, and no one else was known to be present.
(See "Understanding the Evidence" section, Tab G, for details.)

22	05/30/97 (Fri.)	15:32	16:01	Dimel	Dimel	Oval Office	Initial NSC job interview	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000120 (Presidential Movement Log) Dimel 2/18/98 Int. at 1
23	06/11/97 (Wed.)	10:58	12:04	Dimel	Dimel	Oval Office	Follow-up NSC job interview	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000121 (Presidential Movement Log) Dimel 2/18/98 at 1
24	06/16/97 (Mon.)	14:47	16:11	Croft	Croft	Oval Office	Marsha Scott interview	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000132 (Presidential Movement Log) Scott 3/19/98 GJ at 28-29
25	06/24/97 (Tues.)	18:59	19:19	Currie	Currie	Army Navy Country Club	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Log) 1234-DC-00000033 (Presidential Movement Log)
26	07/04/97 (Fri.)	08:51	No exit time logged	Currie	Currie	Oval Office South Grounds (arrived at 11:08)	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry Log) 1222-DC-00000249 (Presidential Activity Report)
27	07/14/97 (Mon.)	21:34	23:23	Currie	Currie	Oval Office (arrived at 21:28) Appointment Secretary's Office (arrived at 21:41) Residence (arrived at 23:25)	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) V006-DC-00002142 (Presidential Movement Log) 1222-DC-00000251 (Presidential Activity Report)

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Purpose — The purpose recalled by the requestor or visitee during an interview with the OIC.
References — The official White House logs that contain the information upon which this chart is based.
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(See "Understanding the Evidence" section, Tab G, for details.)

28	07/16/97 (Wed.)	10:46	11:42	Scott	Scott	Oval Office	Job interview	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 1222-DC-00000253 (Presidential Activity Report) Scott 3/19/98 Int. at 64-68
29	07/24/97 (Thurs.)	18:04	18:27	Currie	Currie	Oval Office	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000155 (Presidential Movement Log)
30	08/01/97 (Fri.)	10:46	11:40	Unknown	Unknown	Oval Office Rose Garden (arrived at 11:10) Oval Office (arrived at 11:17)	No purpose recalled/known	827-DC-00000002 (Epass Entry & Exit Logs) 1222-DC-00000255 (Presidential Activity Report)
31	08/01/97 (Fri.)	12:19	No exit time logged	Unknown	Unknown	Oval Office Cabinet Room (arrived at 12:28) Oval Office (arrived at 12:45) Residence (arrived at 13:16)	No purpose recalled/known	827-DC-00000002 (Epass Entry Log)1222- 1222-DC-00000255 (Presidential Activity Report)
32	08/16/97 (Sat.)	09:02	10:20	Currie	Currie	Oval Office (arrived at 09:20) Second Floor (arrived at 10:05)	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) V006-DC-00002146 (Presidential Movement Log)
33	09/11/97 (Thurs.)	18:59	19:06	Raines	Raines	Oval Office	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs)

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References — The official White House logs that contain the information upon which this chart is based.
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(See "Understanding the Evidence" section, Tab G, for details.)

34	09/12/97 (Fri.)	19:41	20:22	Currie	Currie	Residence	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000172 (Presidential Movement Log)
35	09/22/97 (Mon.)	19:11	19:25	Raines	Raines	New York	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000179 (Presidential Movement Log)
36	10/11/97 (Sat.)	09:37	10:54	Currie	Currie	Oval Office (arrived at 09:54)	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) V006-DC-00002151 (Presidential Movement Log)
37	10/29/97 (Wed.)	No entry time logged	No exit time logged	Wilson	President Clinton	White House	No purpose recalled/known	V006-DC-00000008 (WAVES record) 1234-DC-00000048 (Presidential Movement Log)
38	11/13/97 (Thurs.)	No entry time logged	No exit time logged	Wozniak	Wozniak	White House	Attend military function	V006-DC-00000008 (WAVES record) V006-DC-00002156 (Presidential Movement Log) Wozniak 3/5/98 Int. at 2
39	11/13/97 (Thurs.)	18:21	No exit time logged	Currie	Currie	Oval Office (arrived at 18:34)	No purpose recalled/known	V006-DC-00000008 (WAVES record) 827-DC-00000018 (Epass Entry Log) 968-DC-00000190 (Presidential Movement Log)
40	12/05/97 (Fri.)	No entry time logged	No exit time logged	Schwartz	President Clinton	White House	Christmas Party	V006-DC-00000009 (WAVES record) 1222-DC-00000264 (Presidential Activity Report) V006-DC-00000521 (Holiday Reception Guest List) V006-DC-00001765 (WAVES request)
41	12/06/97 (Sat.)	12:52	13:36	Currie	Currie	Oval Office Residence (arrived at 13:54)	No purpose recalled/known	V006-DC-00000009 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) V006-DC-00002158 (Presidential Movement Log)

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Purpose — The purpose recalled by the requestor or visitee during an interview with the OIC.
References — The official White House logs that contain the information upon which this chart is based.
Shaded Areas — Visits during which Ms. Lewinsky and the President were in the Oval Office area, and no one else was known to be present.
(See "Understanding the Evidence" section, Tab G, for details.)

42	12/15/97 (Mon.)	11:31	12:39	Luzzatto	Wozniak	Oval Office	To do "some things" for Ken Bacon	V006-DC-00000009 (WAVES record) 827-DC-00000018 (Epass Entry & Exit Logs) 968-DC-00000198 (Presidential Movement Log) Wozniak 3/5/98 Int. at 2
43	"A day or two" before or after 12/15/98	No entry time logged	No exit time logged	Wozniak	Wozniak	Unknown	To do "some things" for Ken Bacon	V006-DC-00000009 (WAVES record) Wozniak 3/5/98 Int. at 2
44	12/28/97 (Sun.)	08:16	No exit time logged	Currie	Currie	Oval Office (arrived at 08:10) Residence (arrived at 09:52)	No purpose recalled/known	V006-DC-00000009 (WAVES record) 827-DC-00000018 (Epass Entry Log) V006-DC-00002159 (Presidential Movement Log)

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Shaded Areas — Visits during which Ms. Lewinsky and the President were in the Oval Office area, and no one else was known to be present.
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Tab F

Table of Contacts between Monica Lewinsky and the President

INTRODUCTION TO THE CHART
OF CONTACTS BETWEEN THE PRESIDENT AND MONICA LEWINSKY

The Office of the Independent Counsel ("OIC") prepared the following Chart with Monica Lewinsky's assistance. In her words, "it's a chronology that marks some of the highlights of my relationship with the President. It definitely includes the visits that I had with him and most of the gifts we exchanged. It reflects most of the phone calls that I remember."[1] Dates on which sexual contact occurred are designated in bold.

The most important source of information for this Chart was Ms. Lewinsky's recollections, which were refreshed in small part by the near-contemporaneous compiled record in her Filofax calendar.[2] To an even smaller degree, the OIC used some evidence gathered in its investigation to assist Ms. Lewinsky in refreshing her memory of events. Ms. Lewinsky reviewed several predecessor versions of the Chart over three or four days and made minor modifications before confirming its accuracy.[3]

This Chart was used as Grand Jury Exhibit ML-7 when Ms. Lewinsky testified before the grand jury on August 6, 1998.[4] When she testified, Ms. Lewinsky noted that one change should be made to the chart: The October 23, 1996, contact on page five should also reflect the fact that Ms. Lewinsky attended a

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[1] Lewinsky 8/6/98 GJ at 27-28.

[2] Id. at 28-29.

[3] Lewinsky 8/5/98 Int. at 1.

[4] Id. at 27-28.

Democratic fundraiser on that date.[5] Ms. Lewinsky testified that she believed that the Chart was otherwise accurate, with that correction.[6] On August 26, 1998, Ms. Lewinsky again verified the accuracy of the Chart in a sworn deposition.[7]

Since Ms. Lewinsky last verified the Chart, Ms. Lewinsky has examined a substantial amount of evidence, including the transcripts and audio tapes of several of her conversations with Linda Tripp. In reviewing that evidence, Ms. Lewinsky realized that there were two minor discrepancies between the Chart and the actual sequence of events regarding when she and the President exchanged two gifts. She now recalls that the President gave her the Annie Lenox compact disc on October 11, 1997, rather than on December 6, 1997, as listed on the Chart. Similarly, she now believes she may have sent the package to the President containing sunglasses, an erotic postcard, and a note about education reform on October 16, 1997, rather than on October 21 or 22, 1997, as listed on the Chart.[8] Ms. Lewinsky has made no other revisions to the Chart.

This Chart is a counterpart to the Chart of Recorded Lewinsky Visits to the White House, at Tab E. That chart details Ms. Lewinsky's presence at the White House with documentary evidence.

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[5] Id. at 28.

[6] Id.

[7] Lewinsky 8/26/98 Depo. at 6.

[8] Lewinsky 9/6/98 Int. at 2-3.

CONTACTS BETWEEN THE PRESIDENT AND MONICA LEWINSKY

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
Approx. 8/9/95 Wednesday	Departure ceremony - nonverbal connection - eye contact - green suit			
Approx. 8/10/95 Thursday	Public function - Pres. 49th B-day party - flirtation - eye contact - green suit			
Approx. 8/13 or 8/14/95 Sun. - Mon.	Departure ceremony - intro. to Pres.			
Mid to late 9/95	Photo opportunity - WW basement - Ungvari - Pres. said he knew who ML was			
Approx. 10/95	Chance meeting - West Exec. Ave. - waved at Pres.			
11/15/95 Wednesday	Pres. made several visits to Panetta's office where ML was working			
11/15/95 Wednesday	Private encounter - approx. 8 p.m. - hallway by study - kissing			
11/15/95 Wednesday	Second private encounter - sometime b/t 8 and 10 p.m. - study and hallway by study - physical intimacy including oral sex			
11/17/95 Friday	Private encounter - approx. 8 p.m. - study area - pizza night - kissing			
11/17/95 Friday	Second private meeting of night - bathroom by study - phone call - pizza night - physical intimacy including oral sex			
11/20/95 Monday			Zegna tie - ML gave to Currie to give to Pres	
12/5/95 Tuesday	Brief private encounter - oval office and back study - no sexual contact			autographed photo wearing tie
12/31/95 Sunday	Private encounter - sometime b/t 12 and 1 p.m. - approx. 20 or 25 min. - hallway by study - physical intimacy including oral sex			"Davidoff" cigars

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
1/7/96 Sunday		conversation - first call to ML's home		
1/7/96 Sunday		conversation - ML at office		
1/7/96 Sunday	Private encounter - late afternoon - mtg. lasted approx. 45 min. - bathroom by study - physical intimacy including oral sex			
1/15 or (early a.m.) 1/16/96 Mon. or Tues.		conversation, including phone sex - approx. 12:30 a.m. - ML at home		
1/21/96 Sunday	Chance encounter then private encounter - sometime b/t 3 and 5 p.m. approx. 30 to 40 min. - hallway by study - physical intimacy including oral sex - kissing in N. Hemreich's office			
Approx. 1/28/96 ınday		caller ID on ML's office phone indicated POTUS call		
1/30/96 Tuesday		conversation - during middle of workday at ML's office		
1/30/96 Tuesday	Public function - Griffin's going away party			
2/4/96 Sunday		conversations - ML at office - multiple calls		
2/4/96 Sunday	Private encounter- study and hallway - approx. 1 ½ hr. - physical intimacy including oral sex			Signed "State of Union" address (date approx.)
2/4/96 Sunday		conversation - ML at office		
2/7 or 2/8/96 Wed. or Thurs.		conversation - ML at home		

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
2/8 or 2/9/96 Thurs. or Fri.		conversation, including phone sex - ML at home		
2/19/96 Monday		conversation - ML at home		
2/19/96 Monday	Private encounter - approx. 25 min. sometime b/t 12 and 2 p.m. - oval office - no sexual contact			
Approx. 2/28 or 3/5/96		conversation - approx. 20 min. - after chance meeting in hallway - ML at home		
3/10/96 Sunday	Accidental meeting - outside restroom in WH - Ungvari present			
3/25/96 Monday	Accidental meeting - pass each other in hallway - ML looked away			
3/26/96 Tuesday		conversation - approx. 11 a.m. - ML at office		
3/29/96 riday	Accidental meeting - after jog - ML hurt hand	conversation - ML at office - approx. 8 p.m. - invitation to movie		
3/31/96 Sunday		conversation - ML at office - approx. 1 p.m. - Pres. ill		
3/31/96 Sunday	Private encounter - approx. 45 min. - hallway by study - physically intimate contact		Hugo Boss tie - carried to mtg.	cigars
4/7/96 Easter Sunday		conversation - ML at home		
4/7/96 - Easter Sunday	Private encounter - sometime b/t 5 and 6 p.m.- approx. 30 min. - hallway by study and study - intervening phone call - physical intimacy including oral sex			
4/7/96 Easter Sunday		conversation - ML at home - why ML left		

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
4/12/96 Friday		conversation - ML at home - daytime		
4/12 or (early a.m.) 4/13/96 Fri. or Sat.		conversation - ML at home - after midnight		
4/22/96 Monday		conversation - job talk - ML at home		
Approx. 4/28/96 Sunday	Public function - AIPAC meeting			
4/29 or 4/30/96 Mon. or Tues.		message - after 6:30 a.m.		
5/2/96 Thursday		conversation, possibly including phone sex - ML at home		
5/6/96 Monday		possible phone call		
pprox. 5/8/96 Wednesday	Public function - Saxophone Club event			
5/16/96 Thursday		conversation - ML at home		
5/21/96 Tuesday	Public function - Adm. Boorda memorial service			
5/21/96 Tuesday		conversation, including phone sex - ML at home		
5/31/96 Friday		message		
6/5/96 Wednesday		conversation - ML at home - early evening		
Approx. 6/13/96 Thursday	Public function - arrival of Irish President			
6/14/96 Friday	Public function - radio address - family			

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
6/23/96 Sunday		conversation, possibly including phone sex - ML at home		
7/5 or (early a.m.) 7/6/96 Fri. or Sat.		conversation, including phone sex - ML at home		
7/19/96 Friday		conversation, including phone sex - 6:30 a.m. - ML at home		
7/28/96 Sunday		conversation - ML at home		
8/4/96 Sunday		conversation, including phone sex - ML at home		
Before 8/16/96			Zegna tie - also t-shirt from Bosnia - ML sent to Betty to give to the President	
8/18/96 Sunday	Public function - Pres. 50th B-day party - limited intimate contact			
/24/96 aturday		conversation, including phone sex - ML at home		
9/5/96 Thursday				thank you note - hand signed addendum - "tie is really beautiful"
9/5/96 Thursday		conversation, possibly including phone sex - Pres. in Fla. - ML at home		
9/10/96 Tuesday		message		
9/30/96 Monday		conversation, possibly including phone sex		
10/22/96 Tuesday		conversation, including phone sex - ML at home		
10/23 or (early a.m.) 10/24/96 Wed. or Thurs.		conversation - ML at home		

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
11/6/96 Wednesday	Public function - South Lawn Rally			
12/2/96 Monday		conversation - approx. 10 - 15 min. - ML at home		
12/2/96 Monday		conversation, including phone sex - later that evening - ML at home - approx. 10:30 p.m. - Pres. fell asleep		
12/17/96 Tuesday	Public function - Christmas party			
12/18/96 Wednesday		conversation - approx. 5 min.- 10:30 p.m. - ML at home		
After Christmas 1996			Sherlock Holmes game - glow in dark frog - ML dropped off gifts with Currie	
12/30/96 Monday		message		
12/97 Sunday		conversation, including job talk and possibly phone sex - ML at home		
Sometime between 2/97 and 5/97			two books, Oy Vey and a golf book - card or letter	
2/8/97 Saturday		conversation - ML at home - mid-day - 11:30 or 12:00		
2/8/97 Saturday		conversation, including job talk and phone sex - 1:30 or 2:00 p.m. - ML at home		
2/14/97 Friday			Washington Post ad - Happy Valentine's Day	
2/28/97 Friday	Private encounter after radio address - early evening - approx. 20 to 25 min. - study and bathroom by study - physical intimacy including oral sex to completion		Golf ball and tees from Harrods - plastic pocket frog	hatpin - the book, Leaves of Grass

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
Between 3/3 and 3/9/97			Thank you note - Hugo Boss tie - ML sent package by Federal Express	
3/12/97 Wednesday		conversation - three minutes - ML at work		
After 3/14/97			care package after Pres. injured his leg - "Hi ya, handsome!" card, metal magnet with Pres. seal for his crutches, license plate with "BILL" for his wheelchair, knee pads with Pres. seal - ML sent package by Federal Express	
3/29/97 Saturday	Private encounter - approx. 1:30 or 2 p.m. - study - Pres. on crutches - physical intimacy including oral sex to completion and brief direct genital contact		penny medallion with the heart cut out - her personal copy of Vox - framed Valentine's Day ad [ML also replaced the cut Hugo Boss tie]	
4/26/97 Saturday		conversation - late afternoon - 20 min. - ML at home		
5/17/97 Saturday		conversations - multiple calls		
5/18/97 Sunday		conversations - multiple calls		
5/24/97 Saturday	Private encounter - "D-Day" - mid-day - hugging - dining room, study and hallway		Banana Republic long sleeve casual shirt - puzzle on golf mysteries	
6/29/97 Sunday			letter	
7/3/97 Thursday			letter - frustration re: jobs	
7/4/97 Friday Indep. Day	Private encounter - approx. 9:15 - mtg. ended b/t 10 and 11 a.m. - study and hallway - argument - kiss on neck			
7/8/97 Tuesday	Public function - Madrid - flirtation			

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
7/14/97 Monday	Private encounter - Hernreich's office - late evening - Pres. had conference call during middle of mtg. - ML did not participate in conference call - no sexual contact		wooden B with a frog in it from Budapest - card with a watermelon on it	
7/15/97 Tuesday		conversation - ML at home		
7/24/97 Thursday	Private encounter - oval office - approx. 10 min. - early evening - no sexual contact			b-day gifts: antique flower pin in wooden box and porcelain objet d' art handed to ML by Currie - ML picked up signed picture
8/1/97 Friday		conversation		
Week of 8/10/97 but before 8/16/97			a book, The Notebook and a card	
'/16/97 aturday	Private encounter - physical intimacy including birthday kiss - study		b-day gifts: antique book on Peter the Great, apple square - ML also gave Pres. card game "Royalty" and a book, Disease and Misrepresentation	
Early 9/97				Black Dog items: t-shirts, baseball cap, mug and cotton dress - given to ML by Currie
9/30/97 Tuesday			memorandum - to "HANDSOME" re: "the New Deal"	
9/30/97 Tuesday		conversation, possibly including phone sex		
10/7/97 Tuesday			couriered package - letter - job talk	

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
10/9 or (early a.m.) 10/10/97 Thurs. or Fri.		conversation - long, from 2 or 2:30 a.m. until 3:30 or 4:00 a.m. - job talk - argument - ML at home		
10/11/97 Saturday	Private encounter - approx. 9:30 a.m. - study - job talk - no sexual contact			
10/16/97 Thursday			letter - job-related - "whole fat packet" of job stuff -via Federal Express	
10/21 or 10/22/97 Tues. or Wed.			Calvin Klein tie - a pair of sunglasses - a card, a postcard (erotic painting) - note re: education reform	
10/23/97 Thursday		conversation - ML at home - end b/c HRC		
10/28/97 Tuesday			unidentified couriered package	
'0/30/97 hursday		conversation - ML at home - interview prep		
Approx. week before 10/31/97	--		Halloween gifts: card - pumpkin lapel pin - wooden letter opener with a frog on the handle - plastic pumpkin filled with candy	
11/3/97 Monday			unidentified couriered package	
11/12/97 Wednesday		conversation, possibly including phone sex - discuss re: ML visit		
11/12/97 Wednesday			unidentified couriered package	
11/13/97 Thursday			Ginko biloba and zinc lozenges - ML gave to Currie to give to Pres. per Pres. request	

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
11/13/97 Thursday	Private encounter in study - approx. 5 min. - evening - Zedillo visit		antique paperweight depicting the WH	
11/20/97 Thursday			courier record - letter	
11/21/97 Friday			courier record - cassette tape	
Late 11/97 Early 12/97			letter - ML give to Currie to give to Pres. - Not delivered until 12/5	
12/5/97 Friday	Public function - Christmas party			
12/6/97 Saturday		conversation - approx. 30 min. - ML at home		
12/6/97 Saturday	Private encounter - after NW Gate incident - job talk		Christmas gift: antique standing cigar holder - - Other gifts: Starbucks Santa Monica mug - tie from London - book, Our Patriotic Presidents - Hugs and Kisses box	Annie Lenox compact disc
/8/97 onday			courier record - card - peach candies	
12/17 or (early a.m.) 12/18/97 Wed. or Thurs.		conversation - b/t 2:00 a.m. and 3:00 a.m. - ML at home - witness list		
12/28/97 Sunday	Private encounter - Christmas kiss - doorway by study and bathroom by study - b/t 9 and 10 a.m.		Hand painted Easter Egg - "gummy boobs" from Urban Outfitters	large Rockettes blanket from New York - pin of the New York skyline - a "marble-like" bear's head from Vancouver - a pair of joke sunglasses - a small box of cherry chocolates - Black Dog canvas bag - Black Dog stuffed animal

DATE	IN - PERSON CONTACTS	PHONE CALLS	GIFTS/ NOTES ML TO WJC	GIFTS/NOTES WJC TO ML
./4/98 Sunday			Titanic note - book - Presidents of the United States - dropped off w/Currie	
1/5/98 Monday		conversation		

Tab G

Tables of Phone Conversations

Telephone Calls

TABLE 1

November 15, 1995

No.	Time	Call From	Call To	Length of Call
1	9:25 PM	President Clinton	Rep. Jim Chapman, [redacted]	5:00
2	9:31 PM	President Clinton	Rep. John Tanner, [redacted]	4:00

Source Documents

Call 1: 1472-DC-00000006 (Presidential call log)

Call 2: 1472-DC-00000008 (Presidential call log)

Telephone Calls

TABLE 2

November 17, 1995

No.	Time	Call From	Call To	Length of Call
1	9:53 PM	President Clinton	Rep. H.L. Callahan	21:00

Source Documents

Call 1: 1472-DC-00000015 (Presidential call log)

Telephone Calls

TABLE 3

December 31, 1995

No.	Time	Call From	Call To	Length of Call
1	12:53 PM	Secretary William Perry, White House signal 7-3107	President Clinton	5:00

Source Documents

Call 1: 1506-DC-00000029 (Presidential call log)

Telephone Calls

TABLE 4

January 7, 1996

No.	Time	Call From	Call To	Length of Call
1	4:39 PM	President Clinton	Gene Sperling, White House Admin., [redacted]	10:00

Source Documents

Call 1: 1506-DC-00000031 (Presidential call log)

Telephone Calls

TABLE 5

January 21, 1996

No.	Time	Call From	Call To	Length of Call
1	3:47 PM	Nancy Mitchell, White House Admin., [redacted]	President Clinton	1:00

Source Documents

Call 1: 1506-DC-00000050 (Presidential call log)

Telephone Calls

TABLE 6

February 4, 1996

No.	Time	Call From	Call To	Length of Call
1	4:45 PM	Rahm Emanuel, [redacted]	President Clinton	5:00

Source Documents

Call 1: 1506-DC-00000068 (Presidential call log)

Telephone Calls

TABLE 7

February 19, 1996

No.	Time	Call From	Call To	Length of Call
1	12:42 PM	Alfonso Fanjul, [redacted]	President Clinton	22:00

Source Documents

Call 1: 1472-DC-00000017 (Presidential call log)

Telephone Calls

TABLE 8

March 31, 1996

No.	Time	Call From	Call To	Length of Call
1	3:06 PM	President Clinton	Sen. Barbara Mikulski, [redacted]	1:00

Source Documents

Call 1: 1506-DC-00000139 (Presidential call log)

Telephone Calls

TABLE 9

April 7, 1996

No.	Time	Call From	Call To	Length of Call
1	5:11 PM	Richard Morris, Paris, France, [redacted]	President Clinton	9:00
2	5:30 PM	President Clinton	Evelyn Lieberman, ext. [redacted]	2:00

Source Documents

Calls 1 and 2: 1506-DC-00000144 (Presidential call log)

Telephone Calls

TABLE 10

April 9, 1996

No.	Time	Call From	Call To	Length of Call
1	2:18 PM	Monica Lewinsky's residence, [redacted]	Walter Kaye, [redacted]	19:00
2	4:37 PM	Monica Lewinsky's residence, [redacted]	Walter Kaye, [redacted]	2:00
3	5:05 PM	Monica Lewinsky's residence, [redacted]	Walter Kaye, [redacted]	7:00

Source Documents

Call 1: 1000-DC-00000768 (MCI toll records)

Calls 2 and 3: 1000-DC-00000769 (MCI toll records)

Telephone Calls

TABLE 11

April 10, 1996

No.	Time	Call From	Call To	Length of Call
1	4:56 PM	Monica Lewinsky's residence, [redacted]	Walter Kaye, [redacted]	10:00

Source Documents

Call 1: 1000-DC-00000769 (MCI toll records)

Telephone Calls

TABLE 12

April 12, 1996

No.	Time	Call From	Call To	Length of Call
1	12:38 PM	Monica Lewinsky's residence, [redacted]	Walter Kaye, [redacted]	1:00

Source Documents

Call 1: 1000-DC-00000770 (MCI toll records)

Telephone Calls

TABLE 13

April 15, 1996

No.	Time	Call From	Call To	Length of Call
1	5:18 PM	Monica Lewinsky's residence, [redacted]	Walter Kaye [redacted]	11:00

Source Documents

Call 1: 1000-DC-00000771 (MCI toll records)

Telephone Calls

TABLE 14

July 19, 1996

No.	Time	Call From	Call To	Length of Call
1	12:11 AM	President Clinton	White House Operator	1:00
2	6:40 AM	President Clinton	White House Operator	1:00

Source Documents

Calls 1 and 2: 1506-DC-00000275 (Presidential call log); 1506-DC-00000638 (Presidential diarists notes)

Telephone Calls

TABLE 15

March 29, 1997

No.	Time	Call From	Call To	Length of Call
1	8:37 AM	Ms. Lewinsky's cellular phone, [redacted]	Ms. Currie's office, [redacted]	1:00

Source Documents

Call 1: 1014-DC-00000022 (Cellular One toll records)

Telephone Calls

TABLE 16

July 4, 1997

No.	Time	Call From	Call To	Length of Call
1	10:22 AM	President Clinton	Bruce Lindsey's cellular phone	3:00
2	10:25 AM	President Clinton	Nancy Hernreich	11:00

Source Documents

Calls 1 and 2: **968-DC-00003546 (Presidential call log)**

Telephone Calls

TABLE 17

July 14, 1997

No.	Time	Call From	Call To	Length of Call
1	10:03 PM	President Clinton	Conference call with Robert Bennett and Charles Ruff	51:00
2	10:55 PM	President Clinton	Bruce Lindey's residence, [redacted]	6:00

Source Documents

Calls 1 and 2: 968-DC-00003550 (Presidential call log)

Telephone Calls

TABLE 18

August 16, 1997

No.	Time	Call From	Call To	Length of Call
1	9:18 AM	President Clinton	Ms. Currie's office, ext. [redacted]	1:00

Source Documents

Call 1: 968-DC-00003558 (Presidential call log)

Telephone Calls

TABLE 19

September 3, 1997

No.	Time	Call From	Call To	Length of Call
1	2:24 PM	Ms. Lewinsky's office, [redacted]	Marsha Scott's office, [redacted]	2:25
2	4:55 PM	Ms. Lewinsky's office, [redacted]	Marsha Scott's office, [redacted]	46:58

Source Documents

Calls 1 and 2: 833-DC-00017857 (Pentagon phone records)

Telephone Calls

TABLE 20

October 6, 1997

No.	Time	Call From	Call To	Length of Call
1	3:44 PM	Ms. Lewinsky's office, [redacted]	Ms. Currie's office, [redacted]	5:53
2	4:16 PM	Ms. Lewinsky's office, [redacted]	Ms. Currie's office, [redacted]	7:00

Source Documents

Calls 1 and 2: 833-DC-00017867 (Pentagon phone records)

Telephone Calls

TABLE 21

October 11, 1997

No.	Time	Call From	Call To	Length of Call
1	10:57 AM	Vernon Jordan, [redacted]	President Clinton	9:00

Source Documents

Call 1: 968-DC-00003569 (Presidential call log)

Telephone Calls

TABLE 22

October 21, 1997

No.	Time	Call From	Call To	Length of Call
1	3:09 PM	Ms. Currie, fax number [redacted]	Fax to United Nations	N/A
2	7:01 PM	Ambassador William Richardson's office, [redacted]	Ms. Lewinsky's residence, [redacted]	5:42

Source Documents

Call 1: 828-DC-00000012 (faxed copy of Ms. Lewinsky's resume, produced by United Nations)

Call 2: 828-DC-00000004 (State Department phone records)

Telephone Calls

TABLE 24

November 4, 1997

No.	Time	Call From	Call To	Length of Call
1	3:52 PM	Mr. Jordan's office, [redacted]	Ms. Currie's office [redacted]	0:54
2	3:54 PM	Ms. Lewinsky's office, [redacted]	Mr. Jordan's office, [redacted]	3:32
3	4:09 PM	Mr. Jordan's office, [redacted]	Ms. Currie's office, [redacted]	0:42
4	4:38 PM	Mr. Jordan's office, [redacted]	Ms. Currie's office, [redacted]	1:06

Source Documents

Calls 1, 3, and 4: V004-DC-00000134 (Akin, Gump, Strauss, Hauer & Feld phone records)

Call 2: 833-DC-00017875 (Pentagon phone records)

Telephone Calls

TABLE 25

November 5, 1997

No.	Time	Call From	Call To	Length of Call
1	8:50 AM	Mr. Jordan's office, [redacted]	President Clinton	5:00
2	8:56 AM	Mr. Jordan's office, [redacted]	Ms. Hernreich's office, [redacted]	6:30
3	11:05 AM	Mr. Jordan's office, [redacted]	Ms. Hernreich's office, [redacted]	0:48
4	11:44 AM	Mr. Jordan's office, [redacted]	Ms. Hernreich's office, [redacted]	1:06
5	2:34 PM	Mr. Jordan's office, [redacted]	Ms. Hernreich's office, [redacted]	1:24
6	2:36 PM	Mr. Jordan's office, [redacted]	Ms. Currie's office, [redacted]	1:30

Source Documents

Call 1: 1178-DC-00000011 (Presidential call log)

Calls 2, 3, 4, 5, and 6: V004-DC-00000135 (Akin, Gump, Strauss, Hauer & Feld phone records)

Telephone Calls

TABLE 26

November 24, 1997

No.	Time	Call From	Call To	Length of Call
1	10:14 AM	Ms. Lewinsky's office, [redacted]	Mona Sutphen's office, United Nations, [redacted]	6:44

Source Documents

Call 1: 833-DC-00017908 (Pentagon phone records)

Telephone Calls

TABLE 27

November 26, 1997

No.	Time	Call From	Call To	Length of Call
1	10:32 AM	Ms. Lewinsky at Bernard Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	1:00
2	2:53 PM	Vernon Jordan's office, [redacted]	Ms. Currie's office, [redacted]	0:30
3	3:07 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL VERNON JORDAN, BETTY CURRY."	N/A

Source Documents

Call 1: 1205-DC-00000016 (MCI toll records; times adjusted from Pacific to Eastern Standard time)

Call 2: V004-DC-00000143 (Akin, Gump, Strauss, Hauer & Feld phone records)

Call 3: 831-DC-00000011 (Pagemart; times adjusted from Pacific to Eastern Standard time)

Telephone Calls

TABLE 28

December 5, 1997

No.	Time	Call From	Call To	Length of Call
1	1:11 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:10
2	1:24 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:15
3	3:15 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	2:31
4	3:43 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:43
5	4:03 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:04
6	4:21 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:03
7	4:34 PM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:31
8	5:41 PM	Rader, Campbell, Fisher & Pyke	Fax to Robert Bennett	N/A

Source Documents

Calls 1, 2, 3, 4, 5, 6, and 7: 1216-DC-00000022 (Bell Atlantic toll records)
Call 8: 1408-DC-00000005 (Fax confirmation sheet; produced by Rader, Campbell, Fisher & Pyke; times adjusted from Central to Eastern Standard time)

Telephone Calls

TABLE 29

December 6, 1997

No.	Time	Call From	Call To	Length of Call
1	8:41 AM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:00
2	8:51 AM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:17
3	9:21 AM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:10
4	10:48 AM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	0:29
5	10:57 AM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	6:51
6	11:37 AM	Ms. Lewinsky's residence, [redacted]	Ms. Currie's office, [redacted]	56:23
7	12:05 PM	Betty Currie	Bruce Lindsey's pager; message reads: "Call Betty ASAP [redacted]"	N/A

Source Documents

Calls 1, 2, 3, 4, 5, and 6: 1216-DC-00000022 (Bell Atlantic toll records)
Call 7: 964-DC-00000862 (White House pager records)

Telephone Calls

TABLE 30

December 11, 1997

No.	Time	Call From	Call To	Length of Call
1	9:45 AM	Mr. Jordan's office, [redacted]	Young & Rubicam, [redacted]	0:36
2	10:18 AM	Mr. Jordan's office, [redacted]	Ms. Hernreich's office, [redacted]	1:12
3	10:39 AM	Mr. Jordan's office, [redacted]	Barbara Neysmith, American Express, [redacted]	0:54
4	10:59 AM	Mr. Jordan's office, [redacted]	Barbara Neysmith, American Express, [redacted]	3:36
5	11:12 AM	Mr. Jordan's office, [redacted]	Howard Gittis, McAndrews & Forbes, [redacted]	4:24
6	12:47 PM	Mr. Jordan's office, [redacted]	Barbara Neysmith, American Express, [redacted]	0:48
7	12:49 PM	Mr. Jordan's office [redacted]	Young & Rubicam, [redacted]	1:00
8	12:51 PM	Mr. Jordan's office, [redacted]	Howard Gittis, McAndrews & Forbes, [redacted]	1:06
9	1:06 PM	Mr. Jordan's office, [redacted]	Barbara Neysmith, American Express, [redacted]	0:30
10	1:07 PM	Mr. Jordan's office, [redacted]	Richard Halperin, McAndrews & Forbes, [redacted]	1:06
11	1:36 PM	Mr. Jordan's office, [redacted]	Marcia Lewis, Strauss Communications, [redacted]	0:36
12	1:38 PM	Mr. Jordan's office, [redacted]	Peter Strauss residence, [redacted]	0:30

Source Documents

Calls 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12: V004-DC-00000148 (Akin, Gump, Strauss, Hauer & Feld phone records)

Telephone Calls

TABLE 31

December 19, 1997

No.	Time	Call From	Call To	Length of Call
1	1:47 PM	Ms. Lewinsky's office, [redacted]	Mr. Jordan's office, [redacted]	1:50
2	3:51 PM	Mr. Jordan's office, [redacted]	President Clinton; talked with Debra Schiff	1:00
3	4:17 PM	Mr. Jordan's office, [redacted]	White House Social Office, [redacted]	2:42
4	5:01 PM	President Clinton	Mr. Jordan's office, [redacted]	4:30 *
5	5:06 PM	Mr. Jordan's office, [redacted]	Francis Carter's office, [redacted]	1:54

Source Documents

Call 1: 833-DC-00017890 (Pentagon phone records)

Call 2: 1178-DC-00000013 (Presidential call log); V004-DC-00000151 (Akin, Gump, Strauss, Hauer & Feld phone record)

Calls 3 and 5: V004-DC-00000151 (Akin, Gump, Strauss, Hauer & Feld phone record)

Call 4: 1178-DC-00000014 (Presidential call log); V004-DC-00000151 (Akin, Gump, Strauss, Hauer & Feld phone record)

* Presidential call logs indicate that President Clinton placed a call to Mr. Jordan at 4:57 PM and that they talked from 5:01 PM to 5:08 PM. The best interpretation of the evidence suggests that the call did not end at 5:08 PM. The Presidential call logs are maintained by hand, whereas the automated Akin, Gump, Strauss, Hauer & Feld phone records reflect that the conversation actually ended at 5:05 PM.

Telephone Calls

TABLE 32

December 22, 1997

No.	Time	Call From	Call To	Length of Call
1	unknown	Francis Carter	Message for Robert Bennett	N/A
2	9:02 AM	Ms. Lewinsky's office, [redacted]	Mr. Jordan's office, [redacted]	0:23
3	2:15 PM	Ms. Lewinsky's office, [redacted]	Mr. Jordan's office, [redacted]	0:46
4	5:03 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky's office, [redacted]	0:18

Source Documents

Call 1: 902-DC-00000038 (Carter & Varrone billing statement)

Calls 2 and 3: 833-DC-00017891 (Pentagon phone records)

Call 4: V004-DC-00000151 (Akin, Gump, Strauss, Hauer & Feld phone records)

Telephone Calls

TABLE 33

December 30, 1997

No.	Time	Call From	Call To	Length of Call
1	9:27 AM	President Clinton	Mr. Jordan's residence, [redacted]	24:00
2	1:54 PM	Mr. Jordan's office, [redacted]	White House Operator, [redacted]	3:12
3	1:54 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	7:00
4	2:01 PM	Mr. Jordan's office, [redacted]	Mr. Carter's office, [redacted]	0:36
5	6:09 PM	Mr. Jordan's office, [redacted]	White House Counsel's office, [redacted]	1:42

Source Documents

Call 1: 1178-DC-00000015 (Presidential call log)

Calls 2, 4, and 5: V004-DC-00000154 (Akin, Gump, Strauss, Hauer & Feld phone records)

Call 3: 2004-DC-00000083 (Bell Atlantic toll records)

Telephone Calls

TABLE 34

January 5, 1998

No.	Time	Call From	Call To	Length of Call
1	11:32 AM	Ms. Lewinsky at Ms. Finerman's residence, [redacted]	Mona Sutphen's office, United Nations, [redacted]	1:00

Source Documents

Call 1: 1013-DC-00000095 (MCI toll records)

Telephone Calls

TABLE 35

January 6, 1998

No.	Time	Call from	Call to	Length of call
1	11:32 AM	Mr. Carter	Ms. Lewinsky's pager; message reads: "PLEASE CALL FRANK CARTER @ [redacted]"	N/A
2	2:08 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky's residence, [redacted]	1:48
3	3:14 PM	Mr. Carter	Ms. Lewinsky's pager; message reads: "FRANK CARTER AT [redacted] I WILL SEE YOU TOMORROW MORNING AT 10:00 IN MY OFFICE."	N/A
4	3:26 PM	Mr. Jordan's office, [redacted]	Mr. Carter, [redacted]	6:42
5	3:38 PM	Mr. Jordan's office, [redacted]	Ms. Hernreich, White House, [redacted]	2:12
6	3:48 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky's residence, [redacted]	0:24
7	3:49 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky at Ms. Finerman's residence, [redacted]	5:54
8	4:19 PM	President Clinton	Mr. Jordan's office, [redacted]	13:00
9	4:32 PM	Mr. Jordan's office, [redacted]	Mr. Carter, [redacted]	1:06
10	4:34 PM	Mr. Jordan's office, [redacted]	Mr. Carter, [redacted]	2:30
11	5:15 PM	Mr. Jordan's office, [redacted]	White House, [redacted]	4:06

Source Documents

Calls 1 and 3: 831-DC-00000010 (Pagemart; all times have been adjusted from Pacific to Eastern Standard Time)

Calls 2, 4, 5, 6, 7, 9, 10, and 11: V004-DC-00000158 (Akin, Gump, Straus, Hauer & Feld call log)

Call 8: 1178-DC-00000016 (Presidential call log)

Telephone Calls

TABLE 36

January 7, 1998

No.	Time	Call from	Call to	Length of call
1	9:26 AM	Mr. Jordan's office, [redacted]	Mr. Carter, [redacted]	3:30
2	11:58 AM	Mr. Jordan's office, [redacted]	White House, [redacted]	11:30
3	5:46 PM	Mr. Jordan's office, [redacted]	Ms. Hernreich, White House, [redacted]	10:48
4	6:50 PM	Mr. Jordan's limousine, [redacted]	White House, [redacted]	4:00

Source Documents

Call 1: V004-DC-00000158 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 2 and 3: V004-DC-00000159 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 4: 1033-DC-00000115 (Bell Atlantic Mobile toll records)

Telephone Calls

TABLE 37

January 8, 1998

No.	Time	Call from	Call to	Length of call
1	9:21 AM	Mr. Jordan's office, [redacted]	White House Counsel's office, [redacted]	0:42
2	9:21 AM	Mr. Jordan's office, [redacted]	White House, [redacted]	0:48
3	11:50 AM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	1:00
4	3:09 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	1:00
5	4:48 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	5:00
6	4:54 PM	Mr. Jordan's office, [redacted]	Mr. Perelman, Revlon, [redacted]	1:42
7	4:56 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky at Strauss residence, [redacted]	0:54
8	6:39 PM	Mr. Jordan's limousine, [redacted]	White House Counsel's office, [redacted]	2:00
9	9:02 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	1:00

Source Documents

Calls 1, 2: V004-DC-00000159 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 3: 2004-DC-00000085 (Bell Atlantic toll records)

Calls 4 and 5: 2004-DC-00000086 (Bell Atlantic toll records)

Calls 6 and 7: V004-DC-00000160 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 8: 1033-DC-00000116 (Bell Atlantic Mobile toll records)

Call 9: 2004-DC-00000087 (Bell Atlantic toll records)

Telephone Calls

TABLE 38

January 9, 1998

No.	Time	Call from	Call to	Length of call
1	10:19 AM	Mr. Jordan's office, [redacted]	Mr. Perelman, Revlon, [redacted]	0:54
2	1:29 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	1:00
3	1:29 PM	Ms. Lewinsky at Strauss residence, [redacted]	Akin Gump, [redacted]	1:00
4	4:14 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	7:00
5	4:37 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Carter, [redacted]	1:00
6	5:04 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	1:00
7	5:05 PM	Ms. Lewinsky at Strauss residence, [redacted]	Ms. Currie's office, [redacted]	1:00
8	5:08 PM	President Clinton	Ms. Currie, White House Signal [redacted]	1:00
9	5:09 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	2:00
10	5:12 PM	Ms. Currie, White House Signal [redacted]	President Clinton	1:00
11	5:18 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky at Strauss residence, [redacted]	2:48
12	5:21 PM	Ms. Lewinsky at Strauss residence, [redacted]	Ms. Currie's office, [redacted]	5:00

Source Documents

Call 1: V004-DC-00000160 (Akin, Gump, Strauss, Hauer & Feld call logs)

Calls 2, 3, and 4: 2004-DC-00000087 (Bell Atlantic toll records)

Calls 5, 6, 7, 9 and 12: 2004-DC-00000088 (Bell Atlantic toll records)

Calls 8 and 10: V006-DC-00002064 (Presidential call log)

TABLE 38 continued

Call 11:	V004-DC-00000161 (Akin, Gump, Strauss, Hauer & Feld call logs)

Telephone Calls

TABLE 39

January 10, 1998

No.	Time	Call from	Call to	Length of call
1	3:02 PM	Mr. Jordan's office, [redacted]	White House Counsel's office, [redacted]	0:24
2	3:02 PM	Mr. Jordan's office, [redacted]	White House, [redacted]	1:18

Source Documents

Call 1: V004-DC-00000161 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 2: V004-DC-00000162 (Akin, Gump, Strauss, Hauer & Feld call logs)

Telephone Calls

TABLE 40

January 11, 1998

No.	Time	Call from	Call to	Length of call
1	12:18 PM	Mr. Jordan's office, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	0:18

Source Documents

Call 1: V004-DC-00000162 (Akin, Gump, Strauss, Hauer & Feld call logs)

Telephone Calls

TABLE 41

January 12, 1998

No.	Time	Call from	Call to	Length of call
1	11:18 AM	Mr. Carter, Attorney	Ms. Lewinsky's pager; message reads: "PLEASE CALL FRANK CARTER AT [redacted]"	N/A
2	11:26 AM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Carter, [redacted]	5:00
3	11:50 AM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	1:00
4	3:33 PM	Mr. Jordan's office, [redacted]	White House Counsel's office, [redacted]	1:06
5	4:09 PM	Ms. Lewinsky at Strauss residence, [redacted]	Mr. Jordan's office, [redacted]	4:00
6	4:17 PM	Mr. Jordan's office, [redacted]	Ms. Lewinsky at Strauss residence, [redacted]	2:00
7	4:35 PM	Mr. Jordan's office, [redacted]	White House, [redacted]	5:06
8	5:00 PM	Ms. Lewinsky at Strauss residence, [redacted]	Ms. Currie's office, [redacted]	3:00
9	6:45 PM	Ms. Lewinsky at Strauss residence, [redacted]	Ms. Currie's office, [redacted]	1:00
10	7:48 PM	Ms. Lewinsky at Strauss residence, [redacted]	Ms. Currie's office, [redacted]	1:00

Source Documents

Call 1: 831-DC-00000010 (Pagemart)

Calls 2 and 3: 2004-DC-00000090 (Bell Atlantic toll records)

Calls 4, 6, and 7: V004-DC-00000162 (Akin, Gump, Strauss, Hauer & Feld call logs)

Calls 5, 8, 9, and 10: 2004-DC-00000091 (Bell Atlantic toll records)

Telephone Calls

TABLE 42

January 13, 1998

No.	Time	Call from	Call to	Length of call
1	11:11 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "WILL KNOW SOMETHING THIS AFTERNOON. KAY."	N/A
2	2:20 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL ME. KAY"	N/A
3	5:10 PM	Mr. Jordan at Renaissance Vinoy, St. Petersburg, FL	Ms. Hernreich, White House, 202-[redacted]	5:17
4	9:42 PM	Mr. Jordan at Renaissance Vinoy, St. Petersburg, FL	White House, [redacted]	3:48

Source Documents

Calls 1 and 2: 831-DC-00000010 (Pagemart)

Calls 3 and 4: 1064-DC-00000008 (Renaissance Vinoy Resort phone records)

Telephone Calls

TABLE 43

January 14, 1998

No.	Time	Call from	Call to	Length of call
1	6:56 AM	Mr. Jordan at Renaissance Vinoy, St. Petersburg, FL	White House, [redacted]	1:47
2	9:55 AM	President Clinton	Ms. Currie, [redacted]	2:00
3	unknown	Mr. Jordan at St. Regis Hotel, New York, NY	White House, [redacted]	unknown
4	unknown	Mr. Jordan at St. Regis Hotel, New York, NY	White House, [redacted]	unknown

Source Documents

Call 1: 1064-DC-00000008 (Renaissance Vinoy Resort phone records)

Call 2: V006-DC-00002065 (Presidential call log)

Calls 3 and 4: 1065-DC-00000006 (St. Regis Hotel receipt)

Telephone Calls

TABLE 44

January 15, 1998

No.	Time	Call from	Call to	Length of call
1	unknown	Mr. Jordan at St. Regis Hotel, New York, NY	White House, [redacted]	unknown
2	unknown	Ms. Currie's office, [redacted]	Vernon Jordan's office; message reads:"Betty- POTUS; [redacted] KIND OF IMPORTANT"	N/A
3	10:22 AM	Mr. Carter	Ms. Lewinsky's pager; message reads: "PLEASE CALL FRANCIS CARTER @ [redacted]	N/A
4	12:31 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY."	N/A
5	1:08 PM	Mr. Carter	Ms. Lewinsky's pager; message reads: "PLEASE CALL FRANK CARTER AT [redacted]	N/A
6	3:02 PM	Mr. Jordan's office, [redacted]	Ms. Hernreich, White House, [redacted]	1:30
7	3:04 PM	Mr. Jordan's office, [redacted]	White House, [redacted]	1:54
8	5:16 PM	Mr. Jordan's office, [redacted]	White House, [redacted]	2:48
9	5:22 PM	Ms. Currie	Ms. Lewinsky's pager; message reads:"PLEASE CALL KAY ASAP."	N/A
10	6:45 PM	Mr. Jordan's office, [redacted]	Ms. Currie's residence, [redacted]	0:12

Source Documents

Call 1: 1065-DC-00000006 (St. Regis Hotel receipt)

Call 2: V005-DC-00000058 (Vernon Jordan's message log)

Calls 3, 4, 5 and 9: 831-DC-00000008 (Pagemart)

Calls 6, 7, 8 and 10: V004-DC-00000164 (Akin, Gump, Strauss, Hauer & Feld call logs)

Telephone Calls

TABLE 45

January 16, 1998

No.	Time	Call from	Call to	Length of call
1	11:17 AM	Mr. Jordan's office, [redacted]	Ms. Currie, White House, [redacted]	1:24
2	9:41 PM	Mr. Jordan's residence, [redacted]	President Clinton	5:00

Source Documents

Call 1: V004-DC-00000164 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 2: 1178-DC-00000018 (Presidential call log)

Telephone Calls

TABLE 46

January 17, 1998

No.	Time	Call from	Call to	Length of call
1	5:19 PM	Mr. Jordan's mobile phone, [redacted]	White House, [redacted]	1:00
2	5:38 PM	President Clinton	Mr. Jordan's residence, [redacted]	2:00
3	7:02 PM	President Clinton	Mr. Jordan's office, [redacted]	2:00
4	7:13 PM	President Clinton	Ms. Currie's residence, [redacted]	1:00

Source Documents

Call 1: 1033-DC-00000033 (Bell Atlantic Mobile toll records)

Call 2: 1178-DC-00000019 (Presidential call log)

Call 3: 1178-DC-00000020 (Presidential call log)

Call 4: V006-DC-00002066 (Presidential call log)

Telephone Calls

TABLE 47

January 18, 1998

No.	Time	Call From	Call To	Length of Call
1	11:49 AM	Mr. Jordan's office, [redacted]	White House, [redacted]	1:12
2	12:50 PM	President Clinton	Mr. Jordan's residence, [redacted]	2:00
3	1:11 PM	President Clinton	Ms. Currie's residence, [redacted]	3:00
4	2:15 PM	Mr. Jordan's mobile phone, [redacted]	White House, [redacted]	4:00
5	2:55 PM	Mr. Jordan's residence, [redacted]	President Clinton "hold per PRESUS, 9:20 PM"	N/A
6	5:12 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY AT HOME."	N/A
7	6:22 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY AT HOME."	N/A
8	7:06 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY AT HOME."	N/A
9	7:19 PM	Mr. Jordan's office [redacted]	Cheryl Mills, White House Counsel's Office, [redacted]	1:06
10	8:28 PM	Ms. Currie	Ms. Lewinsky's pager; message reads: "CALL KAY"	N/A
11	11:02 PM	President Clinton	Ms. Currie's residence, [redacted]	1:00

Source Documents

Calls 1 and 9: V004-DC-00000165 (Akin, Gump, Strauss, Hauer & Feld call logs)

Call 2: 1178-DC-00000021 (Presidential call log)

Call 3: V006-DC-00002067 (Presidential call log)

Call 4: 1033-DC-00000034 (Bell Atlantic Mobile toll records)

Call 5: 1248-DC-00000312 (Presidential call log)

Calls 6, 7, 8, and 10: 831-DC-00000008 (Pagemart)

TABLE 47 continued

Call 11: V006-DC-00002068 (Presidential call log)

Telephone Calls

TABLE 48

January 19, 1998

No.	Time	Call From	Call To	Length of Call
1	7:02 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY AT HOME AT 8:00 THIS MORNING."	N/A
2	8:08 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY."	N/A
3	8:33 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY AT HOME."	N/A
4	8:37 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KAY AT HOME. IT'S A SOCIAL CALL. THANK YOU"	N/A
5	8:41 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "KAY IS AT HOME. PLEASE CALL"	N/A
6	8:43 AM	Ms. Currie's residence, [redacted]	President Clinton	1:00
7	8:44 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "PLEASE CALL KATE RE: FAMILY EMERGENCY."	N/A
8	8:50 AM	President Clinton	Ms. Currie's residence, [redacted]	1:00
9	8:51 AM	Ms. Currie	Ms. Lewinsky's pager; message reads: "MSG. FROM KAY. PLEASE CALL, HAVE GOOD NEWS."	N/A
10	8:56 AM	President Clinton	Mr. Jordan's residence, [redacted]	9:00
11	10:29 AM	Mr. Jordan's office, [redacted]	White House, [redacted]	3:42
12	10:36 AM	Mr. Jordan's office, [redacted]	Ms. Lewinsky's pager; message reads: "PLEASE CALL MR. JORDAN AT [redacted]	N/A
13	10:35 AM	Mr. Jordan's office, [redacted]	Nancy Hernreich, White House, [redacted]	1:12
14	10:44 AM	Mr. Jordan's office, [redacted]	Erskine Bowles, White House, [redacted]	1:00

TABLE 48 continued

No.	Time	Call From	Call To	Length of Call
15	10:53 AM	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	0:36
16	10:58 AM	President Clinton	Mr. Jordan's office, [redacted]	1:00
17	11:04 AM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	0:24
18	11:16 AM	Mr. Jordan	Ms. Lewinsky's pager; message reads: "PLEASE CALL MR. JORDAN AT [redacted]"	0:36
19	11:17 AM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	1:36
20	12:31 PM	Mr. Jordan's mobile phone, [redacted]	White House, [redacted]	3:00
21	1:45 PM	President Clinton	Ms. Currie's residence, [redacted]	2:00
22	2:29 PM	Mr. Jordan's mobile phone, [redacted]	White House, [redacted]	2:00
23	2:46 PM	Frank Carter	Ms. Lewinsky's pager; message reads: "PLEASE CALL FRANK CARTER AT [redacted]"	N/A
24	4:51 PM	Mr. Jordan's office [redacted]	Ms. Currie's residence, [redacted]	1:42
25	4:53 PM	Mr. Jordan's office [redacted]	Frank Carter's residence, [redacted]	0:24
26	4:54 PM	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	4:00
27	4:58 PM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	0:12
28	4:59 PM	Mr. Jordan's office, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	0:42
29	5:00 PM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	0:18
30	5:00 PM	Mr. Jordan's office, [redacted]	Charles Ruff, White House Counsel, [redacted]	0:24
31	5:05 PM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	0:06

TABLE 48 continued

No.	Time	Call From	Call To	Length of Call
32	5:05 PM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	0:18
33	5:05 PM	Mr. Jordan's office, [redacted]	White House, [redacted]	2:12
34	5:09 PM	Mr. Jordan's office, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	1:06
35	5:14 PM	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	8:24
36	5:22 PM	Mr. Jordan's office, [redacted]	Bruce Lindsey, White House, [redacted]	0:06
37	5:22 PM	Mr. Jordan's office, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	0:18
38	5:55 PM	Mr. Jordan's office, [redacted]	Ms. Currie's residence, [redacted]	0:24
39	5:56 PM	President Clinton	Mr. Jordan's office, [redacted]	7:00
40	6:04 PM	Mr. Jordan's office, [redacted]	Ms. Currie's residence, [redacted]	3:00
41	6:26 PM	Mr. Jordan's office, [redacted]	Stephen Goodin, White House, [redacted]	0:42

Source Documents

Calls 1, 2, 3, 4, 5, 7, 9, 12, 18, and 23:	831-DC-00000009 (Pagemart)
Calls 6 and 8:	V006-DC-00002069 (Presidential call log)
Call 10:	1178-DC-00000023 (Presidential call log)
Calls 11, 12, 13, 14, 15, 17, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37:	V004-DC-00000165 (Akin, Gump, Strauss, Hauer & Feld call log)
Call 16, 39:	1248-DC-00000319 (Presidential call log)
Calls 20 and 22:	1033-DC-00000035 (Bell Atlantic Mobile toll records)

TABLE 48 continued

Call 21:	V006-DC-00002070 (Presidential call log)
Calls 38, 40, and 41:	V004-DC-00000166 (Akin, Gump, Strauss, Hauer & Feld call log)

Telephone Calls

TABLE 49

January 20, 1998

No.	Time	Call From	Call To	Length of Call
1	unknown	Frank Carter, no phone number indicated	Mr. Jordan (as per Mr. Jordan's message log)	N/A
2	unknown	Robert Bennett, no phone number indicated	Mr. Jordan (as per Mr. Jordan's message log)	N/A
3	10:41 AM	Mr. Jordan's office, [redacted]	Robert Bennett, [redacted]	3:48
4	12:01 P.M.	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	2:48
5	12:04 P.M.	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	0:06
6	unknown	Mr. Jordan at St. Regis Hotel	Bruce Lindsey, White House, [redacted]	unknown
7	unknown	Mr. Jordan at St. Regis Hotel	Robert Bennett, [redacted]	unknown
8	unknown	Mr. Jordan at St. Regis Hotel	White House, [redacted]	unknown

Source Documents

Calls 1 and 2: V005-DC-00000060-61 (Mr. Jordan's message log)

Calls 3, 4, and 5: V004-DC-00000166 (Akin, Gump, Strauss, Hauer & Feld call log)

Calls 6, 7, and 8: 1065-DC-00000006 (St. Regis Hotel receipt)

Telephone Calls

TABLE 50

January 21, 1998

No.	Time	Call From	Call To	Length of Call
1	12:09 AM	President Clinton	Robert Bennett's residence, [redacted]	30:00
2	12:41 AM	President Clinton	Bruce Lindsey's residence, [redacted]	29:00
3	1:16 AM	President Clinton	Ms. Currie's residence, [redacted]	20:00
4	1:36 AM	Bruce Lindsey's residence, [redacted]	President Clinton	2:00
5	1:39 AM	Bruce Lindsey's residence, [redacted]	President Clinton	1:00
6	7:14 AM	President Clinton	Bruce Lindsey's residence, [redacted]	8:00
7	7:26 AM	President Clinton	David Kendall's residence, [redacted]	28:00
8	8:02 AM	President Clinton	Robert Bennett's office, [redacted]	14:00
9	8:11 AM	Mr. Jordan at Revlon, [redacted]	Akin, Gump, Strauss, Hauer & Feld main line, [redacted]	0:30
10	8:19 AM	Mr. Jordan at Revlon, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	10:06
11	8:32 AM	Mr. Jordan at Revlon, [redacted]	Akin Gump, [redacted]	0:54
12	9:12 AM	Mr. Jordan at Revlon, [redacted]	Mr. Jordan's office, [redacted]	7:26
13	2:48 PM	Mr. Jordan's office, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	5:12
14	3:59 PM	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	0:24
15	4:00 PM	Mr. Jordan's office, [redacted]	Cheryl Mills, White House Counsel's office, [redacted]	0:06
16	4:01 PM	Mr. Jordan's office, [redacted]	Nancy Hernreich, White House, [redacted]	1:54

TABLE 50 continued

No.	Time	Call From	Call To	Length of Call
17	7:02 PM	Mr. Jordan's office, [redacted]	Frank Carter's office, [redacted]	0:36

Source Documents

Calls 1, 2, 3, 4, and 5:	1248-DC-00000327 (Presidential call log)
Call 6, 7, and 8:	1248-DC-00000328 (Presidential call log)
Calls 9, 10, and 11:	832-DC-00000004 (McAndrews and Forbes Holding toll records)
Call 12:	832-DC-00000005 (McAndrews and Forbes Holding toll records)
Calls 13, 14, 15, 16, and 17:	V004-DC-00000167 (Akin, Gump, Strauss, Hauer & Feld)

Tab H

Litigation History

LITIGATION HISTORY

I. Introduction

This investigation has centered around the behavior and actions of the President of the United States. As a consequence, it has been necessary to seek information from the White House, a variety of government officials, and the President himself. The President and the Department of Justice have vigorously sought to prevent this Office from obtaining this information, usually through litigation.

This memorandum is a brief chronology of the history of this Office's litigation against the President and government officials in the pursuit of evidence in the Lewinsky matter. This information should allow Congress to understand some of the gaps in the evidence we are providing. For example, we have not been able to report to Congress what the President told White House lawyers about his relationship with Monica Lewinsky. This memorandum explains the reason for this omission.

More importantly, Congress may wish to conduct its own investigation of the events related in this referral. In such an event, Congress may well face the same sort of litigation obstacles that this Office has. We hope that this memorandum will assist Congress in any efforts it finds necessary to obtain information relevant to its inquiry.

We have not included any description of litigation that did not involve our Office seeking investigative materials. Similarly, we have not included any litigation against persons or

institutions other than President Clinton and his agents, the White House, or the Department of Justice. Specifically, we have not included our lengthy litigation with Monica S. Lewinsky and her agents.

The following is a brief description of the relevant events in this Office's litigation. Because we have provided Congress with the actual filings, we have not attempted to describe the filings in greater detail than necessary to understand the chronology of events. We encourage interested persons to consult the particular filings when an issue is significant.

II. Executive Privilege

Date	Event
Feb. 18, 1998	• Bruce Lindsey refuses to answer many questions before the grand jury because the answers are "potentially covered" by the following privileges: • Executive Privilege (presidential communications and deliberative process); • Governmental Attorney-Client Privilege and Work-Product Doctrine; • Personal Attorney-Client Privilege and Work Product Doctrine. Mr. Lindsey refuses either to invoke any such privilege or to contact President Clinton to determine whether to do so. • Chief Judge Johnson instructs Lindsey to decide whether he will invoke privileges or not. (The next day, she mentions that "[i]f he had come in here today still not claiming any privileges and simply telling me he wasn't going to answer the questions, he would be in D.C. Jail by now." Tr. 53)

Feb. 19, 1998	• Neil Eggleston, a private lawyer hired by White House Counsel Charles Ruff, pursuant to Attorney General Janet Reno's authorization, to represent the White House with respect to executive privilege and governmental attorney-client privilege, informs Chief Judge Johnson that the President "has informed and directed Mr. Lindsey" to invoke privileges in response to various questions (Tr. 32). The OIC orally moves to compel him to testify. Chief Judge Johnson determines that she cannot decide the issue without a more developed record and orders that questioning continue. • Before the grand jury, Mr. Lindsey invokes all the privileges listed above. Among other things, he invokes executive privilege over a lunch conversation with Vernon Jordan.
Feb. 24, 1998	• The OIC issues a subpoena for Sidney Blumenthal to testify, seeking to discover what substantive information he has about the Lewinsky matter and to determine whether anyone in the White House is obstructing justice by spreading disinformation about the OIC. Mr. Blumenthal moves to quash, citing: • Executive Privilege; • the First Amendment; and • Overbreadth. Chief Judge Johnson holds a hearing and denies motion. • Before the grand jury, Mr. Blumenthal invokes executive privilege and refuses to answer several questions, including questions about his conversations with the First Lady.
Feb. 25, 1998	Nancy Hernreich, the administrator of the President's secretarial staff, testifies before the grand jury and invokes executive privilege and attorney client-privilege in refusing to answer several questions.
Mar. 4, 1998	Mr. Eggleston sends a proposal to the OIC suggesting an agreement whereby White House attorneys would be absolutely protected while White House non-attorneys would provide "factual information" but not "strategic deliberations and communications." Chief Judge Johnson later holds that the proposal was so vague that it was not worth considering: "Not only was the White House offer ambiguous, but there is also some question as to whether it was a firm offer. Given the ambiguity of the offer, the Court declines to factor it into its decision." Mem. Op. at 13 n.6 (May 4, 1998).

Mar. 6, 1998	The OIC moves to compel Bruce Lindsey (98-095), Sidney Blumenthal (98-096), and Nancy Hernreich (98-097) to testify over their assertions of executive privilege, governmental attorney-client privilege, and personal attorney-client privilege. The OIC argues that because the questions were about the President's personal conduct, executive privilege does not apply at all.
Mar. 10, 1998	The OIC files three motions (one for each case number) to expedite the executive privilege litigation. The OIC suggests a hearing for the week of March 23.
Mar. 12, 1998	The White House, responding to the motions to expedite, states that no hearing would be possible between March 22 and April 5 because the President, Mr. Lindsey, and Cheryl Mills would be traveling to Africa. The White House states that March 19 or 20 would be acceptable.
Mar. 13, 1998	The OIC files reply memoranda in support of its motions to expedite the executive privilege litigation. The OIC asserts that the week of March 23 still would be best, but that March 20 is better than a two-week delay.
Mar. 16, 1998	Chief Judge Johnson sets the executive privilege hearing for March 20.
Mar. 17, 1998	The White House files an opposition to the OIC's motions to compel testimony. President Clinton, in his personal capacity, intervenes to argue that intermediary privilege and various other personal attorney-client privilege theories prevent any testimony by Mr. Lindsey other than "cocktail talk" (as David Kendall, private attorney for President Clinton, said in oral argument before the D.C. Circuit). The White House drops the assertions of privilege by Ms. Hernreich.
Mar. 18, 1998	The OIC files three motions (one for each case number) to unseal the executive privilege litigation.
Mar. 19, 1998	The OIC files reply memoranda in support of its motions to compel. The White House moves to authorize release of papers to the Department of Justice ("DOJ"), and also responds to the earlier unsealing motion filed by the OIC. The White House requests that the March 20 hearing be held in secret but that the transcript later be released to the press.

Mar. 20, 1998	Oral argument before Chief Judge Johnson in the executive privilege litigation.
Mar. 24, 1998	Oral argument before Chief Judge Johnson on President Clinton's personal attorney-client privilege. The OIC discovers that President Clinton has denied knowledge of specific privilege assertions to the press. The OIC sends a letter to Mr. Eggleston seeking an explanation; Mr. Eggleston replies that President Clinton had authorized the invocation of privilege generally and had delegated to White House Counsel Charles Ruff the task of determining exactly what should be privileged.
Mar. 25, 1998	Chief Judge Johnson orders OIC to provide (by April 1) a need submission sufficient to overcome the White House's assertion of executive privilege.
Mar. 27, 1998	• The DOJ moves for access to pleadings, asks for 10 days to file amicus brief, and requests access to grand jury transcripts. The DOJ mistakenly represents that the OIC supports its motion. (Two days later, the DOJ withdraws this claim). This request comes one day after Mr. Lindsey moves for access to his grand jury transcript. • President Clinton files a supplemental memorandum in support of his personal attorney-client privilege invocation.
Mar. 31, 1998	• The OIC opposes the DOJ's motion for grand jury transcripts. • Chief Judge Johnson grants the DOJ access to sealed pleadings, but denies the DOJ's motion for grand jury transcripts. Chief Judge Johnson orders that any amicus brief be filed by April 8 (later extended to April 12 because of a delay in serving the court's order). • The White House files a supplemental memorandum regarding the Lindsey privilege assertions.
Apr. 1, 1998	The OIC files an <u>in camera</u> need submission, showing its need for materials covered by executive privilege.
Apr. 7, 1998	The White House files a document styled "Reply to the OIC's <u>In Camera</u> Submission." The White House argues, <u>inter alia</u>, that the OIC could not have shown need because it had not brought Mr. Blumenthal back before grand jury after the White House stated that he would testify as to "factual matters."

Apr. 12, 1998	The DOJ files an amicus brief criticizing the OIC's public-private distinction and arguing (contrary to the White House's position) that non-strategic factual information is covered by executive privilege. The DOJ also asserts that a balancing test is required to assess claims of governmental attorney-client privilege.
Apr. 15, 1998	Chief Judge Johnson orders the OIC to make a need submission for information covered by governmental attorney-client privilege by April 24.
Apr. 24, 1998	The OIC submits an in camera need submission detailing its need for information covered by governmental attorney-client privilege.
Apr. 30, 1998	The White House files a document styled as a reply to the OIC's in camera need submission. Inter alia, the White House argues that the OIC could not have shown need unless it had questioned "all other available witnesses."
May 4, 1998	Chief Judge Johnson issues an order compelling Messrs. Lindsey and Blumenthal to answer all questions.
May 11, 1998	The White House moves to reconsider the district court's opinion of May 4, 1998. Inter alia, the White House argues that Chief Judge Johnson erred in determining need by reference to categories of questions and in finding no common interest between the Office of the President and President Clinton in his personal capacity. The White House also argues for additional briefing of specific questions and in camera review of all answers.
May 13, 1998	The White House files notices of appeal from the executive privilege decision, despite the pending reconsideration motion. President Clinton in his personal capacity also appeals. The White House requests a slightly expedited 29/22/7 briefing schedule.
May 14, 1998	The OIC moves to dismiss the appeals of the White House and President Clinton from the executive privilege decision, arguing that the D.C. Circuit has no jurisdiction because the motion for reconsideration is still pending.
May 18, 1998	The White House responds to the OIC's motion to dismiss its appeal, largely agreeing with the motion and labeling its notice of appeal a "protective notice of appeal."

May 19, 1998	• The OIC files an opposition to the motion to reconsider the executive privilege decision. • The OIC files a reply in support of its motion to dismiss the appeals of the White House and President Clinton for want of jurisdiction.
May 21, 1998	The D.C. Circuit holds the executive privilege appeals in abeyance pending Chief Judge Johnson's decision on the motion for reconsideration.
May 22, 1998	The White House files a reply memorandum in support of its reconsideration motion.
May 26, 1998	Chief Judge Johnson substantially denies the White House's reconsideration motion. (She modifies one footnote that contains only dicta).
May 28, 1998	The OIC files in Supreme Court a petition for a writ of certiorari before judgment in the executive privilege case.
June 1, 1998	The White House files an opposition to the OIC's petition for a writ of certiorari before judgment. The White House drops its executive privilege appeal, asserting that it had decided not to appeal the executive privilege issue before the petition for a writ of certiorari before judgment was filed. President Clinton in his personal capacity also files a brief in opposition.
June 2, 1998	The OIC files a reply brief in support of its petition for a writ of certiorari before judgment in the (now) governmental attorney-client privilege appeal.
June 4, 1998	The Supreme Court denies the OIC's petition for a writ of certiorari before judgment in the governmental attorney-client privilege case.
June 5, 1998	The D.C. Circuit sets an expedited 10/7/3 briefing schedule in the governmental attorney-client privilege appeal.
June 15, 1998	The White House files a brief appealing the governmental attorney-client privilege ruling. President Clinton also files a brief on personal attorney-client privilege issues.

June 17, 1998	The DOJ files an amicus brief in the governmental attorney-client appeal, arguing that governmental attorney-client privilege should be more protected than executive privilege and that the need standard should be higher, and urging the D.C. Circuit to remand the issue whether there is an absolute governmental attorney-client privilege in the impeachment context.
June 22, 1998	The OIC files its appellee brief in the governmental attorney-client privilege appeal.
June 25, 1998	The White House and President Clinton file reply briefs in the governmental attorney-client privilege appeal.
June 26, 1998	The OIC files a supplemental filing in the governmental attorney-client privilege appeal.
June 29, 1998	Oral argument before the D.C. Circuit in the governmental attorney-client privilege appeal.
July 27, 1998	The D.C. Circuit rules that the governmental attorney-client privilege cannot be maintained in face of a federal grand jury subpoena.
July 31, 1998	The OIC issues a grand jury subpoena to Lanny Breuer, requiring his testimony on August 4.
Aug. 3, 1998	• The White House moves to stay any testimony by Bruce Lindsey pending disposition of a (as yet unfiled) petition for a writ of certiorari, and asks for a protective order preventing testimony of Mr. Breuer. The same day, the OIC files its opposition, and the D.C. Circuit denies the motion as unripe. • The White House asks the Supreme Court to stay any testimony by Messrs. Lindsey or Breuer pending the disposition of a (as yet unfiled) petition for a writ of certiorari. The OIC files an opposition to this motion. • Mr. Breuer moves to stay his testimony pending disposition of the White House's (as yet unfiled) petition for a writ of certiorari.

Aug. 4, 1998	• The Chief Justice denies the White House's motion to stay the testimony of Messrs. Lindsey and Breuer pending disposition of the White House's (as yet unfiled) petition for a writ of certiorari. • The OIC files an opposition to Mr. Breuer's motion to stay his grand jury testimony. Chief Judge Johnson allows questioning to go forward. While testifying before grand jury, Mr. Breuer invokes executive privilege and governmental attorney-client privilege. The OIC orally moves to compel Mr. Breuer's testimony.
Aug. 5, 1998	Chief Judge Johnson orders the parties to brief the executive privilege and governmental attorney-client privilege issues in an expedited fashion.
Aug. 6, 1998	The White House submits memoranda in support of Mr. Breuer's governmental attorney-client privilege claim and in support of a stay pending disposition of a (as yet unfiled) petition for a writ of certiorari. The White House also files a pleading arguing that In re Lindsey sub silentio overruled In re Sealed Case, raising the need standard required to overcome a claim of executive privilege. The OIC files an in camera need submission and a memorandum opposing a stay.
Aug. 7, 1998	Chief Judge Johnson compels Mr. Breuer to testify over his claims of governmental attorney-client privilege, but grants a stay pending appeal.
Aug. 11, 1998	Chief Judge Johnson compels Mr. Breuer to testify over his claims of executive privilege
Aug. 17, 1998	The White House and Mr. Breuer appeal from the district court's order compelling Mr. Breuer to testify over his claims of governmental attorney-client privilege. Mr. Breuer's appeal is dismissed by the D.C. Circuit, on the OIC's motion, three days later. (In grand jury testimony, President Clinton testifies that he strongly supported dropping executive privilege in May, that he never was afraid of the information the White House attorneys have, and that his only concern was to win judicial reaffirmation of existence of executive privilege.)

Aug. 21, 1998	• The White House and Mr. Breuer appeal from the order compelling Mr. Breuer to testify over his claims of executive privilege. Mr. Breuer's appeal is dismissed by the D.C. Circuit, on the OIC's motion, 10 days later. • The White House files a petition for a writ of certiorari in the governmental attorney-client privilege case.
Aug. 25, 1998	The White House moves to hold its Breuer appeal in abeyance pending disposition of petition for a writ of certiorari. The OIC supports that motion two days later, and the D.C. Circuit grants it four days after that.

Case Numbers

98-095	District Court	Bruce Lindsey testimony
98-096	District Court	Sidney Blumenthal testimony
98-097	District Court	Nancy Hernreich testimony
98-278	District Court	Lanny Breuer testimony
98-3060	D.C. Circuit	White House appeal re: Lindsey
98-3061	D.C. Circuit	White House appeal re: Blumenthal
98-3062	D.C. Circuit	Pres. Clinton appeal re: Lindsey
98-3072	D.C. Circuit	White House appeal re: Lindsey
98-3092	D.C. Circuit	Breuer appeal re: Breuer
98-3093	D.C. Circuit	White House appeal re: Breuer
98-3098	D.C. Circuit	Breuer appeal re: Breuer
98-3099	D.C. Circuit	White House appeal re: Breuer
97-1924	Supreme Court	OIC Petition for a Writ of Certiorari before Judgment
98-316	Supreme Court	White House Petition for a Writ of Certiorari

III. Secret Service "Protective Function Privilege"

Date	**Event**
late Jan.-early Feb.	Secret Service Director Lewis Merletti speaks informally to the OIC about why the OIC should not question Secret Service personnel.
Feb. 17, 1998	Former Secret Service officer Lewis Fox testifies before the grand jury.
Feb. 24, 1998	Deputy Assistant Attorney General Gary Grindler sends a letter to Independent Counsel Starr outlining the proposed "protective function" privilege.

Mar. 13, 1998	• Mr. Grindler sends another letter to the OIC outlining the proposed privilege. • The OIC deposes Secret Service officers Gary Byrne and Brian Henderson, who assert "protective function" privilege.
Mar. 23, 1998	The OIC deposes Secret Service General Counsel John Kelleher, who asserts the "protection function" privilege and the governmental attorney-client privilege.
Mar. 29, 1998	Attorney General Reno and Independent Counsel Starr meet to discuss the proposed "protective function" privilege.
Apr. 8, 1998	Deputy Independent Counsel Robert Bittman sends a letter to Mr. Grindler asking whether the President is invoking the "protective function" privilege. The next day, Mr. Grindler states that President Clinton has not directed assertion of a "protective function" privilege.
Apr. 10, 1998	The OIC moves to compel the testimony of Secret Service personnel over claims of "protective function" privilege and governmental attorney-client privilege.
Apr. 20, 1998	The DOJ and the OIC agree that the DOJ will proffer non-privileged information to the OIC and then allow interviews.
Apr. 21, 1998	The DOJ files an opposition to the OIC's motion to compel the testimony of Secret Service personnel.
Apr. 28, 1998	The OIC files a reply memorandum in support of compelling the testimony of Secret Service personnel.
May 11, 1998	White House Counsel Charles Ruff sends a letter to the OIC stating that President Clinton does not believe it is appropriate for him to instruct the Secret Service to testify.
May 14, 1998	Hearing before Chief Judge Johnson on the "protective function" privilege.

May 22, 1998	Chief Judge Johnson rules there is no "protective function" privilege for Secret Service personnel, and orders the OIC to provide a need showing to overcome governmental attorney-client privilege as to John Kelleher. Five days later, the OIC withdraws its request that the Secret Service lawyer testify.
May 25, 1998	Four former Attorney Generals send a letter to Attorney General Reno urging her not to appeal the Secret Service decision.
May 27, 1998	Independent Counsel Starr meets with Solicitor General Seth Waxman, urging the DOJ not to appeal the Secret Service decision.
May 29, 1998	Independent Counsel Starr meets with Attorney General Reno, urging the DOJ not to appeal the Secret Service decision. Later, DOJ attorney Jonathan Schwartz suggests a compromise, and the OIC expresses interest.
May 31, 1998	In a meeting between the OIC and DOJ attorneys, the DOJ proposes a settlement that the OIC believes is far less favorable to the OIC than that suggested by Mr. Schwartz two days earlier. The OIC rejects the proposal.
June 1, 1998	The DOJ files a notice of appeal in the Secret Service case and proposes an expedited 14/14/7 briefing schedule.
June 2, 1998	The OIC files a petition for a writ of certiorari before judgment in the Secret Service appeal.
June 3, 1998	The DOJ files a brief in response to the OIC's petition for a writ of certiorari before judgment in Secret Service appeal, criticizing the petition but not urging its denial.
June 4, 1998	The Supreme Court denies the OIC's petition for a writ of certiorari before judgment in the Secret Service appeal.
June 5, 1998	The D.C. Circuit sets an expedited 7/7/3 briefing schedule in the Secret Service appeal.
June 9, 1998	Mr. Grindler asserts in a letter to Mr. Bittman that the "protective function" privilege applies to former Secret Service personnel.

June 11, 1998	Mr. Bittman sends a letter to Neil Eggleston asking him whether the White House would assert executive privilege over a particular conversation overheard by a Secret Service officer.
June 12, 1998	The DOJ files a brief appealing the Secret Service decision. Former Secret Service agents file an amicus brief in support of the DOJ's position.
June 15, 1998	In a letter to Mr. Bittman, Mr. Eggleston informs the OIC that the White House is not asserting executive privilege over the conversation overheard by a Secret Service officer.
June 19, 1998	The OIC files its appellee brief in the Secret Service appeal. Four former Attorney Generals file an amicus brief in support of the OIC's position.
June 22, 1998	The DOJ files a reply brief in the Secret Service appeal.
July 7, 1998	The D.C. Circuit holds that there is no "protective function" privilege.
July 13, 1998	The OIC subpoenas six Secret Service officers, one agent, and one former agent.
July 14, 1998	• The DOJ petitions for rehearing and suggests rehearing en banc in the Secret Service appeal. • The DOJ moves for stay pending appeal (and protective order) of the Secret Service decision.
July 15, 1998	• The OIC files an opposition to the DOJ's motion for a stay pending appeal of the Secret Service decision. Chief Judge Johnson holds an oral hearing on the motion. • The DOJ moves for a stay pending appeal of the Secret Service decision (and a protective order) in the D.C. Circuit. The OIC files an opposition to that motion. • The DOJ moves in the Supreme Court for a stay and a protective order preventing Secret Service testimony. The OIC files an opposition.

July 16, 1998	• Chief Judge Johnson declines to grant a stay pending appeal of the Secret Service decision. • After approximately one minute of testimony by a Secret Service officer, the D.C. Circuit grants an administrative stay of Secret Service testimony, to consider the stay motion. • Later that day, the D.C. Circuit denies the petition for rehearing and suggestion for rehearing en banc and vacates the stay. The D.C. Circuit issues a temporary stay until Noon the next day, to allow Supreme Court to decide whether to grant a stay. • The DOJ files a petition for a writ of certiorari in the Secret Service case.
July 17, 1998	• The OIC files a brief in opposition to the DOJ's petition for a writ of certiorari in the Secret Service case. • The DOJ files a reply brief in support of its stay motion. The Chief Justice denies the stay. • Secret Service officers testify.

Case Numbers

98-148	District Court	Secret Service Testimony
98-3069	D.C. Circuit	Secret Service Testimony
98-3085	D.C. Circuit	Protective Order
97-1942	Supreme Court	OIC Petition for a Writ of Certiorari before Judgment
98-93	Supreme Court	DOJ Petition for a Writ of Certiorari

IV. White House Documents

Date	Event
May 27, 1998	The OIC files a motion to compel the White House to comply with grand jury subpoenas for President Clinton's meeting records and phone logs. The White House had been redacting such documents on relevancy grounds and refusing to provide phone logs unless the OIC gave them a list of all persons in which the grand jury was interested.
June 12, 1998	The White House files an opposition to the OIC's motion to compel production of meeting records and phone logs, and tries to "reserve[] the right to assert executive privilege over the material."

June 19, 1998	The OIC files a reply memorandum in support of its motion to compel the White House to produce meeting records and phone logs.
June 26, 1998	Chief Judge Johnson orders the White House to produce meeting records and phone logs to the grand jury.

Case Number
98-202 District Court White House documents

V. Presidential Testimony

Date	Event
July 17, 1998	The OIC issues a grand jury subpoena for President Clinton's testimony on July 28.
July 22, 1998	David Kendall, President Clinton's private attorney, calls Deputy Independent Counsel Robert Bittman and asks to have until August 4 to respond to the grand jury subpoena to President Clinton.
July 23, 1998	Mr. Bittman offers Mr. Kendall an extension until July 31, conditioned on Mr. Kendall agreeing not to seek additional time.
July 24, 1998	Mr. Kendall sends a letter to Mr. Bittman stating that the President is willing to "provide testimony" to grand jury. He insists that the grand jury subpoena be withdrawn, asserting that he would explain why on July 28. Mr. Bittman responds by letter, refusing to withdraw the subpoena until, at very least, President Clinton agrees upon a firm date.
July 27, 1998	Mr. Kendall sends another letter to Mr. Bittman, stating that President would testify but only if (i) the grand jury subpoena were withdrawn; (ii) the testimony were given in the White House, with a time limit and with a description of the general subject areas of questioning; (iii) there were protection against leaks; and (iv) the testimony were no earlier than September 13. Mr. Kendall states that President Clinton cannot testify during his vacation because he would be preparing for a foreign trip. Mr. Bittman responds that any date later than August 7 would be unacceptable.

July 28, 1998	President Clinton moves to postpone any response to the grand jury subpoena until August 11. He wants until this date even to decide whether he will testify or oppose the subpoena. That afternoon, Chief Judge Johnson holds a hearing.
July 30, 1998	Having agreed to testify on August 17, President withdraws his motion for continuance. (Chief Judge Johnson had been prepared to rule earlier, but withheld her ruling to encourage a settlement.)
Aug. 17, 1998	President Clinton testifies to grand jury.

Case Number
98-267 District Court Presidential subpoena

VI. Terry Lenzner Subpoena

Date	Event
Feb. 24, 1998	Williams & Connolly and Skadden Arps file a motion to quash the grand jury subpoena issued to Terry F. Lenzner and Investigative Group International, Inc. (After hearing reports that Mr. Lenzner and IGI were researching the private lives of career prosecutors, the OIC had issued this subpoena to try to determine whether this was true and, if so, whether this was part of scheme to obstruct the OIC's investigation.) After the President's law firms claim attorney-client privilege and work product protection, Mr. Lenzner appears, provides a privilege log of documents, and refuses to reveal the general subject matter of his retention.
Mar. 9, 1998	The OIC files an opposition to the motion to quash the grand jury subpoena, arguing that the attorney-client privilege does not protect the general subject matter of retention, amount of fees, or identity of fee payer.
Mar. 16, 1998	Williams & Connolly and Skadden Arps file a reply memorandum in support of their motion to quash Lenzner subpoena.

July 29, 1998	Chief Judge Johnson issues an order on the grand jury subpoena to Terry Lenzner, ruling that Mr. Lenzner must provide all fee information to the grand jury, but that the general subject matter of his retention is protected by the attorney-client privilege.

Tab I

Evidence Reference

EVIDENCE REFERENCE

Although the Office of the Independent Counsel has gathered and verified the information presented in this Referral from a wide variety of sources, the information falls into two broad categories. First, there is the direct testimony of numerous witnesses, who were called before grand juries, deposed under oath, or questioned by agents of the Federal Bureau of Investigation. Second, information was obtained from the many documents, tapes, and physical objects which the Office has subpoenaed and collected -- including some of the many gifts

exchanged by the President and Monica Lewinsky, the logs kept by the White House and the Secret Service (which record entries and exits of staff and visitors, the movements of the President, and telephone calls involving the President), and private records (such as appointment diaries, business telephone logs, and financial records).

This section discusses some of the issues and questions related to the evidence that might arise when reviewing the Referral. Part I provides an overview of the potential rules for the admissibility of evidence, drawing a comparison between the rules that would apply in a courtroom and those that may apply in Congress. Part II briefly describes the particular evidence sources upon which we rely -- focusing upon those that may be unfamiliar -- and provides the footnote citation forms for each type of source. Part III discusses the tape recorded conversations made by Linda Tripp. The first section in Part III addresses potential problems raised by the possibility that some of the tapes that were made by Linda Tripp and turned over to the OIC are duplicate, rather than original, tapes. The second section then explains in detail how the Office was able to assign dates to the particular conversations on the tapes.

I. ADMISSIBILITY

Much of the OIC's investigative time and effort was devoted to verifying information provided by the main witnesses: it pursued corroborating witnesses, telephone records, gift receipts, correspondence, movement logs, and other evidence that would support or refute the critical facts. In making the reliability of the evidence the touchstone of the investigation, the OIC nevertheless recognized that some of the information gathered and cited in the Referral might not be admissible in a judicial trial. For example, a court might not permit a jury to consider testimony by one Secret Service officer about what he heard another Secret Service officer say. If that testimony were used to prove that what the first officer said was true, then the testimony would be "hearsay," which is inadmissible at a trial under the Federal Rules of Evidence (unless an exception applies).[1]

In compiling this Referral, the OIC has thought carefully about the role of federal evidentiary rules. Whenever feasible, the OIC has sought direct and circumstantial evidence that federal courts would admit, and indeed, this Office believes that the vast majority of the salient facts are supported by this type of information. Ultimately, however, the Office chose not to limit itself to *judicially* admissible evidence for several reasons.

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[1] See Fed. R. Evid. 801-804 (discussing hearsay rules and exceptions).

First, the Rules of Evidence sometimes exclude reliable evidence for reasons that the OIC considers inapplicable in the context of this Referral. For instance, some rules of evidence address special concerns of the jury system. The hearsay rule is one example: If the jury hears only a report of what a declarant has said, it ordinarily cannot assess the declarant's perception, memory, narration, or sincerity. This Office believes that the inclusion of hearsay information is appropriate in the context of this Referral, however, both because 28 U.S.C. § 595(c) contemplates a written referral that necessarily prevents the assessment of live witnesses, and because members of the House of Representatives may conduct their own investigation and call witnesses directly.

Second, the Congress need not adhere to the Federal Rules of Evidence when deciding whether to impeach federal officers. The House of Representatives historically has delegated the task of gathering information to a committee (usually, the Judiciary Committee), which traditionally has collected and considered evidence that would be inadmissible in federal court.[2] Similarly, although the Senate customarily has followed some

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[2] See House Rules Manual (House Document No. 104-272) §§ 603-606 (1998) (describing House procedures for investigating prior to voting whether to impeach); Charles L. Black, Jr., Impeachment: A Handbook 7 (1974) (describing the impeachment process in the House). The committee, however, does take evidentiary concerns into account when assessing the strength of the case for impeachment. See Warren S. Grimes, Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism For Federal Judges, 38 UCLA L. Rev. 1209, 1226 (1991).

evidentiary rules in impeachment proceedings,[3] it has no fixed set of evidentiary rules.[4] The Constitution requires the Senate merely to "try" impeachments.[5] It does not specify the requirements for trial, and the federal courts will not review the procedures that the Senate decides to use.[6] In an impeachment proceeding, therefore, the Senate also is not obligated to follow the Federal Rules of Evidence,[7] and may choose to disregard or relax some rules that would apply in a trial conducted by the judiciary branch.[8]

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[3] See Stephen B. Burbank, Alternative Career Resolution: An Essay on the Removal of Federal Judges, 76 Ky. L.J. 643, 693 (1988) (noting that the Senate has always applied some rules of evidence); 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives 537-643 (1907) (describing evidentiary rules used by the Senate in 19th-century impeachment trials).

[4] The Senate has adopted a set of "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials." Senate Manual (Senate Document 104-1) 177-185 (1998). These rules do not include rules of evidence, however. See id.; see also Michael J. Gerhardt, Rediscovering Nonjusticiability: Judicial Review of Impeachments after Nixon, 44 Duke L.J. 231, 267 (1994) (discussing the possibility of adopting rules of evidence for impeachments).

[5] See U.S. Const. art. I, § 3, cl. 6.

[6] See Nixon v. United States, 506 U.S. 224, 230 (1993) (holding that "the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions").

[7] See Black, supra note 2, at 18; see also Hastings v. United States Senate, Impeachment Trial Committee, 716 F. Supp. 38 (D.D.C.), aff'd sub nom. Nixon v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989) ("It is clear that the federal rules of evidence do not apply in impeachment trials ....").

[8] See Michael J. Broyde, Expediting Impeachment: Removing Article III Federal Judges after Criminal Conviction, 17 Harv. J.L. & Pub. Pol'y 157, 180 n.97 (1994) (noting that the Senate

Third, many of the Rules of Evidence would serve little purpose in an impeachment context. As Professor Charles L. Black, Jr., explained:

> [The] technical rules of evidence were elaborated primarily to hold *juries* within narrow limits. They have no place in the impeachment process. Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to "hearsay" evidence; they cannot be sequestered and kept away from newspapers, like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for all the factors of unreliability that have led to our keeping evidence away from juries, then they are not in any way up to the job, and "rules of evidence" will not help.[9]

The Congress therefore may decide in a particular impeachment trial to adopt only a few broad rules that exclude irrelevant evidence, but that generally admit any other reliable evidence.[10]

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often relaxes the rules of evidence).

[9] Black, supra note 2, at 18. Other scholars have echoed this analysis. See Michael J. Gerhardt, The Constitutional Limits to Impeachment and its Alternatives, 68 Tex. L. Rev. 1, 93 (1991) ("The concerns leading to the use of special rules of evidence in state and federal courts do not apply to impeachment proceedings."); Broyde, supra note 9, at 180 n.97 (arguing that the rules of evidence "are designed to prevent confusion or manipulation of a lay jury and are not really necessary in the Senate, which includes many lawyers").

[10] Professor Stephen B. Burbank has recommended that the Senate exclude irrelevant evidence but admit relevant hearsay. See Burbank, supra note 4, at 693. He explains:

> Relevance remains the cornerstone of modern evidence law, and it is an imperative for impeachment trials as much as for any other trial. Hearsay, if by that word we intend the elaborate and largely irrational system accreted over two centuries of distrust for juries, is not a cornerstone of anything except the incomes of law professors. Trustworthiness and necessity should be the dominant considerations in the Senate's decision

II. UNDERSTANDING THE EVIDENCE

For the reader's convenience, this part briefly describe the sources of evidence upon which the Office has relied. Each description includes the abbreviated footnote form used in the rest of the Referral to refer to the particular source.

A. Direct Testimony

Testimony before the grand jury and testimony given in a deposition is given under oath, while testimony provided in interviews with the OIC is not.

1. Grand Jury Testimony.

The Grand Jury has heard the sworn testimony of many witnesses during the course of this investigation. Questions posed to witnesses before the grand jury may be asked either by members of the Independent Counsel's Office, or by members of the grand jury. Every question and answer spoken in the grand jury is recorded and then transcribed by a professional transcriber who is not affiliated with the OIC. Information gained from grand jury testimony is referred to in the footnotes with [name] [date] GJ at [#]. "GJ," of course, refers to "grand jury." The rest of the details identify the name of the witness, the date of that particular testimony, and the pages of the transcript upon which the information appears.

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whether to admit relevant evidence that is hearsay according to whatever test is accepted.

Id. at 693-94 (footnotes omitted).

2. Deposition Testimony.

A deposition is a sworn statement in which a person responds to questions from the opposing side in a civil case. Depositions are recorded and then transcribed word-for-word by an independent transcriber. Depositions are cited in the footnotes as "[name] [date] Depo. at [#]. This format provides the last name of the person who testified at the deposition, the date of the deposition, and the page number(s) of the transcript pages relied upon. Thus, for example, President Clinton's deposition of January 17, 1998, which is frequently cited in the Referral, is referred to in the footnotes as "Clinton 1/17/98 Depo. at __."

3. Interviews with FBI Agents.

During the course of the investigation, FBI agents have interviewed many witnesses and taken detailed notes of those interviews. Although interviewees do not take an oath to answer truthfully, a knowing misstatement of a material fact to an FBI agent during the course of an investigation is subject to criminal punishment.[11] An FBI interview is referred to in the footnotes as "[name] [date] Int. at [#]." This citation format provides the last name of the person interviewed, the date of the particular interview, and the page of the interview notes upon which the information in the text appears.

[11] 18 U.S.C. § 1001.

B. Subpoenaed Documentary and Physical Evidence

A subpoena is a legal command issued to a person or entity by the authority of a court. A subpoena may direct a person to appear and give testimony at a trial or deposition, or, as discussed in this section, may also direct that the recipient turn over documents or things to the investigating authority -- in this case, the OIC. The recipient of a subpoena must either truthfully and fully produce the material described in the subpoena, or challenge the subpoena in court. Generally, a person producing materials in response to a subpoena will then "verify" under penalty of perjury that the materials produced are truly those called for by the subpoena, and that the person does not have other responsive documents that he has not produced. Subpoenas may seek government, financial, or personal records; they may also seek tangible physical things such as clothing or tapes. The OIC has served and received responses to a large number of subpoenas during the course of this investigation. Some of the specific types of documents are described in greater detail in the next part of this section.

Information derived from subpoenas is referred to in the footnotes in the following way: ###-DC-########. The first three (or four)-digit number refers to the subpoena's place in the sequence of all subpoenas served during the course of this investigation. "DC" indicates that the subpoena was issued from

the D.C. office.[12] The eight-digit number indicates the particular page or pages of the document(s) produced in response to the subpoena that are being relied upon. Because the response to one subpoena may include many different documents, all of which would share the same initial number, the OIC has at times provided a parenthetical reference after the numbered reference (which gives the type of document -- or the name of the particular document -- being referenced).

1. White House Records.

[redacted][13]

a. White House Access Logs

[redacted]

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[12] A few subpoena references begin with the letter "V." This indicates that they were issued from a Virginia grand jury.

[13] B. Smith, Moffit, Dougherty, and Dates 3/16/98 Int. at 1.

[redacted][14]

(i) Epass records

[redacted][15][16]

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[14] Dougherty 2/11/98 Int. at 2.

[15] Id.

[16] Id.

[redacted][17] [redacted][18] [redacted]

(ii) WAVES records

[redacted][19] [redacted][20] [redacted]

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[17] Dougherty 2/11/98 Int. at 2.

[18] Id.

[19] B. Smith et al. 3/16/98 Int. at 4.

[20] Id.

[redacted]

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[21] Id.

[22] B. Smith et al. 3/16/98 Int. at 2.

[23] Id.

[24] Id.

[25] Dougherty 2/11/98 Int. at 1-2.

[redacted][26]

[redacted][27]

[redacted][28]

b. Presidential Telephone Logs

[redacted][29]

[redacted][30]

[redacted][31]

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[26] B. Smith 3/16/98 Int. at 3.

[27] Id.

[28] Id.

[29] Nagy 2/19/98 Int. at 1.

[30] Nagy 2/19/98 Int. at 2; S. Smith 7/20/98 Depo. at 18, 24.

[31] Nagy 2/19/98 Int. at 1; S. Smith 7/20/98 Depo. at 36-37.

(i) WHTS

[redacted][32]

[redacted][33]

[redacted][34]

[redacted][35]

[redacted][36]

[redacted][37]

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[32] Nagy 5/18/98 Depo. at 9-10.

[33] Id.

[34] Nagy 5/18/98 Depo. at 44.

[35] Nagy 2/19/98 Int. at 2.

[36] Nagy 2/19/98 Int. at 4.

[37] Nagy 5/18/98 Depo. at 69-71.

[redacted][38]

[redacted][39]

(ii) WHCA

[redacted][40]

[redacted][41]

[redacted][42]

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[38] Nagy 5/18/98 Depo at 69.

[39] Nagy 5/18/98 Depo. at 69-70.

[40] S. Smith 7/20/98 Depo. at 19. [redacted]

[41] Id. at 20-21.

[42] Id. at 36-41.

[redacted][43]

[redacted][44]

[redacted][45]

[redacted][46]

[redacted][47]

[redacted][48]

2. United States Secret Service Records.

[redacted]

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[43] Id. at 38-41.

[44] Id. at 37.

[45] Id. at 47-50.

[46] Id.

[47] Id.

[48] Id.

a. Uniform Division Itineraries

[redacted][49] [redacted][50] [redacted]

b. POTUS Movement Logs/ First Family Locator Command Post Log

[redacted]

c. Protective Operations Activity and Personnel Reports

[redacted]

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[49] Wilson 7/23/98 GJ at 14-15.

[50] Id.

[redacted][51]

[redacted][52]

[redacted][53]

[redacted][54]

d. F1 Movement Logs

[redacted][55]

[redacted][56]

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[51] Wilson 7/23/98 GJ at 19-20.

[52] Id.

[53] Id. at 62.

[54] Id. at 29-31, 40-43.

[55] [redacted]

[56] Wilson 7/23/98 GJ at 54-55.

C. Other Documentary and Physical Evidence

1. Searches.

The OIC has also obtained documentary and physical evidence through voluntary production of that evidence and through searches of certain locations, such as Ms. Lewinsky's apartment and Ms. Tripp's house. The search of Ms. Lewinsky's apartment is referred to in the footnotes as "MSL-55-DC-####." The transcript of Ms. Lewinsky's telephone answering machine tapes is referred to as "Search.001 at #.

The search of Ms. Tripp's house was directed solely toward finding the tapes she made of conversations with Ms. Lewinsky. The tapes are cited as T# at #. "T#" refers to the number of the tape on which the conversation is recorded, and "at #" refers to the transcript page on which the transcribed conversation appears. (Details of how the tapes were dated are given in Part III, below.)

2. The Dress.

In accordance with her cooperation agreement, on July 29, 1998, Ms. Lewinsky produced to the OIC a navy blue dress that she said might contain stains corroborating the sexual nature of her relationship with the President.[57] The OIC subsequently submitted the dress to the FBI lab for examination.[58] On Friday, July 31, 1998, the FBI lab orally informed the OIC that the

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[57] See FBI form FD-597, Receipt for Property, 7/29/98.

[58] See Memorandum, FBI File No. 29D-OIC-LR-35063, Lab No. 980730002 S BO, Aug. 3, 1998.

stains on the dress tested positive for human semen, and recommended that the OIC obtain a blood sample from any known subject.[59] On August 3, 1998, in the presence of FBI and OIC personnel, the President provided a blood sample, which was turned over to the FBI for comparison.[60]

The first examination the FBI conducted was a PCR-based DNA test.[61] On August 6, 1998, the FBI notified the OIC that all the PCR markers from the test matched the DNA of President Clinton.[62] The FBI lab was able to extract enough quality DNA from the dress for additional analysis, so it began an RFLP-based DNA test.[63] During the week of August 10, the FBI lab orally informed the OIC that, based on its continuing comparison using RFLP, the lab believed its tests would show a more discriminating match between the DNA from the semen stain and the President's DNA. On the morning of August 17, 1998, the FBI formally concluded that the

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[59] See Report of Examination, FBI File No. 29D-OIC-LR-35063, Lab No. 980730002 S BO, Aug. 3, 1998.

[60] See FBI Memorandum of SSA Jenifer A.L. Smith, Aug. 3, 1998.

[61] PCR is the acronym for polymerase chain reaction, a less definitive DNA test that can be completed relatively quickly and requires only a small specimen of genetic material.

[62] The FBI concluded that the "probability of selecting an unrelated individual [from President Clinton's population] at random" was 1 in 43,000. Report of Examination, FBI File No. 29D-OIC-LR-35063, Lab Nos. 980730002 S BO and 980803100 S BO, Aug. 6, 1998.

[63] RFLP is the acronym for restriction fragment length polymorphism, an extremely definitive DNA test that requires a generous, high quality DNA specimen and usually takes additional time.

President "is the source of the DNA obtained from [Ms. Lewinsky's dress], to a reasonable degree of scientific certainty."[64]

III. CONVERSATIONS TAPED BY LINDA TRIPP.

A. Background

After receiving court-ordered immunity under 18 U.S.C. §6002, Linda Tripp produced several cassette tapes and testified before the grand jury.[65] Among other subjects, she discussed notes and tape recordings she made of several conversations between herself and Monica Lewinsky.

Ms. Lewinsky began confiding in Ms. Tripp soon after Ms. Lewinsky began working at the Pentagon. Ms. Tripp took two sets of notes during their conversations. The first notes are in a Skilcraft Steno Notebook.[66] Ms. Tripp testified she took these between May 23, 1997, and July 1997.[67] The second notes are on a series of papers. Ms. Tripp testified she took these during

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[64] Report of Examination, FBI File No. 29D-OIC-LR-35063, Lab Nos. 980730002 S BO and 980803100 S BO, Aug. 17, 1998. The FBI concluded that the "probability of selecting an unrelated individual [from President Clinton's population] at random" was 1 in 7.87 trillion.

[65] See Tripp GJ, 6/30/98, pg. 8-14 (The Office of the Independent Counsel also promised Ms. Tripp that it would do what it could to persuade the State of Maryland from prosecuting Ms. Tripp for any violations of the state wiretapping law.).

[66] 845-DC-00000001-25.

[67] May 23, 1997, is the last date recorded in the notebook. Linda Tripp testified she wrote the book in July, see Tripp 7/7/98 GJ at 111, but did so before she knew about the contact between Ms. Lewinsky and Bruce Lindsey on July 14, 1997. Id. at 135.

several conversations, starting in September 1997.[68] Ms. Tripp indicated that Ms. Lewinsky was aware of the first note-taking but not the second.[69] Ms. Lewinsky said, though, that she never knew Ms. Tripp was taking notes.[70]

From approximately October 3, 1997, to January 15, 1998, Linda Tripp tape recorded many of her telephone conversations with Monica Lewinsky. According to Ms. Tripp, on October 3, 1997, she purchased a voice activated tape recorder with a manual pause capability from Radio Shack (model CTR107), and connected it to a telephone in the study of her home. Ms. Tripp testified that she set the system to record all conversations from the study telephone so long as there was a tape in the machine and the machine remained on. Ms. Tripp added that because of the length of the conversations and the tapes, most of the tapes contain several conversations. As Ms. Tripp further told the grand jury, because the recorder was always working unless she turned it off, she captured conversations with people other than Ms. Lewinsky.

On October 6, 1997, after making two tapes, Ms. Tripp met in

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[68] Tripp GJ 7/16/98 at 112-13.

[69] Tripp 7/7/98 GJ at 108-109, 160; Tripp 7/16/98 GJ at 113.

[70] The dates in the notebook sometimes appear to be a day or two off. One note, for instance, refers to Sunday, March 30, 1996; Sunday actually fell on March 31. See 845-DC-00000011 (notes); Tripp GJ 7/9/98 at 17. Ms. Tripp surmised that Ms. Lewinsky was consulting a 1997 calendar for dates without realizing the discrepancy. Tripp GJ 7/9/98 at 18.

Washington, D.C. with her friend Lucianne Goldberg, Jonah Goldberg (Ms. Goldberg's son), and Michael Isikoff. After this meeting, Ms. Goldberg kept the two tapes and brought them to New York. Ms. Goldberg made copies of these tapes, and she presented the two originals and copies of them to the Office of the Independent Counsel in January 1998.

Ms. Tripp told the grand jury she continued to make recordings and keep them in a bowl on a piece of furniture. She testified that around the beginning of 1998, she gave most of the tapes to her lawyer, Kirby Behre. According to Ms. Tripp, she changed attorneys and retained Jim Moody. She stated that Mr. Moody obtained the tapes from Mr. Behre and provided them to the OIC in early January 1998.

Later, the OIC received four additional tapes from Ms. Tripp. On March 3, 1998, Ms. Tripp searched her home with the help of her new attorney, Anthony Zaccagnini, and several FBI Special Agents assigned to the OIC. During this search, Ms. Tripp and the others found three additional tapes. After previewing these tapes on the cassette player in his car, Mr. Zaccagnini presented them to the Special Agents. Ms. Tripp told the grand jury that just before March 17, 1998, she found another tape in her home and gave it to Mr. Zaccagnini. He brought it to the Office of the Independent Counsel on March 17, 1998.

The OIC provided to the FBI Audio Signal Analysis Unit in Quantico, Virginia, all of the tapes obtained from Ms. Tripp. This unit is engaged in the elaborate and time-consuming process

of authenticating the tapes, but it has provided some results.

* Examination has preliminarily determined that 8 of the tapes submitted do not exhibit signs of duplication.

* Examination has preliminarily determined that 9 of the tapes submitted exhibit characteristics that are not consistent with being recorded on the Radio Shack CTR107 tape recorder Ms. Tripp says she used to record the original tapes.

* Examination has preliminarily determined that the 9 tapes inconsistent with the tape recorder Ms. Tripp says she used exhibit signs of duplication.

* Examination has preliminarily determined that 7 of the tapes that exhibit signs of duplication are consistent with the use of one tape recorder to duplicate.

* The examination has preliminarily determined that one of the tapes that exhibits signs of duplication was produced by a recorder that was stopped during the recording process.

These results raise three important issues. First, the Office of the Independent Counsel does not possess original recordings for nine of the tapes Ms. Tripp made. Two of these tapes contain inaudible recordings. Second, the OIC is not aware who made the "likely to be duplicate" tapes. Third, if Ms. Tripp duplicated any tapes herself or knew of their duplication, then she has lied under oath before the grand jury and in a deposition. The OIC continues to investigate this matter.

In light of these three issues, and to help ensure the reliability, authenticity, and accuracy of the evidence, the accompanying submission only refers to recorded conversations which meet four conditions: (1) the recorded conversation is contained on a tape that FBI examination has preliminarily determined not to exhibit signs of duplication; (2) Monica Lewinsky has listened to the recording and identified her voice

and Linda Tripp's voice;[71] (3) Monica Lewinsky has identified the recording as an accurate depiction of a conversation she remembers;[72] and (4) there is independent evidence to corroborate the contents of the recorded conversation.

Even though they do not appear in the submission, the Office of Independent Counsel has provided all of the recorded conversations as raw evidence. Consequently, a fourth issue arises when assigning dates to the tapes that exhibit signs of duplication.

When a tape was filled with recorded conversations, Ms. Tripp removed the tape and stored it in the bowl. Ms. Tripp did not mark the tapes, and she did not catalog them. As a result, the only way to determine which day Ms. Tripp recorded each tape was to use the information she provided while she was debriefed,[73] combined with information from the conversations.

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[71] Ms. Lewinsky stated with respect to these recordings that she believes the voice on the tapes is hers, based on "intonation and content."

[72] Although Ms. Lewinsky cannot attest to whether there are missing portions of the conversations, she could not recall any specific conversation that was excluded from the particular conversations on the tapes. Ms. Lewinsky noted, however, that she had many more conversations with Linda Tripp about certain subject matters than were captured on tape.

[73] Ms. Tripp appeared at the Office of the Independent Counsel on many occasions between January 1998, and July 1998. During most of her initial visits, Ms. Tripp listened to the recordings of her conversations with Ms. Lewinsky and compared them with transcripts that the Office of the Independent Counsel prepared. Ms. Tripp corrected the transcripts as necessary. Ms. Tripp told the grand jury that the tapes accurately depict her conversations with Ms. Lewinsky and that the transcripts are accurate.

For the seven tapes which contain audible conversations and which exhibit signs of duplication, the Office of the Independent Counsel cannot exclude the possibility of tampering at this time. For this reason, the Office of the Independent Counsel cannot have full confidence that the dates assigned to these tapes are accurate. The following appendix represents the opinion of the Independent Counsel regarding the date of each tape. The tapes that exhibit signs of duplication are marked to reduce the possibility of confusion.

B. Dating the Tape Recorded Conversations

The following discussion represents the opinion of the Office of the Independent Counsel regarding the date of each tape. Although they are assigned dates, the duplicates are marked to reduce the possibility of confusion.

In her later visits to the Office of the Independent Counsel, Ms. Tripp participated in debriefing sessions with investigators and attorneys. One aspect of these sessions included eliciting information about the tapes and when Ms. Tripp made them.

1. Reference Charts Summarizing The Dates of the Tapes

Conversations Listed By Date

1. Friday, October 3, 1997:
Tape 18, side A, first conversation on tape.
Transcript pages: 2-25.

2. Friday, October 3, 1997:
Tape 18, side A, second conversation on tape.
Transcript pages: 25-71.

3. Saturday, October 4, 1997:
Tape 18, side B, third conversation on tape.
Transcript pages: 71-110.

4. Sunday, October 5, 1997:
Tape 19, side A, first conversation on tape.
Transcript pages: 2-21.

5. Sunday, October 5, 1997:
Tape 19, side A, second conversation on tape.
Transcript pages: 21-34.

6. Sunday, October 5, 1997:
Tape 19, side A, third conversation on tape.
Transcript page: 34.

7. Monday, October 6, 1997:
Tape 19, side A, fourth conversation on tape.
Transcript pages: 35-41.

8. Monday, October 6, 1997:
Tape 1, Side A, first conversation on tape.
Transcript pages: 2-40.

9. Monday, October 6, 1997:
Tape 1, side A, second conversation on tape.
Transcript pages: 40-110.

10. Thursday, October 16, 1997:
Tape 2, Side A, third conversation on tape.
Transcript pages: 2-38.

11. Thursday, October 16, 1997:
Tape 13, Side A, first conversation on tape.
Transcript pages 2-30.

Conversations Listed By Tape

Note: Tapes Which Exhibit Sign of Duplication Are Printed In Italics

1. Tape 1, Side A, first conversation on tape:
Transcript pages: 2-40.
Monday, October 6, 1997

2. Tape 1, side A, second conversation on tape:
Transcript pages: 40-110.
Monday, October 6, 1997.

3. Tape 2, Side A, third conversation on tape:
Transcript pages: 2-38.
Thursday, October 16, 1997.

4. Tape 3, side A, first conversation on tape:
Transcript: pages 2-39.
Saturday, October 18, 1997.

5. Tape 5, side A, first conversation on tape:
Transcript pages: 2-16.
Thursday, November 20, 1997.

6. Tape 5, side A, third conversation on tape:
Transcript pages: 17-41.
Thursday, November 20, 1997.

7. Tape 5, side A, fourth conversation on tape:
Transcript pages: 41-47.
Thursday, November 20, 1997.

8. Tape 5, side A, fifth conversation on tape:
Transcript pages: 47-52.
Friday, November 21, 1997.

9. Tape 5, side B, sixth conversation on tape:
Transcript pages: 53-55.
Friday, November 21, 1997.

10. Tape 5, side B, seventh conversation on tape:
Transcript pages: 55-59.
Friday, November 21, 1997.

11. Tape 5, side B, eighth conversation on tape:
Transcript pages: 59-91.
Friday, November 21, 1997.

12. Friday, October 17, 1997:
Tape 13, side A, second conversation on tape.
Transcript pages: pages 30-38.

13. Saturday, October 18, 1997:
Tape 3, side A, first conversation on tape.
Transcript: pages 2-39.

14. Saturday, October 18, 1997:
Tape 8, Side A, first conversation on tape.
Transcript pages 2-34.

15. Sunday October 19, 1997:
.Tape 7, Side A, first conversation on tape.
Transcript pages: 2-51.

16. Thursday, October 23, 1997:
Tape 15, Side A, first conversation on tape.
Transcript pages: 2-30.

17. Thursday, October 23, 1997:
Tape 15, Side A, second conversation on tape.
Transcript pages: 30-73.

18. Wednesday, October 29, 1997:
Tape 11, first conversation on tape.
Transcript pages: 2-57.

19. Monday, November 3, 1997:
Tape 11, Side B, fifth conversation on tape.
Transcript pages: 58-113.

20. Saturday, November 8, 1997:
Tape 16, side B, sixth conversation on tape.
Transcript pages: 60-103.

21. Tuesday, November 11, 1997:
Tape 16, side B, ninth conversation on tape.
Transcript pages: 104-114.

22. Tuesday, November 11, 1997:
Tape 26, side A, first conversation on tape.
Transcript pages: 2-5.

23. Tuesday, November 11, 1997:
Tape 26, side A, second conversation on tape.
Transcript pages: 5-32.

24. Tuesday, November 11, 1997:
Tape 26, side A, third conversation on tape.
Transcript pages: 32-55.

12. Tape 6, side A, second conversation on tape:
Transcript pages: 2-24.
Monday, December 22, 1997.

13. Tape 6, side A, fourth conversation on tape:
Transcript pages: 24-32.
Monday, December 22, 1997.

14. Tape 6, side B, fifth conversation on tape:
Transcript pages: 33-68.
Monday, December 22, 1997.

15. Tape 7, Side A, first conversation on tape:
Transcript pages: 2-51.
Sunday October 19, 1997.

16. Tape 8, Side A, first conversation on tape:
Transcript pages 2-34.
Saturday, October 18, 1997.

17. Tape 9, side A, first conversation on tape:
Transcript pages: 2-33.
Sunday, November 16, 1997.

18. Tape 9, side A, second conversation on tape:
Transcript pages: 33-51.
Monday, November 17, 1997.

19. Tape 9, side B, third conversation on tape:
Transcript pages: 51-79.
Tuesday, November 18, 1997.

20. Tape 9, side B, fourth conversation on tape:
Transcript pages: 79-100.
Thursday, November 20, 1997

21. Tape 11, Side A, first conversation on tape:
Transcript pages: 2-57.
Wednesday, October 29, 1997

22. Tape 11, Side B, fifth conversation on tape:
Transcript pages: 58-113.
Monday, November 3, 1997.

23. Tape 13, Side A, first conversation on tape:
Transcript pages 2-30.
Thursday, October 16, 1997.

24. Tape 13, side A, second conversation on tape:
Transcript pages: pages 30-38.
Friday, October 17, 1997.

25. Thursday, November 13, 1997:
Tape 16, side A, first conversation on tape.
Transcript pages: 2-9.

25. Tape 15, Side A, first conversation on tape:
Transcript pages: 2-30.
Thursday, October 23, 1997.

26. Friday, November 14, 1997:
Tape 16, side A, second conversation on tape.
Transcript pages: 9-51.

26. Tape 15, Side A, second conversation on tape:
Transcript pages: 30-73.
Thursday, October 23, 1997.

27. Sunday, November 16, 1997:
Tape 16, side A, third conversation on tape.
Transcript pages: 52-60.

27. Tape 16, side A, first conversation on tape:
Transcript pages: 2-9.
Thursday, November 13, 1997.

28. Sunday, November 16, 1997:
Tape 9, side A, first conversation on tape.
Transcript pages: 2-33.

28. Tape 16, side A, second conversation on tape:
Transcript pages: 9-51.
Friday, November 14, 1997.

29. Monday, November 17, 1997:
Tape 9, side A, second conversation on tape.
Transcript pages: 33-51.

29. Tape 16, side B, sixth conversation on tape:
Transcript pages: 60-103.
Saturday, November 8, 1997.

30. Tuesday, November 18, 1997:
Tape 9, side B, third conversation on tape.
Transcript pages: 51-79.

30. Tape 16, side B, ninth conversation on tape.
Transcript pages: 104-114.
Tuesday, November 11, 1997:

31. Thursday, November 20, 1997:
Tape 9, side B, fourth conversation on tape.
Transcript pages: 79-100.

31. Tape 16, side A, third conversation on tape:
Transcript pages: 52-60.
Sunday, November 16, 1997.

32. Thursday, November 20, 1997:
Tape 5, side A, first conversation on tape.
Transcript pages: 2-16.

32. Tape 18, side A, first conversation on tape:
Transcript pages: 2-25.
Friday, October 3, 1997.

33. Thursday, November 20, 1997:
Tape 5, side A, third conversation on tape.
Transcript pages: 17-41.

33. Tape 18, side A, second conversation on tape:
Transcript pages: 25-71.
Friday, October 3, 1997.

34. Thursday, November 20, 1997:
Tape 5, side A, fourth conversation on tape.
Transcript pages: 41-47.

34. Tape 18, side B, third conversation on tape:
Transcript pages: 71-110.
Saturday, October 4, 1997.

35. Friday, November 21, 1997:
Tape 5, side A, fifth conversation on tape.
Transcript pages: 47-52.

35. Tape 19, side A, first conversation on tape:
Transcript pages: 2-21.
Sunday, October 5, 1997

36. Friday, November 21, 1997:
Tape 5, side A, sixth conversation on tape.
Transcript pages: 53-55.

36. Tape 19, side A, second conversation on tape:
Transcript page: 21-34.
Sunday, October 5, 1997

37. Friday, November 21, 1997:
Tape 5, side A, seventh conversation on tape.
Transcript pages: 55-59.

37. Tape 19, side A, third conversation on tape:
Transcript pages: 34.
Sunday, October 5, 1997.

38. Friday, November 21, 1997:
Tape 5, side A, eighth conversation on tape.
Transcript pages: 59-91.

39. Tuesday, December 9, 1997:
Tape 23, side A, first conversation on tape.
Transcript pages: 2-6.

40. Tuesday, December 9, 1997:
Tape 23, side A, second conversation on tape.
Transcript pages: 6-56.

41. Friday, December 12, 1997:
Tape 23, side A, fifth conversation on tape.
Transcript pages: 57-68.

42. Friday, December 12, 1997:
Tape 23, side B, sixth conversation on tape.
Transcript pages: 68-127.

43. Friday, December 12, 1997:
Tape 23, side B, eighth conversation on tape.
Transcript pages: 127-131.

44. Monday, December 22, 1997:
Tape 6, side A, second conversation on tape.
Transcript pages: 2-24.

45. Monday, December 22, 1997:
Tape 6, side A, fourth conversation on tape.
Transcript pages: 24-32.

46. Monday, December 22, 1997:
Tape 6, side B, fifth conversation on tape.
Transcript pages: 33-68.

47. Thursday, January 15, 1998:
Tape 22, side A, first conversation on tape.
Transcript pages: 2-55.

48. Thursday, January 15, 1998:
Tape 22, side A, second conversation on tape.
Transcript pages: 55-76.

38. Tape 19, side A, fourth conversation on tape:
Transcript pages: 35-41.
Monday, October 6, 1997.

39. Tape 22, side A, first conversation on tape:
Transcript pages: 2-55.
Thursday, January 15, 1998.

40. Tape 22, side A, second conversation on tape:
Transcript pages: 55-76.
Thursday, January 15, 1998.

41. Tape 23, side A, first conversation on tape:
Transcript pages: 2-6.
Tuesday, December 9, 1997.

42. Tape 23, side A, second conversation on tape:
Transcript pages: 6-56.
Tuesday, December 9, 1997.

43. Tape 23, side A, fifth conversation on tape:
Transcript pages: 57-68.
Friday, December 12, 1997.

44. Tape 23, side B, sixth conversation on tape:
Transcript pages: 68-127.
Friday, December 12, 1997.

45. Tape 23, side B, eighth conversation on tape:
Transcript pages: 127-131.
Friday, December 12, 1997

46. Tape 26, side A, first conversation on tape:
Transcript pages: 2-5.
Tuesday, November 11, 1997.

47. Tape 26, side A, second conversation on tape:
Transcript pages: 5-32.
Tuesday, November 11, 1997.

48. Tape 26, side A, third conversation on tape:
Transcript pages: 32-55.
Tuesday, November 11, 1997.

2. How the OIC Determined the Chronology of these Undated Tapes

Conversation # 1:
Friday, October 3, 1997
Tape 18, side A, first conversation on the tape.
Transcript pages: 2-25.

During this conversation, Ms. Tripp says it is October. See T18 at 24. Ms. Lewinsky observes that the President will be delivering a radio address on the following morning, and then traveling to Maryland and Camp David. See T18 at 20. The President's October 4, 1997, schedule shows he gave a radio address, see 968-DC-00003058, and then traveled to Prince George's County, Maryland and Camp David. See 968-DC-00003059. Ms. Lewinsky also comments the President will be at an event in Virginia on Saturday night. See page 21. The Presidential Press Schedule shows the President attended a function at the National Airport Hilton on October 4, 1997. See 968-DC-00003060.

These factors are consistent with a conversation on October 3, 1997.

Conversation # 2:
Friday, October 3, 1997
Tape 18, side A, second conversation on the tape.
Transcript pages: 25-71.

During this conversation, Ms. Tripp says it is Friday night, and Ms. Lewinsky says she is going to New York City on the next Saturday for the weekend. See T18 at 28. Ms. Lewinsky's American Express bill reveals she bought an airplane ticket from LaGuardia Airport to the Ronald Reagan National Airport on October 13, 1997. See 852-DC-00000042. Ms. Lewinsky also mentions that the

President is leaving the following Sunday, October 12, 1997. See T18 at 41. The President's schedule shows he left for a week-long trip to Latin America on October 11, 1997. See United States President, Weekly Compilations of Presidential Documents at 1608, 1609, 1652.

These factors are consistent with a conversation on Friday, October 3, 1997.

Conversation # 3:
Saturday, October 4, 1997
Tape 18, side B, third conversation on the tape.
Transcript pages: 71-110.

The conversation that immediately precedes this conversation on the tape occurred on Friday, October 3, 1997. At the end of the previous portion, Ms. Lewinsky notes that it is 10:20, that she is going to sleep, and she indicates that she is not working the next day. See T18 at 70. This conversation begins with Ms. Lewinsky describing her trip to the Potomac Mills Mall for the day. See T18 at 70-79. The placement of the conversation on the tape and the day-long trip to the mall are consistent with a weekend day.

In addition, Ms. Lewinsky says Betty Currie was in the office during the morning because of the Radio Address. See T18 at 88. The President delivered a Radio Address on Saturday October 4, 1997, at 10:06 am. Also, Betty Currie rarely works on Sunday because it is her "church day." See Currie 5/7/98 GJ at 91. Ms. Lewinsky further says she wants to buy the President a gift because he now had a hearing aid. See T18 at 80. The

President was fitted for hearing aids on October 3, 1997. See "Age Catching Up With Clinton; He's Getting Hearing Aids," Sandra Sobieraj, The Associated Press, October 3, 1997.

Ms. Lewinsky also says there are three months before the beginning of the year, and she refers to sunglasses she bought the President for his Latin America trip. See T18 at 103-4. This statement would place the tape in early October.

These factors are consistent with a conversation on October 4, 1997.

Conversation # 4:
Sunday, October 5, 1997
Tape 19, side A, first conversation on the tape.
Transcript pages: 2-21.

Ms. Lewinsky tells Ms. Tripp that CNN is leading its "Headline News" with a story about the White House releasing video tapes of the coffee receptions for Democratic supporters. See T19 at 2. At the outset of the call, Ms. Lewinsky is waiting excitedly for the next half hour news cycle so she can see the whole story. Evidently, she was concerned the White House might have a video taping system that showed her on tape.

The White House released these tapes, and the story broke on October 5, 1997. See Videotapes Released Showing Presidential Coffee Meetings, NBC Nightly News, October 5, 1997. Because of her excitement and the fact that Ms. Lewinsky followed White House news so carefully, it is likely she is describing the story that broke earlier in the day.

In addition, Ms. Tripp refers to a message she received at

work on Friday, and she says she did not call back because it was "the kind of thing that could wait until Monday." See T19 at 31. This statement is consistent with a weekend conversation. Also, Ms. Tripp and Ms. Lewinsky discuss how Ms. Lewinsky will help Ms. Tripp with parking at work the next day. See T19 at 15. This final point places this conversation on a Sunday night.

These factors are consistent with a conversation on Sunday, October 5, 1997.

Conversation # 5:
Sunday, October 5, 1997
Tape 19, side A, second conversation on the tape.
Transcript pages: 21-34.

Ms. Lewinsky discusses the sunglasses she bought for the President and how she will send them to him. See T19 at 24. Because Ms. Lewinsky bought these sunglasses on October 4, 1997, this conversation must have occurred after that day. Ms. Tripp also says Ms. Lewinsky should send the glasses by FedEx. FedEx receipts show that Ms. Lewinsky sent a Federal Express package to the White House on October 10, 1997. See 925-DC-00000003. For this reason, the conversation probably occurred before October 10, 1997.

In the conversation that immediately precedes this conversation, Ms. Lewinsky and Ms. Tripp discussed their parking plans for the next morning. Ms. Lewinsky said she would be in a meeting until approximately 8:00 am, and then she could bring Ms. Tripp into the parking lot. See T19 at 16. Ms. Tripp and Ms. Lewinsky ended this conversation by bidding each other good night

and with Ms. Tripp saying she would call Ms. Lewinsky "probably eight-ish." See T19 at 34. For these reasons, the conversation that immediately precedes this conversation likely occurred on October 5, 1997.

The conversation that immediately follows this one also occurred on October 5, 1997 (see explanation of next conversation). Because this conversation comes between two October 5 conversations on T19, it most likely occurred on October 5, 1997.

These factors are consistent with a conversation on Sunday, October 5, 1997.

Conversation # 6:
Sunday, October 5, 1997
Tape 19, side A, third conversation on the tape.
Transcript page: 34.

Ms. Lewinsky and Ms. Tripp spoke during the early evening of October 5, 1997. See T19 at 2-21. After this first conversation, Ms. Tripp went to the gym to exercise and Ms. Lewinsky called back. See 19 at 21-34. Sometime after that conversation ended, Ms. Tripp received a call from her friend Kate Friederich and turned off the recorder. See T19 at 34. Ms. Tripp knows the conversation with Ms. Friederich occurred in the late evening of Sunday, October 5, 1997, because the conversation happened the day before Ms. Tripp met with Lucianne Goldberg, Jonah Goldberg, and Michael Isikoff. That meeting occurred October 6, 1997. Furthermore, in a letter to the President, Ms. Lewinsky wrote that Ms. Friederich spoke to Ms. Tripp on Sunday

night. See MSL-55-DC-0178.

These factors are consistent with a conversation on Sunday October 5, 1997.

Conversation 7:
Monday, October 6, 1997
Tape 19, side A, fourth conversation on the tape.
Transcript pages: 35-41.

The segment of conversation that immediately precedes this conversation is the interrupted discussion between Ms. Tripp and Ms. Friedrich. In this conversation, Ms. Tripp tells Ms. Lewinsky what Ms. Friederich said. During her debriefing, Ms. Tripp remembered having this conversation the morning after speaking with Ms. Friederich. One thing that sparked Ms. Tripp's memory was her statement during the conversation, "Let me get my coffee . . . I've got to wake up." T19 at 35. According to Ms. Tripp, she usually only drinks coffee in the morning.

There are further indications that this conversation occurred on October 6, 1997. In this conversation, Ms. Tripp says she has not spoken to Kate in a month. During a conversation taped on the night of October 6, 1997, Ms. Tripp and Ms. Lewinsky discussed this conversation again. See T1 at 13-23. Consequently, this conversation must have occurred before the evening of October 6, 1997.

These factors are consistent with a conversation on October 6, 1997.

Conversation # 8:
Monday, October 6, 1997
Tape 1, Side A, first conversation on the tape.
Transcript pages: 2-40.

Ms. Lewinsky tells Ms. Tripp that Ms. Currie would not get her into the White House this evening because of a dinner. See T1 at 6. The Presidential press schedule reveals the President hosted a state dinner with the President of Israel on October 6, 1997. See 968-DC-00003063.

Also, this conversation ends with a discussion about a letter that Ms. Lewinsky intends to send to the President. At the end of the conversation, Ms. Lewinsky says she will write the letter and call Ms. Tripp back in about 15-20 minutes. See T1 at 40. The next conversation, which follows immediately on the tape, begins with a discussion of the letter Ms. Lewinsky has composed. The next conversation also features Ms. Lewinsky saying it is the 6th. See T1 at 90.

In addition, Ms. Lewinsky and Ms. Tripp discuss a conversation between Ms. Tripp and her friend Kate Friederich who works at the National Security Council. See T1 at 13-36. For the reasons cited above, the conversation between Ms. Tripp and Ms. Friederich occurred on the previous night.

These factors are consistent with a conversation on Monday, October 6, 1997.

Conversation # 9:
Monday, October 6, 1997
Tape 1, side A, second conversation on the tape.
Transcript pages: 40-110.

During this conversation, Ms. Lewinsky says: "Today is the 6th." See T1 at 90. In addition, Ms. Lewinsky and Ms. Tripp are discussing a letter that Ms. Lewinsky intends to send to the

White House. There is a courier receipt which shows a delivery from Ms. Lewinsky to the White House on October 7, 1997. See 837-DC-00001.

Ms. Lewinsky also observes that Mrs. Clinton "is coming home Friday night from Panama to go to South America with him on Sunday, just so she can be here for their anniversary." See T1 at 69. The First Lady's travel schedule reveals Mrs. Clinton returned from Panama on Friday, October 10. See 968-DC-00003477. Ms. Lewinsky further refers to the fact that the President is leaving for Latin America on Sunday. See T1 at 69. The Presidential Press Schedule shows that the President left for Latin American on Sunday October 12, 1997. See 968-DC-00003076.

These factors are consistent with a conversation on Monday, October 6, 1997.

Conversation # 10:
Thursday, October 16, 1997
Tape 2, Side A, third conversation on the tape.
Transcript pages: 2-38.

Ms. Tripp says tomorrow is the 17th. See T2 at 31. Also, on page 4, Ms. Lewinsky says the President is in Latin America and will be back on Sunday morning. The Presidential Press Schedule reveals the President returned from Latin America on October 19, 1997. See 968-DC-00003141.

These factors are consistent with a conversation on October 16, 1997.

Conversation # 11:
Thursday, October 16, 1997
Tape 13, Side A, first conversation on the tape.
Transcript pages: 2-30.

This conversation ends with Ms. Tripp telling Ms. Lewinsky, "I'll talk to you tomorrow." See T13 at 30. The next conversation on the tape begins with Ms. Tripp asking Ms. Lewinsky what Ms. Lewinsky is still doing in the office on a Friday night. See T13 at 30. These factors are consistent with a Thursday conversation.

The following factors place the conversation in a more general time frame. Ms. Lewinsky says the President will get a package she has sent him on Monday. See T13 at 17. The Presidential Press Schedule shows the President returned from his Latin America trip on Sunday, October 19, 1997. See 968-DC-00003141. Ms. Lewinsky also indicates the First Lady will be in New York on Monday and then go to Chicago "for some big birthday thing." See T13 at 17. The First Lady's schedule reveals that she was in New York on October 20, 1997, that her birthday was October 26, 1997, and that she went to Chicago on October 27, 1997. See 968-DC-00003477.

All of these factors are consistent with a conversation on Thursday, October 16, 1997.

Conversation # 12:
Friday, October 17, 1997
Tape 13, side A, second conversation on the tape.
Transcript pages: pages 30-38.

At the outset of this tape, Ms. Tripp asks Ms. Lewinsky why she is working late on a Friday night. See T13 at 31. October

17, 1997, was a Friday. Also, Ms. Lewinsky tells Ms. Tripp the First Lady's birthday is the next week. See T13 at 12. The First Lady's birthday is October 26. See 968-DC-00003477.

These factors are consistent with a conversation on Friday October 17, 1997.

Conversation # 13:
Saturday, October 18, 1997
Tape 3, side A, first conversation on the tape.
Transcript: pages 2-39.

In a question regarding the President, Ms. Tripp asks: "When does he get back? Tonight, tomorrow?" Ms. Lewinsky responds: "I think early tomorrow morning." See T3 at 12. The President's schedule reveals that he returned from Latin America on the morning of October 19. See 968-DC-00003141. Later, Ms. Lewinsky once again notes that the First Lady's birthday is the next weekend, and she recites the First Lady's travel schedule including a trip to New York, a trip to Chicago, and a trip to Ireland. The First Lady's travel schedule includes a trip to New York (October 20), her birthday (October 26), and a trip to Ireland (Starting October 30). See 968-DC-00003477.

These factors are consistent with a conversation on Saturday, October 18, 1997.

Conversation # 14:
Saturday, October 18, 1997
Tape 8, Side A, first conversation on tape.
Transcript pages 2-34.

Ms. Lewinsky says she called Andy Bleiler earlier in the day. See T8 at 8. Phone records reflect four calls from Ms. Lewinsky to Mr. Bleiler on October 18 (three were one minute each

and one was four minutes, the first at 7:33 p.m. and the last at 7:41 p.m.). See 810-DC-00000017. In addition, Ms. Lewinsky says she first told the President she wanted help finding a job on January 8, 1997-- ten months ago. This statement is consistent with this conversation's being in October.

These factors are consistent with a conversation on Saturday, October 18, 1997.

Conversation 15:
Sunday October 19, 1997
Tape 7, Side A, first conversation on the tape.
Transcript pages: 2-51.

Ms. Lewinsky mentions that the President returned from Latin America and could have gone to his office and seen her package. See T7 at 10. The Presidential travel schedule reveals the President returned from Latin America on the morning of Sunday, October 19. See 968-DC-00003141. Also, Ms. Lewinsky comments that a World Series game is on television. See T7 at 2. Game 2 of the 1997 World Series occurred on Sunday, October 19, 1997. See "The Schedule," The Daily News, October 19, 1997.

There are other indications that this call happened on a Sunday. First, Ms. Lewinsky suggests that the President can call her on a Sunday even if Mrs. Clinton is in the White House. See T7 at 10-11. Lewinsky also mentions that Ms. Currie usually does not come in on Sundays. See T7 at 14. Furthermore, Ms. Lewinsky refers to going to the Mall earlier that day. See T7 at 2-5. This assertion is consistent with a weekend conversation.

These factors are consistent with a conversation on Sunday,

October 19, 1997.

Conversation # 16:
Thursday, October 23, 1997
Tape 15, Side A, first conversation on tape.
Transcript pages: 2-30.

Ms. Lewinsky indicates that Ambassador Richardson called on Tuesday. See T15 at 15. Phone records reflect a call from Ambassador Richardson's line to Ms. Lewinsky on Tuesday, October 21. See 828-DC-00000004.

These factors are consistent with a conversation on Thursday, October 23, 1997.

Conversation # 17:
Thursday, October 23, 1997
Tape 15, Side A, second conversation on the tape.
Transcript pages: 30-73.

This is a continuation of the previous conversation. In the conversation that immediately precedes this conversation on the tape, Lewinsky is upset because she has not had enough contact with the President. During this previous conversation, Ms. Lewinsky says it is 8:15 and she promises to call Ms. Tripp as soon as the President calls her. See T15 at 27.

This conversation opens with Ms. Lewinsky describing the conversation she has just finished with the President. Ms. Lewinsky says it is 10:30. See T15 at 34. This timing and Ms. Lewinsky's comments are consistent with back-to-back phone calls. Also, Ms. Lewinsky says she told the President that Ambassador Richardson called her on Tuesday. See T15 at 31. Ambassador Richardson called Ms. Lewinsky on Tuesday, October 21, 1997. See 828-DC-00000004. Also, as a general matter, Ms. Lewinsky says it

is October. See T15 at 65.

These factors are consistent with a conversation on Thursday, October 23, 1997.

Conversation 18:
Wednesday, October 29, 1997
Tape 11, first conversation on tape.
Transcript pages: 2-57.

This Conversation Appears On A "Likely To Be Duplicate Tape."

Ms. Lewinsky says she spoke to Bayani Nelvis on the telephone that afternoon. T11 at 2. Telephone records reflect a conversation between Mr. Nelvis and Ms. Lewinsky on this day. See 1051-DC-00000003. Ms. Lewinsky also says she last spoke to the President a week ago. See T11 at 30. At this time, Ms. Lewinsky and the President last spoke six days before--on October 23. Finally, Ms. Lewinsky says she sent the President a present. On October 28, Ms. Lewinsky sent a package to the White House via Speed Service Couriers. See 837-DC-00000004.

These factors are consistent with a conversation on Wednesday, October 29, 1997.

Conversation # 19:
Monday, November 3, 1997
Tape 11, Side B, fifth conversation on the tape.
Transcript pages: 58-113.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky refers to a call from the U.N. regarding a job offer. See T11 at 60-63. Phone records show a call from the U.N. to Ms. Lewinsky at 11:02 a.m. See 828-DC-00000003. Ms.

Lewinsky further says she arranged with Ms. Currie to send a package to the White House by courier. See T11 at 84. A courier receipt reflects that Ms. Lewinsky sent a package to the White House on November 3, 1997. See 837-DC-00000006. Moreover, Ms. Lewinsky remarks that the First Lady is leaving on Sunday. The First Lady's travel schedule reveals that she left for London on Sunday, November 9, 1997.

These factors are consistent with a conversation on Monday, November 3, 1997.

Conversation # 20:
Saturday, November 8, 1997
Tape 16, side B, sixth conversation on tape.
Transcript pages: 60-103.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

An answering machine recording that immediately precedes this conversation identifies the date as November 8. See T16 at 60. In addition, Ms. Lewinsky tells Ms. Tripp the First Lady is leaving the next day. See T16 at 69. Mrs. Clinton left for London on Sunday, November 9, 1997. There are two additional indications that this conversation occurred on a Saturday. First, Ms. Lewinsky says that, when she asked Ms. Currie if she could see the President "tomorrow," Ms. Currie said the President would be attending church in the morning. See T16 at 68. Second, Ms. Lewinsky says that she was told by Ms. Currie that the President taped the Radio Address on the previous day. See T16 at 65. Furthermore, because Ms. Lewinsky tells Ms. Tripp how

she asked Ms. Currie for a Veterans Day meeting with the President, the conversation must have occurred before November 11. See T16 at 69.

These factors are consistent with a conversation on Monday, November 8, 1997.

Conversation # 21:
Tuesday, November 11, 1997
Tape 16, side B, ninth conversation on tape.
Transcript pages: 104-114.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Tripp says she has a message from Norma Asnes in which Ms. Asnes invites Ms. Tripp to a play at the Arena Theatre for the next night. See T16 at 104. That event was on November 12, 1997. Also, Ms. Lewinsky describes a conversation with Ms. Currie in which she asked about the President's schedule "tonight," then "tomorrow," then Thursday, and then Friday. See T16 at 107-08. This sequence places this conversation on a Tuesday. November 11, 1997, was a Tuesday.

These factors are consistent with a conversation on Tuesday, November 11, 1997.

Conversation # 22:
Tuesday, November 11, 1997
Tape 26, side A, first conversation on tape.
Transcript pages: 2-5.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Tripp asks Ms. Lewinsky whether she would like to attend the play with Ms. Tripp, Ms. Asnes, and others. As noted in the

description of conversation 21, this production occurred on November 12, 1997. Also, in the next conversation, which is clearly a continuation of this one, Ms. Tripp says it is the 11th. See T26 at 22.

These factors are consistent with a conversation on Tuesday, November 11, 1997.

Conversation # 23:
Tuesday, November 11, 1997
Tape 26, side A, second conversation on tape.
Transcript pages: 25-32.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Tripp says it is the 11th. See T26 at 22. This exchange is clearly a continuation of the conversation that immediately precedes it on the tape because the topic is the same, and Ms. Lewinsky hung up from the last conversation merely to get a telephone number from information. Ms. Lewinsky said she would call back immediately. See T26 at 5.

These factors are consistent with a conversation on Tuesday, November 11, 1997.

Conversation # 24:
Tuesday, November 11, 1997
Tape 26, side A, third conversation on tape.
Transcript pages: 32-55.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky says she wants to see the President because it is Veterans Day and he is all alone. See T26 at 35. Veterans Day is November 11. In addition, this conversation is a continuation

of the previous conversation (also dated November 11) which was interrupted by call waiting. Ms. Tripp says she just got off the phone with Ms. Asnes, whom Ms. Tripp was trying to reach. See T26 at 36.

These factors are consistent with a conversation on Tuesday, November 11, 1997.

Conversation # 25:
Thursday, November 13, 1997
Tape 16, side A, first conversation on tape.
Transcript pages: 2-9.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

In this brief conversation, Ms. Lewinsky says she was in the White House earlier in the evening while President Zedillo of Mexico was there. She says she saw the President for 60 seconds. President Zedillo dined at the White House on November 13. See Baltimore Sun (Nov. 14, 1997, at 17A. WAVES records confirm Ms. Lewinsky was at the White House on this date. See 827-DC-000018, V006-DC-000008, 137-DC-000318.

These factors are consistent with a conversation on Thursday, November 13, 1997.

Conversation # 26:
Friday, November 14, 1997
Tape 16, side A, second conversation on tape.
Transcript pages: 9-51.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

On T16, this conversation immediately follows the one in which Ms. Lewinsky describes her visit earlier in the day with

President Clinton while President Zedillo was in the White House. The previous discussion ends with Ms. Lewinsky and Ms. Tripp exchanging "good night" wishes. See T16 at 9. This conversation begins with Ms. Lewinsky commenting that the President is in Las Vegas. See T16 at 9. The President's travel schedule indicates he was in Las Vegas on November 14, 1997. See 968-DC-0003257. Also, Ms. Lewinsky says she is going to New York by train. See T16 at 11. On November 14, 1997, Ms. Lewinsky sent an e-mail which indicated her plans to travel to New York by train. See V06-DC-000359.

These factors are consistent with a conversation on Friday, November 14, 1997.

Conversation # 27:
Sunday, November 16, 1997
Tape 16, side A, third conversation on tape.
Transcript pages: 52-60.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

This very brief conversation, which is the last one on T16, immediately follows a Friday, November 14, 1997, conversation. This conversation is also cut off in the middle. The first conversation on T9 is also from Sunday night, November 16, 1997. Ms. Tripp told the Office of the Independent Counsel she would record until a tape ran out and then replace it with another tape. Ms. Tripp also told the Office of the Independent Counsel that when a tape was filled up, she would not put it in the recorder again.

Ms. Lewinsky left for New York City early in the morning on November 15, 1997. Ms. Lewinsky returned the night of the 16th. In this conversation, she describes her trip. Sunday night would have been the first time she could have made such a call. Moreover, T9 contains additional discussion of the weekend in New York City, and it was also recorded on Sunday night. For all of these reasons, it is likely that Ms. Tripp began this recording of Ms. Lewinsky on Sunday night and the tape ran out. Ms. Tripp then apparently inserted T9 into the recorder and captured the remaining discussion.

These factors are consistent with a conversation on Monday, November 16, 1997.

Conversation # 28:
Sunday, November 16, 1997
Tape 9, side A, first conversation on tape.
Transcript pages: 2-33.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky says that she arrived in New York City "yesterday." See T9 at 3. Ms. Lewinsky was in New York City on November 15 and 16. These facts would place this conversation on Sunday night, November 16, 1997. In addition, Ms. Lewinsky describes a chance encounter with Ambassador Richardson in a restaurant in New York the day before. During this meeting, Ambassador Richardson commented on Ms. Lewinsky's pending job offer. See Richardson 4/30/98 Depo. at 115 (recalling encounter with Ms. Lewinsky on his birthday, November 15).

More generally, Ms. Lewinsky says she tried to buy Ms. Tripp a birthday present at a flea market in New York City over the weekend. See T9 at 8. Ms. Tripp's birthday is November 24. Since Ambassador Richardson offered Ms. Lewinsky a job at the UN on November 3, 1997, this conversation would have to be between these two dates. Of the three intervening weekends, Ms. Lewinsky was in New York City only once: on November 15 and 16.

These factors are consistent with a conversation on Sunday, November 16, 1997.

Conversation # 29:
Monday, November 17, 1997
Tape 9, side A, second conversation on tape.
Transcript pages: 33-51.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky mentions it is November. See T9 at 41. Furthermore, Ms. Lewinsky says she spotted an attractive man in New York the day before. See T9 at 43. During November 1997, Ms. Lewinsky was only in New York City on November 15 and 16. In addition, this conversation immediately follows a conversation from Sunday, November 16, 1997, on tape T9. The previous conversation ended with Ms. Tripp and Ms. Lewinsky saying good night. In the next conversation on T9, Ms. Lewinsky says it is Tuesday.

These factors are consistent with a conversation on Monday, November 17, 1997.

Conversation # 30:
Tuesday, November 18, 1997
Tape 9, side B, third conversation on tape.
Transcript pages: 51-79.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky says it is Tuesday. See T9 at 60. In addition, the conversation that immediately precedes this one on T9 is November 17, 1997, the Monday Ms. Lewinsky returned from New York City. Also, Ms. Lewinsky says she spoke with the President a week ago. See T9 at 60. According to an e-mail Ms. Lewinsky sent to a friend, she spoke to the President on November 12, 1997, six days earlier. See 1037-DC-0000318.

These factors are consistent with a conversation on Tuesday, November 18, 1997.

Conversation # 31:
Thursday, November 20, 1997
Tape 9, side B, fourth conversation on tape.
Transcript pages: 79-100.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky says her 60 second meeting with the President was one week before. See T9 at 84. Ms. Lewinsky visited with the President for 60 seconds on November 13, 1997, when President Zedillo of Mexico was at the White House. In addition, Ms. Lewinsky describes a conversation with Ms. Currie in which Ms. Lewinsky says the First Lady is leaving tomorrow. T9 at 80. The First Lady's travel schedule shows she left for Los Angeles on November 21, 1997. See 968-DC-00003478.

These factors are consistent with a conversation on Thursday, November 20, 1997.

Conversation # 32:
Thursday, November 20, 1997
Tape 5, side A, first conversation on tape.
Transcript pages: 2-16.

Conversation # 33:
Thursday, November 20, 1997
Tape 5, side A, third conversation on tape.
Transcript pages: 17-41.

Conversation # 34:
Thursday, November 20, 1997
Tape 5, side A, fourth conversation on tape.
Transcript pages: 41-47.

These 3 Conversations Appear On A Tape That Exhibits Signs of Duplication.

Conversations 32-34 (treated together here) concern an audio tape that Ms. Lewinsky is making for the President. In the first two conversations, Ms. Lewinsky plays portions of the tape for Ms. Tripp and asks for advice preparing it. In conversation 34, Ms. Lewinsky calls Ms. Tripp to thank her for her help. Consistent with Ms. Lewinsky's sending the tape the next morning, courier receipts show Ms. Lewinsky ordered a courier delivery from the Pentagon to the White House at 8:18 a.m. on November 21. See 837-DC-00000014.

Also, Ms. Lewinsky says that Ms. Currie told her the President will leave too early on Saturday to allow a 15-minute visit by Ms. Lewinsky. See T5 at 5. According to the Presidential schedule, the President left for Vancouver on

November 22. Baggage check-in occurred at 6:00 a.m. at Andrews Air Force Base, and Air Force One press pool check-in occurred at 8:30. 968-DC-00003301. This schedule is consistent with an early wake-up at the White House.

These factors are consistent with a conversation on Thursday, November 20, 1997.

Conversation # 35:
Friday, November 21, 1997
Tape 5, side A, fifth conversation on tape.
Transcript pages: 47-52.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

This conversation immediately follows a conversation from November 20, 1997, on the tape. Ms. Lewinsky ended the last conversation by saying, "I'll see you tomorrow." See T5 at 47. This conversation is clearly the next day because Ms. Lewinsky describes several phone calls she had with Ms. Currie during the day, including calls after an interview the President was taping at 6:15 p.m. See T5 at 51.

These factors are consistent with a conversation on Monday, November 21, 1997.

Conversation # 36:
Friday, November 21, 1997
Tape 5, side A, sixth conversation on tape.
Transcript pages: 53-55.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

At the end of the conversation that immediately precedes this conversation on T5, Ms. Tripp instructs Ms. Lewinsky to call

Ms. Currie and Ms. Currie her to remain at work until the President leaves. See T5 at 52. At the beginning of this conversation Ms. Lewinsky reports the results of the call. T5 at 53. These exchanges indicate this conversation was shortly after conversation 33. In addition, Ms. Currie told Ms. Lewinsky she was waiting for the President to leave the office and return to the residence. See T5 at 53. Since the President left for Denver, Seattle, and Vancouver early in the morning on November 22, see 968-DC-00003301, this conversation most likely occurred on November 21, 1997.

These factors are consistent with a conversation on Monday, November 21, 1997.

Conversation # 37:
Friday, November 21, 1997
Tape 5, side A, seventh conversation on tape.
Transcript pages: 55-59.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

This conversation is another report from Ms. Lewinsky regarding whether Ms. Currie gave Ms. Lewinsky's cassette tape to the President. Besides the context of the tapes, in the conversation that immediately follows this one, Ms. Tripp says it is the 21st. See T5 at 69.

These factors are consistent with a conversation on Monday, November 21, 1997.

Conversation # 38:
Friday, November 21, 1997
Tape 5, side A, eighth conversation on tape.
Transcript pages: 59-91.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Tripp says it is the 21st during this conversation. See T5 at 69. Also, Lewinsky says that Monday is the 24th. See T5 at 81. November 21, 1997, was a Friday, so November 24, 1997, was a Monday. Moreover, this conversation is clearly a continuation of the earlier conversations in the evening because Ms. Lewinsky gives another report regarding Ms. Currie and the cassette tape Ms. Lewinsky sent to the President.

These factors are consistent with a conversation on Monday, November 21, 1997.

Conversation # 39:
Tuesday, December 9, 1997
Tape 23, side A, first conversation on tape.
Transcript pages: 2-6.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky says she delivered something to the White House on "Monday," which was "yesterday morning." See T5 at 4-5. This statement is consistent with a courier receipt which shows a delivery from Ms. Lewinsky at the Pentagon to the White House on December 8, 1997. See 837-DC-00000017. In addition, Ms. Lewinsky says she is having lunch with Vernon Jordan on Thursday. See T23 at 2. The visitor log at Mr. Jordan's law firm and his calendar reveal that Ms. Lewinsky met with Mr. Jordan on

Thursday, December 11, 1997. See V004-DC-00000171. (Akin and Gump visitor/contact log); V004-DC-00000148. (Vernon Jordan's calendar).

These factors are consistent with a conversation on Monday, December 9, 1997.

Conversation # 40:
Tuesday, December 9, 1997
Tape 23, side A, second conversation on tape.
Transcript pages: 6-56.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Tripp says it is "Tuesday afternoon." See T23 at 19. December 9, 1997, was a Tuesday. Ms. Tripp also says, "I can't believe you got in there Saturday." See T23 at 44. Epass records reveal Ms. Lewinsky saw the President at the White House on Saturday, December 6, 1997. See 827-DC-00000018. Ms. Tripp further mentions that Ms. Lewinsky will be seeing Mr. Jordan on Thursday. The visitor log at Mr. Jordan's law firm and his calendar reveal that Ms. Lewinsky met with Mr. Jordan on Thursday December 11, 1997. See V004-DC-00000171. (Akin and Gump visitor/contact log); V004-DC-00000148. (Vernon Jordan's calendar).

Moreover, Ms. Tripp mentions Ms. Lewinsky had an item sent to the White House by courier on Monday morning. See T23 at 19. A courier receipt reveals a delivery from Ms. Lewinsky at the Pentagon to the White House on Monday, December 8, 1997. See 837-DC-17, 20.

These factors are consistent with a conversation on Monday, December 9, 1997.

Conversation # 41:
Friday, December 12, 1997
Tape 23, side A, fifth conversation on tape.
Transcript pages: 57-68.

Conversation # 42:
Friday, December 12, 1997
Tape 23, side B, sixth conversation on tape.
Transcript pages: 68-127.

Conversation # 43:
Friday, December 12, 1997
Tape 23, side B, eighth conversation on tape.
Transcript pages: 127-131.

These Conversations Appear On A Tape That Exhibits Signs of Duplication.

These three segments on tape 23 were likely two different conversations held on the same night. Because they concern the same subject matter (Ms. Tripp's meeting with her attorney regarding the subpoena she received in the Jones case), and because they wrap around two sides of the same cassette tape (conversation 39 ends side A and conversation 40 begins side B of tape 23) conversation 39 and conversation 40 are most likely the same discussion interrupted by side A of the tape's running out.

Conversation 41 is most likely a new conversation on the same night. In conversation 41, Ms. Lewinsky reads a letter she composed to the President. The letter concerns suggestions on how to settle the Jones case. See T23 at 129. Ms. Tripp and Ms. Lewinsky discussed this issue in conversation 40. See T23 at 88.

In addition, conversation 40 ends with Ms. Tripp saying she will speak to her attorney in the morning and then call Ms. Lewinsky. See T23 at 126. At the outset of conversation 41, Ms. Tripp says, "I cannot believe someone who I thought was already in bed is at the computer." This statement is consistent with a later call on the same night.

Given these circumstances, the date for all three conversations comes from conversation 40. In conversation 40, Ms. Tripp describes how she watched a movie called "A Home of Our Own" on this evening. The Family Channel broadcast this movie on December 12, 1997 at 8:00 p.m. During her debriefings, Ms. Tripp confirmed she watched the movie on the night it was broadcast on the Family channel.

These factors are consistent with a conversation on Monday, December 12, 1997.

Conversation # 44:
Monday, December 22, 1997
Tape 6, side A, second conversation on tape.
Transcript pages: 2-24.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Ms. Lewinsky received her subpoena on December 19, 1997. See 902-DC-00000135-138. In this conversation, Ms. Tripp refers to the subpoena and the fact that it calls for a hat pin. See T6 at 3. For this reason, the conversation has to be after the 19th. Ms. Lewinsky also says she had a short meeting with Mr. Jordan on this day. Mr. Jordan's calendar reveals he met with

Ms. Lewinsky on December 22, 1997. This is the day Mr. Jordan brought Ms. Lewinsky to see Frank Carter. See V004-DC-0000072, 1034-DC-00000103. Vernon Jordan also met with Ms. Lewinsky on December 19, 1997, but that meeting was for 45 minutes. See V004-DC-00000172.

These factors are consistent with a conversation on Monday, December 22, 1997.

Conversation # 45:
Monday, December 22, 1997
Tape 6, side A, fourth conversation on tape.
Transcript pages: 24-32.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

This brief conversation is a continuation of conversation 42. At the end of conversation 42, Ms. Tripp told Ms. Lewinsky to speak with her mother about their plan to avoid the subpoena. See T6 at 23. At the beginning of this conversation, Ms. Lewinsky says her mother thinks the plan is brilliant. See T6 at 24.

These factors are consistent with a conversation on Monday, December 22, 1997.

Conversation # 46:
Monday, December 22, 1997
Tape 6, side B, fifth conversation on tape.
Transcript pages: 33-68.

This Conversation Appears On A Tape That Exhibits Signs of Duplication.

Conversation 43 is brief because the first side of the tape runs out. This conversation, which is the first conversation on

side B, is clearly a continuation of the same conversation. Ms. Tripp and Ms. Lewinsky were speaking about Ms. Currie at the end of conversation 43. See T6 at 32. This conversation begins with a continuation of the same conversation about Ms. Currie. See T6 at 33.

These factors are consistent with a conversation on Monday, December 22, 1997.

Conversation # 47:
Thursday, January 15, 1998
Tape 22, side A, first conversation on tape.
Transcript pages: 2-55.

Conversation # 48:
Thursday, January 15, 1998
Tape 22, side A, second conversation on tape.
Transcript pages: 55-76.

Both of the conversations on this tape were made under the supervision of the Office of the Independent Counsel. For this reason, the OIC knows the date of the conversations independently from the contents of the tapes.

Tab J

Legal Reference

LEGAL REFERENCE

LEGAL REFERENCE

This section contains a brief summary of the statutes and legal precepts that, in the context of a criminal proceeding, would be germane to a determination of the criminality of the conduct described in the Referral. The Office of Independent Counsel recognizes that Congress, in assessing whether the information presented constitutes "substantial and credible" information that "may constitute grounds for an impeachment" need not consider the elements of analogous criminal offenses. In other words, a showing of criminality is neither necessary nor sufficient to an impeachment; Congress may impeach for conduct that is less than criminal or decline to impeach for conduct that, nonetheless, constitutes a crime.

However, as an Office which exercises the investigative and prosecutorial function of the Department of Justice, see 28 U.S.C. § 594(a), our assessment of what constitutes "substantial and credible" information that "may constitute grounds for an impeachment" is necessarily informed by our understanding of criminal law. Hence, we deem it appropriate to set forth our understanding of the law that would be applicable to the conduct described in the Referral if that conduct were to be judged in a criminal proceeding. We do not attempt to be comprehensive, but merely set forth principles of law that might reasonably be deemed applicable.

Briefly, we highlight the following legal conclusions of

general applicability:

- Perjury in connection with a pending civil proceeding may be, and has been, charged as a violation of 18 U.S.C. §§ 1621, 1623, see infra § I.C.2.b ;

- False statements made during the course of civil discovery can be material to perjury charged as a violation of 18 U.S.C. §§ 1621, 1623, see infra §§ I.C.5.c, I.C.5.d;

- The Court of Appeals for the District of Columbia Circuit has determined that Monica Lewinsky's affidavit was material to the Jones v. Clinton matter and was legally sufficient to support a charge of perjury in violation of 18 U.S.C. § 1623 and a charge of obstruction of justice in violation of 18 U.S.C. § 1503, see infra §§ I.C.5.d.ii, II.B.3;

- Feigned forgetfulness and other evasive conduct may form the basis for a charge of perjury in violation of 18 U.S.C. §§ 1621, 1623, see infra § I.E;

- Obstruction of justice in connection with a pending civil proceeding may be, and has been, charged as a violation of 18 U.S.C. § 1503, see infra §§ II.B.2, II.D.2;

- Concealment of documents and other materials called for by a subpoena may form the basis for a charge of obstruction of justice in violation of 18 U.S.C. §§ 1503, 1512, see infra §§ II.D, III;

- Seeking to influence the testimony of a potential witness may form the basis for a charge of obstruction of justice in violation of 18 U.S.C. § 1503, see infra § II.D, or a charge of witness tampering in violation of 18 U.S.C. § 1512, see infra § III.

I. Perjury -- 18 U.S.C. §§ 1621 & 1623

Two separate statutes address the crime of perjury. 18 U.S.C. § 1621[1] covers perjury "generally," while 18 U.S.C. §

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[1] Section 1621 provides:

> Whoever --
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> (1) having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or

1623[2] specifically addresses false declarations before a grand jury or court.[3] The elements of perjury under § 1621 and § 1623 are virtually the same but, as discussed below, with § 1623 Congress eased some of the prosecution's burden imposed by the common law.

A. Elements of § 1621

"The essential elements of the crime of perjury as defined

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certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury . . . .

[2] Section 1623 provides:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623 (1996 Supp.).

[3] Both provisions note that where 28 U.S.C. § 1746 permits the use of an unsworn declaration "under penalty of perjury" in place of an oath, then it is also a crime to make a false statement in such a declaration. See United States v. Gomez-Vigil, 929 F.2d 254, 258 (6th Cir. 1991).

in 18 U.S.C. § 1621 . . . are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing."[4] Because perjury has a specific intent element, "[t]estimony resulting from confusion, mistake or faulty memory cannot support a perjury conviction."[5]

B. Elements of § 1623

The government's burden for establishing false declarations before a court under 18 U.S.C. § 1623 is largely the same as its burden under 18 U.S.C. § 1621.[6] The prosecution must

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[4] United States v. Hvass, 355 U.S. 570, 574 (1958) (internal quotation marks omitted). The Model Jury Instructions for Perjury under D.C. Code § 22-2511 provide:

> [t]he essential elements of perjury, each of which the government must prove beyond a reasonable doubt, are:
> 1. That the defendant testified under oath or affirmation;
> 2. That the oath or affirmation were taken before a competent [tribunal] [officer] [person] in a case in which the law authorized that oath or affirmation;
> 3. That in his/her testimony the defendant made the statements detailed in the indictment;
> 4. That the statements were false; and
> 5. That the defendant knew or believed that the statements were false when s/he made them.

Criminal Jury Instructions for the District of Columbia (4th ed. 1993) 4.87.

[5] United States v. Dean, 55 F.3d 640, 659 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1288 (1996) (citing United States v. Dunnigan, 507 U.S. 87, 94 (1993)).

[6] Section 1623 differs from § 1621 in five minor respects. First, § 1623 applies only to false statements made during or ancillary to grand jury or court proceedings, whereas § 1621 applies also to false statements made under oath in other proceedings. Second, Congress expressly exempted § 1623 prosecutions from the two-witness rule; the government need only

demonstrate: "1. that the defendant testified under oath before [or in a proceeding ancillary to a court or] grand jury; 2. that the testimony so given was false in one or more respects charged; 3. that the false testimony concerned matters that were material to the [court proceedings]; and, 4. that the false testimony was knowingly given as charged."[7]

C. Essential Elements Further Defined

1. Oath

The taking of an oath before giving allegedly false testimony is an essential element of the crime of perjury.[8]

2. Civil Proceedings and Criminal Charges

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prove beyond a reasonable doubt that the defendant make a knowing false declaration. See 18 U.S.C. § 1623(e). Third, "[i]n contrast to § 1621, the Government need not prove the falsity of [inconsistent] declarations under § 1623(c); rather, the Government [need only] prove that 'the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false.'" United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993) (quoting 18 U.S.C. § 1623(c)). Fourth, under § 1623, retraction of a false statement is a defense to prosecution "if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." 18 U.S.C. § 1623(d); see United States v. Moore, 613 F.2d 1029, 1039 (D.C. Cir.), cert. denied, 446 U.S. 954 (1980); cf. United States v. Norris, 300 U.S. 564, 573 (1937) (under [the predecessor to 18 U.S.C. § 1621] witnesses who testified falsely cannot purge themselves by later recanting). Finally, while § 1621 requires proof that a false statement was made "willfully," § 1623 requires proof that the false statement was made "knowingly."

[7] United States v. Bridges, 717 F.2d 1444, 1449 n.30 (D.C. Cir. 1983) (citations omitted), cert. denied, 465 U.S. 1036 (1984).

[8] United States v. Debrow, 346 U.S. 374, 377 (1953).

Section 1623 applies only to "proceedings before or ancillary to any court or grand jury of the United States." Courts uniformly agree that civil depositions taken pursuant to Fed. R. Civ. P. 30 are ancillary proceedings under § 1623.[9] Even though civil depositions, unlike their criminal counterparts, do not require a court order, courts faced with the issue have rejected the argument that § 1623 is thereby limited to criminal proceedings.[10]

The Department of Justice often prosecutes for perjury that occurs during the course of civil proceedings. This section details some of the recent cases[11] in which the Department has

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[9] See, e.g., United States v. Wilkinson, 137 F.3d 214 (4th Cir. 1998) (deposition is ancillary proceeding for purposes of § 1632); United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993) (affirming conviction in prosecution under § 1623(c) for inconsistent statements made in two deposition testimonies); United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982) (terms "deposition" and "ancillary proceeding" are synonymous); United States v. Krogh, 366 F. Supp. 1255-56 (D.D.C. 1973) (sworn deposition taken at Office of the United States Attorney found to be "ancillary" to Watergate grand jury proceedings). In Dunn v. United States, 442 U.S. 100, 113 (1979), the Supreme Court held that § 1623 does not encompass statements made in contexts less formal than a deposition -- implying that it does cover deposition testimony.

[10] See McAfee, 8 F.3d at 1014.

[11] Several other cases involving criminal perjury charges for actions in civil cases are described in the discussions of materiality in civil cases (Kross; Holley; Naddeo; Edmonson; Clark; Adams; Hale; Hendrickson; Allen), feigned forgetfulness as perjury (Chaplin; Moreno Morales) and obstruction of justice charges for actions in civil cases (Roberts), infra. This is, of course, a list of only some of the cases which have been reported. By definition, an unknown number of similar unreported cases may also exist.

brought criminal charges for civil perjury.[12]

A partner at a New York law firm was charged under § 1623, convicted, and sentenced to 15 months imprisonment for declaring under oath in a civil bankruptcy proceeding that he was "unaware of any other current representation by Milbank [Tweed] of any equity security holder or institutional creditor" of Bucyrus-Erie when he was, in fact, aware that Milbank Tweed was representing certain creditors of Bucyrus-Erie in a legal dispute against Bucyrus-Erie.[13] The partner had been retained to represent Bucyrus-Erie in filing for bankruptcy, and had made the false statement during a hearing relating to Milbank Tweed's approximately $2 million in legal fees.[14]

Another corporate defendant was charged with perjury for falsely denying -- during his civil deposition in a civil suit based on a corporate failure to satisfy an outstanding loan -- that he knew about the use of a fictitious name in the accounting books of the company. He was convicted, and his conviction was affirmed by the Fourth Circuit.[15]

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[12] On occasion civil perjury is charged as obstruction of justice. A summary of recent instances of such charges is included in the obstruction of justice section infra.

[13] See United States v. Gellene, (No. 97-Cr-221, E.D. Wisc., Dec. 9, 1997) (Indictment, Count Three).

[14] Gellene was also charged with, and convicted of, two violations of 18 U.S.C. § 152, which proscribes the making of a false declaration in relation to a bankruptcy proceeding.

[15] See United States v. Wilkinson, 137 F.3d 214, 225 (4th Cir. 1998).

Another defendant in a civil suit filed an affidavit (in response to plaintiff's motion for summary judgment) in which he falsely denied any knowledge of the fraudulent scheme[16] that was the subject of the suit. For filing this false affidavit, he was charged and convicted of perjury; his conviction was affirmed on appeal.[17]

Another defendant was charged with, and convicted of, perjury under 18 U.S.C. § 1621 after he made a false declaration about his financial status (so that he would be able to prosecute an appeal from a civil judgment in forma pauperis) and repeated that declaration in a post-judgment deposition.[18] The district court, citing the civil nature of Holland's perjury, declined to apply the Sentencing Guidelines (which called for a sentence of 87 to 108 months) and instead sentenced Holland to home detention. On appeal, however, the Eleventh Circuit vacated the sentence and remanded for application of the Sentencing Guidelines. The court held that the perjury statute applies "without distinction both to perjury committed in a civil proceeding and to perjury in a criminal prosecution."[19] In so holding,

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[16] The plaintiff had alleged that Sassanelli had fraudulently inflated construction bills and created fictitious invoices.

[17] See United States v. Sassanelli, 118 F.3d 495 (6th Cir. 1997).

[18] See United States v. Holland, 22 F.3d 1040 (11th Cir.), cert. denied, 513 U.S. 1109 (1994).

[19] Id. at 1047.

the court:

> categorically reject[ed] any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding. Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals. In the instant case, Holland's perjury inexcusably wasted valuable and scarce public resources. His actions needlessly consumed court time, forced the Federal Bureau of Investigation and the United States Attorney's Office to engage in prolonged investigations, and attempted to prevent private citizens . . . from satisfying their judgment.[20]

3. Falsity

Under both § 1621 and § 1623, the government must prove the falsity of the statement that is the basis for the perjury accusation. As discussed in detail infra, "the falsity of an 'I don't recall' answer must be proven by circumstantial evidence."[21] Furthermore, under the less burdensome § 1623(c), the government may prove that a statement is false merely by proving that the defendant made two "irreconcilably contradictory declarations."[22]

4. State of Mind

While § 1621's "wilfulness" requirement appears on its face to demand a more burdensome showing than § 1623's knowledge

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[20] Id. at 1047-48.

[21] United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

[22] For example, United States v. McAfee, 8 F.3d 1010 (5th Cir. 1993), affirmed the conviction of a defendant under § 1623(c) based upon two contradictory statements he gave in two civil depositions.

element, the cases make little, if anything, of the distinction.[23] Indeed, the D.C. Circuit has held that "in the perjury statute [willfully] means 'knowingly' or 'intentionally.'"[24] In order to prove that a defendant's false testimony was provided "knowingly" or "wilfully," the government must prove beyond a reasonable doubt that the defendant did not believe his testimony to be true at the time he testified.[25] Often, the government may do so merely by proving that the testimony was in fact false.[26]

5. Materiality

Under both § 1621 and § 1623, the government must prove that the misrepresentation was "material." In 1995, the Supreme Court held that whether the misrepresentation was material is a question of fact that must go to the jury.[27] The jury may be

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[23] See United States v. Endo, 635 F.2d 321, 323 (4th Cir. 1980) ("The substantive difference (whether the accused acted 'knowingly' or 'willfully') . . . has no pertinence for our purposes.").

[24] Maragon v. United States, 187 F.2d 79, 80 (D.C. Cir. 1950) (sustaining perjury conviction under D.C. Code § 22-2501), cert. denied, 341 U.S. 932 (1951).

[25] Young v. United States, 212 F.2d 236, 240 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954).

[26] See id. at 241 ("Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself.").

[27] See United States v. Gaudin, 115 S. Ct. 2310 (1995) (in construing 18 U.S.C. § 1001 Court holds materiality is a question of fact); see also United States v. Levine, 72 F.3d 920 (D.C. Cir. 1995) (extending Gaudin to § 1621).. Prior to the Supreme Court's decision, most courts had treated materiality as a question of law for the judge to decide.

guided by the precepts explained in the following discussion.

a. General Definition

A misrepresentation or concealment is material if it "was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision;"[28] or if it concerns "'a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction;'"[29] or if "a truthful answer would have aided the inquiry."[30] "[T]he effect necessary to meet the materiality test is relatively slight, and certainly not substantial."[31]

In addition, in proving that a statement was material, the government need not prove that the false statement actually was

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[28] Kungys v. United States, 485 U.S. 759, 771 (1988). Although Kungys construes a denaturalization statute rather than § 1001 or a perjury statute, the Court indicated that "material" bears the same meaning in all three spheres. See Kungys, 485 U.S. at 769-72. Kungys also might be distinguished on the ground that it treats materiality as a question of law, see id. at 772, a doctrine that Gaudin overturned. But Gaudin did not modify the materiality standard; in fact it cites Kungys for the applicable standard. 115 S. Ct. at 2313.

[29] United States v. Winstead, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (quoting and approving language in jury instructions); see also United States v. Allen, 131 F. Supp. 323, 325 (E.D. Mich. 1955) (citations omitted) ("A material matter does not necessarily mean a matter that directly affects the ultimate issue of the trial. . . . It is sufficient if the false testimony gives weight and force to or detracts from testimony as to matters that are material.").

[30] United States v. Cunningham, 723 F.2d 217, 226 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984).

[31] United States v. Moore, 613 F.2d 1029, 1038 (D.C. Cir. 1979) (distinguishing materiality from "substantial effect" standard of perjury recantation provision), cert. denied, 446 U.S. 954 (1980)

relied upon, but rather need show only that the statement was capable of influencing the outcome -- or of adding or detracting to facts that themselves could influence the outcome -- if it had been relied upon.[32] For example, the Eighth Circuit affirmed the perjury conviction of an individual whose false testimony (that he had not visited Florida during 1983) had been contradicted by the testimony of other witnesses, despite the defendant's argument that his statements before the grand jury were not material. The court found that "Moeckly's denials, regardless of the availability to the grand jury of accurate information through other witnesses, tended to obscure Moeckly's whereabouts at critical times during the conspiracies."[33]

b. Causation in Investigations

In cases involving investigations or other inquiries,[34] the

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[32] See United States v. Dale, 991 F.2d 819, 834 n.27 (D.C. Cir.), cert. denied, 114 S. Ct. 286 (1993); United States v. Jones, 464 F.2d 1118, 1122 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973); United States v. Hendrickson, 200 F.2d 137 (7th Cir. 1952). The causation aspect of false statements in civil actions has been infrequently addressed by the courts. When they do address it, however, courts have interpreted causation broadly. For example, when a defendant argued that his false testimony was immaterial because the topic concerning which he had testified falsely was not directly relevant to the question before the court in which he testified, the Seventh Circuit held that: "[W]here the false testimony is capable of influencing the tribunal, then the actual effect of the false testimony is not the determining factor, but its capacity to affect or influence the trial judge in his judicial action and the issue before him." Hendrickson, 200 F.2d at 139.

[33] United States v. Moeckly, 769 F.2d 453, 465 (8th Cir. 1985), cert. denied, 475 U.S. 1015 (1986).

[34] When assessing materiality, courts do not distinguish between the various contexts -- civil, administrative, or

test for materiality has been stated as "whether a truthful answer would have aided the inquiry."[35] This question seems to call for speculation as to the likelihood that a truthful answer would have changed the course of official actions, such as by provoking or re-channeling an investigation that in turn might have altered the final outcome. The Supreme Court has suggested that a fact can be material even if there was a less than 50% chance of changing the official decision: "It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation."[36]

Other courts agree that the government need not show such a consequence to have been likelier than not. The D.C. Circuit, for example, has held in connection with the false statements statute, 18 U.S.C. § 1001, that "[a]pplication of § 1001 does not require judges to function as amateur sleuths, inquiring whether

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criminal -- in which an investigation can arise.

[35] United States v. Cunningham, 723 F.2d 217, 226 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984). One court in the Southern District of New York applied a similar test in a case charging false statements to prosecutors as well as courtroom perjury: "[M]ateriality is the flimsiest of obstacles to a perjury conviction. 'Materiality is . . . demonstrated if the question posed is such that a truthful answer could help the inquiry, or a false response hinder it, and these effects are weighed in terms of potentiality rather than probability.'" United States v. Guariglia, 757 F. Supp. 259, 266 (S.D.N.Y. 1991) (quoting United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980)).

[36] Kungys, 485 U.S. at 771.

information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot."[37]

Another Circuit opinion, in a different formulation, has said that a statement is material if it would have caused investigators to make additional inquiries, even if it would not have affected the agency's ultimate decision. The court found a defendant's false answers in a security clearance application to be material because truthful responses would have prompted investigators to make further inquiries. Whether the clearance would still have been granted was irrelevant, the court said, because "[m]ateriality . . . is not concerned with whether the alleged omission would have affected the ultimate agency determination."[38] The court appeared to reason that a statement's materiality is judged by its effect on an ongoing investigation, rather than its effect on the ultimate decision. In other words, materiality exists if a statement would have had a 100 percent likelihood of affecting an investigation, even if it that effect on the investigation would in turn have had a zero percent likelihood of changing the agency outcome.[39]

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[37] United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986).

[38] United States v. Dale, 782 F. Supp. 615, 625-26 (D.D.C. 1991).

[39] Cf. United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979) (a statement is material if it influences the agency's decision to investigate or the agency's conclusion as to whether

"[W]hether a truthful answer would have aided the inquiry" depends to some degree upon the type of investigation occurring. "[I]n a grand jury setting," the D.C. Circuit has said, "the false testimony must have the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation."[40] Because a grand jury investigation is usually wide-reaching, information can be material to a grand jury even if it might not be material to a more tightly focused inquiry.[41] For example, information is material if it would help investigators locate other witnesses whose testimony would be directly pertinent to the grand jury. The Second Circuit affirmed the conviction of a defendant whose false statements impeded investigation because "they covered up the fact that additional witnesses . . . should also have been interviewed."[42] Similarly, in an Prohibition-era case, a grand jury witness was

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it has jurisdiction), cert. denied, 444 U.S. 1018 (1980); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978) (false statement to a customs inspector was material because a truthful answer would have led to a more rigorous inspection).

[40] United States v. Moore, 613 F.2d 1029, 1038 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980) (internal quotation marks and citation omitted).

[41] See United States v. Paxson, 861 F.2d 730, 733 (D.C. Cir. 1988) (finding false statements before grand jury material and noting that "[m]any cases have recognized that hindsight is not the proper perspective for discerning the limits of a grand jury's investigative power. It must pursue its leads before it can know its final decisions."); LaRocca v. United States, 337 F.2d 39, 43 (8th Cir. 1964) ("the grand jury is imbued with broad inquisitorial powers").

[42] United States v. Gribben, 984 F.2d 47, 52 (2d Cir. 1993).

convicted for falsely denying that a particular woman had been present at a party where liquor allegedly had been served: "A false statement as to the woman tended to mislead the grand jury, and to deprive them of knowledge as to who she was, so that she might not be obtained as a witness."[43]

c. Interpretation in Civil Proceedings

Courts act similarly in deciding the materiality of false statements made in the context of civil discovery -- i.e., false affidavits, false deposition testimony, or false responses to discovery requests. As the Supreme Court has explained, in deciding whether a statement is material a court must

> determin[e] at least two subsidiary questions of purely historical fact: (a) "what statement was made?"; and (b) "what decision was the [decisionmaker] trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality [as defined in Kungys] to these historical facts.[44]

The third of these issues -- application of the legal standard to the facts -- is characterized as a mixed question of law and fact which requires "delicate assessments of the inferences a 'reasonable [decision maker]' would draw from a given set of facts and the significance of those inferences to him."[45]

In deciding "what decision is being made" in the context of

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[43] Carroll v. United States, 16 F.2d 951, 954 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

[44] United States v. Gaudin, 515 U.S. 506, 512 (1995).

[45] Id. (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976)).

a discovery deposition, courts have generally concluded that the decision being made is not, "does this prove the case?" but rather "does this inquiry lead to potentially relevant evidence?" This is because, as when analyzing materiality in other investigative contexts, the courts look at what decision is "being made" in response to the (false) information provided in the deposition or discovery answer, rather than at the ultimate issue for decision in the case.

The definition of "materiality" in the context of a deposition or discovery response, therefore, is tied to the purposes of civil discovery. Discovery is intended to allow a party to uncover any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Discoverable information need not itself be admissible -- to the contrary it encompasses many matters that are manifestly inadmissible in a civil trial. Thus, as the Second Circuit has explained, a false statement in a civil deposition is material when "a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit."[46] In other words, as one court has said, the broad scope of civil discovery means that the test for materiality in a civil context is "broader than that used to determine materiality during trial."[47]

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[46] United States v. Kross, 14 F.3d 751, 754 (2d Cir.), cert. denied, 513 U.S. 828 (1994).

[47] United States v. Naddeo, 336 F. Supp. 238, 240 (N.D. Ohio 1972).

Such a broader definition of materiality in the discovery context is appropriate and even necessary. Otherwise, the oath to testify truthfully would become a contingent one. A person could knowingly tell a falsehood in the hope or expectation that if the "information elicited . . . ultimately turn[s] out not to [meet the higher standards of admissibility] at a subsequent trial,"[48] then the person would suffer no penalty for the lie.

In determining materiality in the context of civil discovery, then, some courts have treated the question categorically, so that if the question falsely answered was itself permissible under the rules of discovery, then the false answer is deemed material. For example, while convicting a defendant of perjury for his false civil deposition in a civil forfeiture case pendent to a criminal investigation, the Second Circuit reasoned that there was "no persuasive reason not to apply [to the defendant's statements] the broad standard of materiality of whether a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at trial."[49]

Other courts have engaged in a inquiry -- albeit a very limited one -- to ensure that the questions and answers at issue in the perjury charge bore some general relationship to the underlying civil litigation. For example, the chairman of a bank

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[48] United States v. Holley, 942 F.2d 916, 925 (5th Cir. 1991), cert. denied 510 U.S. 821 (1993).

[49] Kross, 14 F. 3d at 754.

was charged with and convicted of perjury for lying in a deposition -- taken in the course of civil bankruptcy proceedings initiated by the bank -- about his actions at the bank. On appeal he argued that the materiality of his statements had to be measured against the issues specifically raised in the bank's bankruptcy filings and, thus, that the court should ask whether his false statements were about those transactions that had caused a loss to the bank. The Fifth Circuit rejected this narrow reading of materiality and found that so long as the false statements were related to the allegations of the underlying civil complaint in a general way, they would be material to the ongoing discovery.[50]

One reason that the standard is not quite settled is that the proximate relation between the false statements supporting the perjury charge, and the underlying civil case, can be quite attenuated and still satisfy the materiality requirement. For example, the plaintiffs in a civil rights lawsuit charging a police department with racial bias falsely claimed in a deposition that they had not violated the department's sick leave policy. The Ninth Circuit began with the premise of Kungys -- that a statement is material if it has a "natural tendency to influence" the decision maker -- and read this broadly to define a material false statement as "one which 'is relevant to any

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[50] See Holley, 942 F.2d at 924-25; accord United States v. Edmondson, 410 F.2d 670, 673 (5th Cir. 1969) (false letters used at a bankruptcy creditors' meeting were material).

subsidiary issue under consideration.'"[51] Because the plaintiffs' violation of a sick leave policy was, to some degree, relevant to their underlying complaint of racial bias, the court concluded that false statements about the violation were material to the underlying civil litigation and were a sufficient basis for a perjury charge. This attenuated standard makes the difference more one of theory than of practice, and seems to have made it unnecessary for most courts to resolve the issue.[52]

Despite the attenuated nature of the materiality standard, it does sometimes operate to preclude prosecution. At least one reported case has overturned a perjury conviction based upon a civil deposition because it found that the misrepresentation was not material. In this case the defendant had been asked in a civil deposition for the source of the prior earnings figures she had provided to her employer, she had replied that it was a "Schedule C worksheet [used] in preparation for doing the income taxes,"[53] and she had been convicted of perjury because she had,

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[51] United States v. Clark, 918 F.2d 843, 846 (9th Cir. 1990) (quoting United States v. Lococo, 450 F.2d, 1196, 1199 (9th Cir. 1971)), overruled on other grounds, United States v. Keys, 95 F.3d 874 (9th Cir. 1996).

[52] For example, in a recent case the Fourth Circuit recognized these somewhat diverging treatments of civil materiality but found it unnecessary to resolve the question in disposing of the case because the matters were material under any standard of materiality adopted. See Wilkinson, 137 F.3d at 224-25.

[53] United States v. Adams, 870 F.2d 1140, 1147 (6th Cir. 1989) (involving a sex discrimination law suit against the Equal Employment Opportunity Commission).

in fact, taken the figures from a prepared Schedule C rather than a Schedule C worksheet.[54] The Sixth Circuit overturned the conviction. While agreeing generally that the "test of whether a false declaration satisfies the materiality requirement is whether a truthful answer might have assisted or influenced the tribunal in its inquiry,"[55] and recognizing the contingent nature of the materiality inquiry, the court concluded that there was no adequate explanation for why the difference between a prepared Schedule C and a Schedule C worksheet mattered to any decisionmaker.[56]

Another method of assessing materiality considers the timing of the false statement. Under this method of analysis, the question is not whether the false statements are material to some issue at the underlying civil trial, but rather whether the statements were "at the time made, material to the proceeding in which [the] deposition was taken."[57]

Such an analysis makes clear that statements do not lose

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[54] Id. at 1147.

[55] Id. (citing United States v. Swift, 809 F.2d 320, 324 (6th Cir. 1987)).

[56] Adams, 879 F.2d at 1147. The Court appeared to be animated in part by its concern that the perjury prosecution was vindictive retaliation for Adams' discrimination suit. Id. at 1145-46 (noting the "thinness of the [criminal] charges" and holding that "there is enough smoke here, in our view, to warrant the unusual step of letting defendants find out how this unusual prosecution came about")

[57] Holley, 942 F.2d at 923 (citing United States v. Gremillion, 464 F.2d 901, 904-05 (5th Cir.), cert. denied, 409 U.S. 1085 (1972)).

their materiality because of subsequent developments. Indeed, courts generally do not hold that settlement of a case renders a false statement immaterial; nor do they accept the argument that a decision to exclude a statement at trial (based upon the stricter standards for trial admissibility) reaches backward, to make immaterial, statements that were material during a deposition. For example, one defendant convicted of perjury in connection with a civil deposition argued on appeal that his deposition was immaterial because it had not been used at trial.[58] The Tenth Circuit rejected those arguments: "When the oath was administered to Hale and he thereafter willfully gave false testimony as to material facts in the case, all of the elements of the offense were present and the crime of perjury had been committed."[59]

The Second Circuit has made this point strongly, albeit in a criminal context.[60] A defendant's conviction under the Wagering Tax Act[61] was reversed on appeal because the underlying statutes were deemed unconstitutional violations of the Fifth Amendment privilege against self-incrimination; the United States then

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[58] See Hale v. United States, 406 F.2d 476 (10th Cir.) (rejecting the defendant's argument that he could not be charged with perjury because he had not read or signed the deposition after it was transcribed), cert. denied, 395 U.S. 977 (1969).

[59] Id. at 480 (citing United States v. Norris, 300 U.S. 564 (1957)).

[60] See United States v. Manfredonia, 414 F.2d 760 (2nd Cir. 1969).

[61] 26 U.S.C. §§ 4401, 4411, 7203 and 7262 (1968).

charged him with perjury because he had lied in his original criminal trial when he denied accepting wagers. After his perjury conviction, the defendant argued on appeal that the lies were not "material" because his underlying wagering conviction had been vacated on constitutional grounds, effectively rendering the perjury prosecution legally "untenable." The Second Circuit rejected this argument as follows:

> In advancing this argument appellant completely ignores the purpose of the perjury statute which is to keep the process of justice free from the contamination of false testimony. It is for the wrong done the courts and the administration of justice that punishment is given, not for the effect that any particular testimony might have on the outcome of any given trial. . . .
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> Indeed, it has long been established that an acquittal of the defendant in a trial where false testimony was given does not bar a prosecution for perjury. . . . It has likewise been held that the reversal of a conviction because of an improper indictment will not prevent a prosecution for perjury committed at the former trial. . . . In all of these cases the questioned testimony was material at the time it was given and subsequent events do not eliminate that materiality. To sustain a conviction of perjury ' * * * materiality must be established only as of the time the answers were given.'[62]

d. Legal Rulings Relating to Jones v. Clinton

This Referral concerns, in part, allegedly false statements made in connection with Jones v. Clinton No. LR-C-94-290 (E.D. Ark.), a civil rights case filed in the Eastern District of Arkansas. The materiality of some of those statements has already been the subject of court rulings, as detailed below.

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[62] Manfredonia, 414 F.2d at 764-65 (citations and footnotes omitted) (asterisks in original).

i. Rulings by Judge Wright in Jones v. Clinton

During discovery in the Jones case, the plaintiff, Paula Jones, repeatedly sought discovery as to whether President Clinton had sexual encounters with women other than his wife during the time that he was Governor and then President.[63] The district court judge, Judge Susan Webber Wright, rejected most of the President's arguments against such discovery. Her discovery orders reflect her conclusion that the evidence about "other women" known as "Jane Does" -- including evidence related to Ms. Lewinsky -- was relevant and material to the discovery process in Jones (and potentially relevant or material to summary judgment or trial, though, as discussed above, admissibility at trial is typically not a part of a materiality inquiry).

Judge Wright twice held that Ms. Jones was entitled to the testimony of the Jane Does. First, on November 24, 1997 Judge Wright held that Ms. Jones could question the Jane Does if Ms. Jones first established a factual predicate for doing so. In the words of the Clerk's minutes:

> Plaintiff is entitled to ask questions that are calculated to lead to admissible evidence;. . . In response to [President Clinton's counsel, Robert] Bennett's concerns that pleadings will become public and do damage to institution of presidency, Court states questions have to be related to this cause of action and believes the Rules of Evidence and rules governing sexual harassment require Court to permit the

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[63] Ms. Jones's attorneys intended to use evidence of any such encounters to establish that the President was engaged in a pattern and practice of sexual advances in the workplace.

questions [about sexual activity with the President].[64]

Second, on December 18, 1997 Judge Wright issued an order discussing the materiality and relevance of testimony about "other women." She indicated that it was likely that not all of the discoverable evidence would be admissible, and stated that if the case went to trial, then she "anticipate[d] limiting the amount of time and number of witnesses that will be spent on issues of alleged sexual activity of both the President and the plaintiff (should such matters be deemed admissible)."[65] Judge Wright then held, however, that the "other women" questions were proper questions to ask during discovery. As she explained, "the issue [before the Court was] one of discovery, not admissibility of evidence at trial. Discovery, as all counsel know, by its very nature takes unforseen twists and turns and goes down numerous paths, and whether those paths lead to the discovery of admissible evidence often simply cannot be predetermined."[66] For this reason, Judge Wright ordered the Jane Does to answer certain deposition questions regarding whether they had engaged in sexual activity with Mr. Clinton.

Judge Wright also several times held that the President was obliged to answer written or oral questions about whether he had engaged in sexual activity with other women. First, on December

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[64] See 921-DC-00000268-69 (Clerk's Minutes of In-Camera Hearing, Nov. 24, 1997).

[65] 1414-DC-00001012-13 (Dec. 18 Order, at 7).

[66] 1414-DC-00001012-13 (Dec. 18 Order at 7-8).

11, 1997, Judge Wright held that "the plaintiff is entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees." [67]

Second, on January 8, 1998, Judge Wright reiterated that:

> [she] ha[d] already ruled that questions regarding whether the President, as Governor of Arkansas, had sexual relations with certain women (other than his wife) in meetings that were arranged, facilitated, concealed, and/or assisted by at least one member of the Arkansas State Police and whether some of these women were or became employees of the State of Arkansas (or an agency thereof) are within the scope of the issues in the case. To the extent the President denies these allegations, he can so state without any undue burden. To the extent answers to the questions require something other than an outright denial, the Court finds that such answers may not necessarily be redundant to any previous answers the President has given to such questions and, further, that such answers may be relevant to the issues in this case and may lead to the discovery of admissible evidence.[68]

Third, at a January 12, 1998 hearing, Judge Wright ruled that Ms. Jones would be permitted to ask questions about "other women" during the President's deposition. During the same hearing, Judge Wright also required the plaintiffs to describe all the evidence they planned to introduce at trial, and then made several comments about the potential admissibility of that evidence at trial:

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[67] 921-DC-0000461 (Dec. 11 Order, at 3) (emphasis supplied). Judge Wright did establish a limited time frame for such discovery, and also required that any women questioned have been federal or state employees during the time of their encounter with the President.

[68] 921-DC-00000734 (Jan. 8 Order, at 4)(emphasis supplied).

> [T]he Rules of Evidence in harassment cases -- and I'm not citing any authority right now for it, but I know in harassment cases, frequently, court's [sic] permit other bad acts, other volatile acts, that kind of thing. And I'm also aware that in sexual assault cases, the Rules of Evidence promulgated by the Violence Against Women Act has certainly opened it up. So I can't say that you can't call any of the witnesses in group B [the pattern and practice issue witnesses].[69]

Judge Wright concluded that for purposes of discovery and depositions, she would permit Ms. Jones's attorneys to ask the President "about people whose -- you know, whose names have been given you or people whom you have, you know, a reasonable basis for asking about."[70] This list included Monica Lewinsky.

Fourth, just before Ms. Jones' attorneys deposed President Clinton on Saturday, January 17, 1998, Judge Wright rejected the President's counsel's attempt to place limits on the scope of deposition questioning. In so ruling, she commented about the nature of the questions that President Clinton would be asked: "Unfortunately, the nature of this case is such that people will be embarrassed. I have never had a sexual harassment case where there was not some embarrassment."[71] President Clinton's counsel also attempted to stop the questioning about Ms. Lewinsky during the deposition, by citing Ms. Lewinsky's affidavit. Judge

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[69] 1414-DC-00001327-32 (Transcript of Jan. 12, 1998 Hearing, at 37-42).

[70] 1414-DC-00001336 (Transcript of Jan. 12, 1998 Hearing, at 46).

[71] Clinton 1/17/98 Depo. at 9.

Wright refused to limit the questioning.[72]

Finally, on January 29, 1998, after the OIC moved to suspend discovery relating to Ms. Lewinsky because she was the subject of a pending criminal investigation, Judge Wright concluded that Lewinsky-related evidence might be capable of influencing the ultimate decision in the lawsuit,[73] but determined pursuant to Fed. R. Evid. 403[74] that the probative value of the evidence was outweighed by the prejudice that would result from delaying the trial to allow the evidence to be obtained without conflicting with the OIC's criminal investigation. Judge Wright's order also held that other evidence of improper conduct occurring in the White House would not be precluded by the Court's ruling.

Judge Wright amplified this holding in an Order entered March 9, 1998. She first "readily acknowledg[ed] that evidence of the Lewinsky matter might have been relevant to the plaintiff's case,"[75] but then reiterated her decision to exclude

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[72] Id. at 53-56.

[73] Jones v. Clinton, Jan. 29 Order, at 2 ("The Court acknowledges that evidence concerning Monica Lewinsky might be relevant to the issues in this case.").

[74] Federal Rule of Evidence 403, entitled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time" provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[75] Jones v. Clinton, March 9 Order, at 9 (footnote omitted).

the evidence under Fed. R. Evid. 403 on the ground that it was not "essential to the core issues" of the case (namely, whether "plaintiff herself was the victim of quid pro quo sexual harassment.")[76]

ii. Ruling by the D.C. Circuit

The materiality of the allegedly false statements made in Jones v. Clinton has also been litigated by the OIC. Chief Judge Norma Holloway Johnson of the District Court for the District of Columbia ordered Francis Carter (Ms. Lewinsky's first lawyer) to testify as to matters relating to his representation of Ms. Lewinsky. In ordering the testimony, the court invoked the crime-fraud exception to the attorney-client privilege, based on the OIC's prima facie showing that Ms. Lewinsky had used Mr. Carter to prepare a false affidavit "for the purpose of committing perjury and obstructing justice."[77] On appeal to the United States Court of Appeals for the District of Columbia Circuit, Ms. Lewinsky argued that her affidavit related to matters later excluded from the Jones case and hence, as a matter of law, was not "material."[78] The appellate court rejected this argument:

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[76] Id. (emphasis in original)

[77] In re Grand Jury Proceedings, slip op. at 5 (D.D.C., Misc. No. 98-68, March 31, 1998).

[78] Being immaterial, she argued, the affidavit could not form the basis for a criminal charge and thus the crime-fraud exception could not be applied to vitiate her attorney-client privilege.

> Lewinsky tells us she could not have committed [the] crime: the government could not establish perjury because her denial of having had a "sexual relationship" with President Clinton was not "material" to the Arkansas proceedings within the meaning of 18 U.S.C. § 1623(a). . . . Lewinsky's proposition[] rel[ies] on the Arkansas district court's ruling on January 30 [sic], 1998, after Lewinsky had filed her affidavit, that although evidence concerning Lewinsky might be relevant, it would be excluded from the civil case under Fed. R. Evid. 403 as unduly prejudicial, "not essential to the core issues in th[e] case" and to prevent undue delay resulting from the Independent Counsel's Investigation.
>
> A statement is "material" if it "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." United States v. Barrett, 111 F.3d 947, 953 (D.C. Cir.), cert. denied, 118 S.Ct. 176 (1997). The "central object" of any materiality inquiry is "whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision." Kungys v. United States, 485 U.S. 759, 771 (1988). Lewinsky used the statement in her affidavit, quoted above, to support her motion to quash the subpoena issued in the discovery phase of the Arkansas litigation. District courts faced with such motions must decide whether the testimony or material sought is reasonably calculated to lead to admissible evidence and, if so, whether the need for the testimony, its probative value, the nature and importance of the litigation, and similar factors outweigh any burden enforcement of the subpoena might impose. See Fed. R. Civ. P. 26(b)(a),. 45(c)(3)(A)(iv); Linder v. Department of Defense, 133 F.3d 17, 24 (D.C. Cir. 1998); see generally 9A Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 2459 (2d ed. 1995). There can be no doubt that Lewinsky's statements in her affidavit were -- in the words of Kungys v. United States -- predictably capable of affecting this decision. She executed and filed her affidavit for this very purpose.[79]

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[79] In re Sealed Case, slip op. at 4-6 (D.C. Cir., Nos. 98-3052, 98-3053, 98-3059, May 26, 1998) (brackets and ellipsis in original).

D. Literal Truth Defense to Perjury

Where a witness's answers are literally true -- even if they are unresponsive, misleading, or false by negative implication -- a perjury conviction cannot be maintained.[80] This is because, as the Supreme Court held in Bronston, "If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."[81]

In Bronston, the defendant was convicted of perjury for testimony given at a bankruptcy hearing relating to a corporation of which he was the sole owner. In pertinent part, the following colloquy gave rise to the conviction:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> A. No, sir.
>
> Q. Have you ever?
>
> A. The company had an account there for about six months, in Zurich.

Mr. Bronston had in fact had a personal bank account in Geneva for five years, but his answers were literally truthful: he did not have a Swiss bank account at the time of the questioning and his company did have the account described. The prosecution's theory in the lower court was "that in order to mislead his questioner, petitioner answered the second question with literal

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[80] Bronston v. United States, 409 U.S. 352, 360 (1973).

[81] Id. at 358-59.

truthfulness but unresponsively addressed his answer to the company's assets and not to his own -- thereby implying that he had no personal Swiss bank account at the relevant time."[82]

The Supreme Court, however, found it irrelevant that Bronston may have intended to mislead the questioner and reversed the perjury conviction. The Court explained that though in casual conversation one might interpret the responses to mean that there was never a personal bank account, "the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true."[83] Following Bronston, courts have repeatedly found literal truth a complete defense to perjury where the witness's answer was literally true but misleading or unresponsive.[84]

Bronston made clear, however, that in order for a statement

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[82] 409 U.S. at 354.

[83] Id. at 357-58.

[84] See, e.g., United States v. Chaplin, 25 F.3d 1373, 1380 (7th Cir. 1994) (defense applies where witness denied giving $8,000 on October 23 and government only showed that transaction took place sometime in October); United States v. Earp, 812 F.2d 917, 919 (4th Cir. 1987) ("[I]n questioning [defendant], the questioner simply did not probe deep enough to recognize any potential evasion."); United States v. Tedder, 801 F.2d 1437, 1447-48 (4th Cir. 1986) (defense applicable where government failed to ask defendant if he knew of prior bank accounts held by named individual and defendant truthfully answered question posed in the present tense), cert. denied, 480 U.S. 938 (1987); cf. United States v. Rymer, No. 91-5585, 1992 WL 86528, at *3 (6th Cir. April 27, 1992) (defense not applicable to defendant's testimony that he could not recall statements he made to FBI a year earlier, as his answers were not non-responsive) (unpublished disposition).

to be considered literally true, it must be true in the context of the question. The Court analyzed a hypothetical example in which a witness, when asked how many times she entered a store on a given day, responds "five" when she actually visited the store 50 times. The district court had considered the response in this hypothetical to be literally true, but had instructed the jury that a defendant could be convicted of perjury if the answer was "'not literally false but when considered in the context in which it was given, nevertheless constitute[d] a false statement.'"[85] The Supreme Court agreed that a perjury conviction would be proper in such a case, noting that "the answer 'five times' is responsive to the hypothetical question and contains nothing to alert the questioner that he may be sidetracked."[86] The Court also expressed doubt that the answer in the hypothetical was literally true in any event, explaining: "Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question."[87]

In light of Bronston, a witness who gives a responsive answer that is false when viewed in the context of the question

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[85] 409 U.S. at 354.

[86] Id. at 354 n.3.

[87] Id.

may not benefit from the literal truth defense.[88] Indeed, most courts (including the D.C. Circuit) have held that the literal truth defense does not bar perjury convictions where the defendant and the government interpret the relevant question differently. In other words, most circuits hold that Bronston's literal truth defense is inapposite where "the answer is true only if one of two asserted interpretations of the question is accepted."[89] The Bell court, for example, said:

> In Bronston, the answer was a full, explanatory sentence, the truthfulness of which could be determined without reference to the question. Here, the answer simply was "no"; the truthfulness of that answer can be determined only by first looking to the question. Bronston simply did not deal with a yes or no answer given to a question susceptible to more than one interpretation.[90]

Under these circumstances, when the defendant claims that he understood the question differently from the questioner "the

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[88] See United States v. Schafrick, 871 F.2d 300, 303 (2d Cir. 1989) ("In Bronston, the crucial factor was that the answer Bronston gave was not responsive to the question he was asked. . . . If an answer is responsive to the question, then there is no notice to the examiner and no basis for applying Bronston."); United States v. Kehoe, 562 F.2d 65, 68-69 (1st Cir. 1977) ("An answer that is responsive and false on its face does not come within Bronston's literal truth analysis simply because the defendant can postulate unstated premises of the question that would make his answer literally true."); United States v. Crippen, 570 F.2d 535, 537 (5th Cir. 1978) ("The words used were to be understood in their common sense, not as they might be warped by sophistry or twisted"), cert. denied, 439 U.S. 1069 (1979). .

[89] United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980). As discussed below, only the First Circuit's Glantz decision may be at odds with this line of cases.

[90] Id. at 1136.

defendant's understanding of the question is a matter for the jury to decide."[91] (The First Circuit has, however, applied the literal truth defense to "bar perjury convictions for arguably untrue answers to vague or ambiguous questions when there is insufficient evidence of how they were understood by the witness."[92])

In a Watergate-related case, for example, the defendant was convicted of falsely stating that he was not "'familiar with'" the distribution of negative campaign literature by a Nixon staffer he had hired, and that he did not recall "'express[ing] any interest . . . or giv[ing him] any directions or instructions with respect to any single or particular candidate.'"[93] The government had charged that the defendant did know of the literature distribution and that he did give specific instructions regarding a particular Senator, Senator Muskie, a

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[91] Id. (collecting cases). Bell itself held "that [because] 'a reasonably minded jury must have a reasonable doubt as to the existence of the essential elements of the crime charged,' the conviction may not stand." Id. (quoting United States v. Reynolds, 511 F.2d 603, 606 (5th Cir. 1975)); cf. Kehoe, 562 F.2d at 69 (finding no evidence to support defendant's claim that the context of the questions was unclear); United States v. Cash, 522 F.2d 1025, 1029-30 (9th Cir. 1975) (affirming perjury conviction where jury chose to disbelieve defendant's purported understanding of question); cf. United States v. Thompson, 637 F.2d 267, 270 (5th Cir. 1981) (Bronston "does not mean . . . that question and answer must be aligned in categorical and digital order.").

[92] United States v. Glantz, 847 F.2d 1, 6 (1st Cir. 1988). Glantz might be viewed as premised on an insufficiency of the evidence analysis, however the court characterized it as a literal truth defense.

[93] See United States v. Chapin, 515 F.2d 1274, 1277 (D.C. Cir. 1975), cert. denied, 423 U.S. 1015 (1975).

potential political opponent of President Nixon. The defendant argued on appeal that because the questions were vague, his answers were truthful: he did not know whether the staffer actually passed out literature, and he never gave directions about one candidate to the exclusion of others. The D.C. Circuit rejected this argument, explaining:

> As another court stated when faced with the charge that "met with" and "regular" were too vague, "mere vagueness or ambiguity in the questions is not enough to establish a defense to perjury. Almost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact." When the questions involved here are considered in the context of both the purpose of the grand jury investigation, which was known to Chapin, and the series of questions actually asked, we cannot say that the words involved could not be "subject to a reasonable and definite interpretation by the jury."[94]

The court distinguished Bronston, in which the answer was unresponsive, because there "[t]he [Supreme] Court explicitly considered only the problem posed by a declarative statement which was true no matter what the question might have meant, and did not consider the effect of any possible vagueness of the question." The court then explained that "Bronston does not deal with the situation where a defendant has given a 'yes or no' answer, the truth of which can be ascertained only in the context of the question posed."[95]

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[94] Id. at 1279-80 (quoting United States v. Ceccerelli, 350 F. Supp. 475, 478 (W.D. Penn. 1972) and United States v. Marchisio, 344 F.2d 653, 662 (2d Cir. 1965), respectively); see also Chapin, 515 F.2d at 1280 n.3 (collecting cases in which questions challenged as ambiguous were upheld as sufficient to support an indictment or a conviction).

[95] Chapin, 515 F.2d at 1279-80.

The court was also unpersuaded by the defendant's argument that the lack of follow-up questions meant "that the prosecutors were not successfully misled by Chapin."[96] Instead, the court observed that "neither the court nor the jury must accept as conclusive the meaning the defendant, after the fact, puts on a question." The court found the jury's interpretation of the question, as evidenced by the verdict, the "only reasonable [one]."[97]

One D.C. district court has recently relied upon Chapin to reject an Iran-Contra defendant's motion to dismiss perjury counts based on his having "dissect[ed] each of the alleged perjuries to demonstrate that they are true, albeit unresponsive."[98] The court explained:

> Such stretching of the language would be unnecessary were the contested statements literally true. Nor does Bronston give a defendant latitude to insulate himself from prosecution by reinterpreting his statements in order to give them a meaning which is literally true. . . . Bronston requires the court to dismiss the indictment only when it is plain that the government cannot prove that the defendant's statement was false. In situations, as here, where there may be one or more arguable constructions of the defendant's statements under which those statements might be true, and the

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[96] Id. at 1283.

[97] Id. In Chapin, the district court had charged the jury that it could not convict if any reasonable interpretation of the question rendered the answer true. The D.C. Circuit therefore did not need to decide "whether a conviction would be upheld if the government proved that the defendant was truthfully answering some possible-and-reasonable interpretation of the question but falsely answering the question as he himself interpreted it." Id. at 1280.

[98] See United States v. Clarridge, 811 F. Supp. 697, 712 (D.D.C. 1992).

> other constructions that the statements were, the question is left for the jury.[99]

The difference between perjury and literal truth is well illustrated by another high-profile case, in which the D.C. Circuit affirmed a perjury count involving conflicting interpretations of questions and answers but reversed another count because the statement was literally true.[100] The defendant, a HUD official, had been convicted of four counts of perjury and four § 1001 violations for statements made during congressional hearings investigating favoritism in the administration of funding for substandard housing. A Senator had asked the defendant, in pertinent part:

> [I]t is suggested that informal solicitations and unawarded applications from the past are guarded by you, and that you personally go through the selections, excluding review by the appropriate staff experts.
>
> Furthermore, it is suggested that developers have personally come to you asking for awards. Now, as you know, the proper procedure is for the HUD Washington office to deal with housing authorities and for them to deal with developers. In some cases, the housing authorities have subsequently alerted HUD that these funds aren't even needed. How do you respond to that?[101]

In response, the defendant had explained the procedure for reviewing funding applications, including review by a panel. The statement found perjurious was that "[t]hat panel goes solely on

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[99] Id.

[100] United States v. Dean, 55 F.3d 640, 659 (D.C. Cir. 1995), cert. denied, 516 U.S. 1184 (1996) (citing United States v. Dunnigan, 507 U.S. 87, 94 (1993)).

[101] Id. at 659.

information provided by the Assistant Secretary for Housing."[102] Challenging her perjury conviction on appeal, the defendant claimed that she had answered the question asked, to wit, whether she made funding decisions alone. The court rejected the argument, saying that "[t]he thrust of the Senator's inquiry was whether Dean played a part in any moderate rehabilitation funding decision in which Departmental regulations were not followed," and that "[i]n essence, Dean denied [the Senator's] intimations."[103] The court concluded from the government's evidence that "the jury was entitled to find that the panel did not base its decisions solely on information provided by the Assistant Secretary for Housing."[104] Thus, notwithstanding the wordiness and complexity of the question and the defendant's explanation of how she understood it, the court affirmed the conviction on this count.

Dean reversed the defendant's conviction on a separate perjury count, however. The defendant had been convicted for stating that "no moderate rehabilitation [funds] have ever gone to my home State of Maryland, simply for that reason -- that I sat on the panel [which made allocation decisions]".[105] The D.C.

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[102] Id.

[103] Id. at 660 (emphasis added); cf. Schafrick, 871 F.2d at 304 ("The questions as well as the answers, and the answers understood as a whole, are crucial to the determination of whether [defendant]'s statements were perjury.").

[104] Dean, 55 F.3d at 660.

[105] Id. at 661.

Circuit rejected the government's claim that the statement represented the defendant's denial of ever having participated in a moderate rehabilitation funding decision for a Maryland project, because "that is not literally what she said." The court wrote:

> While Dean had participated in decisions for Maryland projects, her testimony indicated that those projects did not receive special consideration "simply" because Dean sat on the panel. Dean's statement could have been true, and, in any event, the government never proved at trial that she showed particular favoritism to Maryland projects. Although it may be, as Mark Twain said, that "[o]ften, the surest way to convey misinformation is to tell the strict truth," a statement that is literally true cannot support a perjury conviction.[106]

In addition, the prosecution provided no evidence to support the alleged falsity of the defendant's statement, and the defendant made the statement gratuitously -- it was not in response to a pending question. Thus, unlike the perjury count discussed above, the court could not view the answer in the context of the question to determine the defendant's understanding. As a result, it concluded that the conviction could not stand as it might be literally true.

E. Perjury in Cases of Feigned Forgetfulness

Perjury cases can be and have been charged when a witness feigns forgetfulness about the events in question. When this type of charge is brought, the government must prove that the witness in fact had knowledge about the events as to which he claims

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[106] Id. at 662 (citing Bronston, 409 U.S. at 360).

memory loss.

1. Proof of Knowledge

Because proving feigned forgetfulness requires proving the state of mind of the witness, the key issue is "whether th[e] circumstantial evidence meets the test of proof beyond a reasonable doubt."[107] In rare instances, direct proof of feigned forgetfulness -- an inconsistent statement of recollection, for example -- might be available, and such proof would constitute "direct evidence that the defendant did know or recall the fact that he denied knowing or recalling under oath." [108]

Such direct proof is unlikely and courts have generally concluded that the government can also meet its burden (to prove

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[107] Id; see also United States v. Mathern, 329 F. Supp. 536, 538 (E.D. Pa. 1971); Chapin, 515 F.2d at 1284 ("Of course . . . the falsity of an 'I don't recall' answer must be proven by circumstantial evidence."); Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943) ("Necessarily the recollection of a witness must be shown by circumstantial evidence.").

[108] Gebhard v. United States, 422 F.2d 281, 287-88 (9th Cir. 1970); see also United States v. Forrest, 623 F.2d 1107, 1111-12 (5th Cir. 1980) (admission recounted by another witness is direct evidence of falsity), cert. denied, 449 U.S. 924 (1980); United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.) (implying that only possible direct evidence tending to prove falsity of claimed inability to recall would be statement of defendant), cert. denied, 423 U.S. 1015 (1975); United States v. Sweig, 441 F.2d 114, 116 (2d Cir.) (same), cert. denied, 403 U.S. 932 (1971); United States v. Beach, 296 F.2d 153, 157 (4th Cir. 1961) (direct evidence of defendant, and others, that he knew certain men, supported perjury conviction for defendant's grand jury testimony that he did not know identity of men); United States v. Bergman, 354 F.2d 931, 934 (2d Cir. 1966) (upholding conviction for false of grand jury testimony denying recollection of receipt of kickbacks and income from unlawful sources when such income was proven by extrajudicial admissions and circumstantial evidence that defendant possessed additional funds).

beyond a reasonable doubt that claimed forgetfulfulness was feigned) when it presents enough circumstantial evidence that a defendant must have remembered.[109] A broad range of circumstantial evidence can support a perjury conviction on the theory that purported inability to remember was a lie. In general, just as with any other attempt to prove a defendant's state of mind,

> [t]he jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know.[110]

Thus, in order to prove the claimed forgetfulness was feigned, "the witness must testify to some overt act from which the jury may infer the accused's actual belief."[111] As the D.C. Circuit has said, in a different formulation of the same principle, "a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself."[112]

2. Cases in Brief

The following subsection briefly reviews some representative

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[109] See Behrle v. United States, 100 F.2d 714, 716 (D.C. Cir. 1938) (prosecution may use circumstantial evidence to prove that a witness charged with perjury must have remembered facts about which he testified that "he 'remembered nothing'").

[110] Sweig, 441 F.2d at 117.

[111] Beach, 296 F.2d at 155 (internal quotation marks omitted).

[112] Young v. United States, 212 F.2d 236, 241 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954).

reported cases involving feigned forgetfulness and perjury charges. The next subsection summarizes principles gleaned from a larger number of such cases.[113]

- A witness to a shooting, who had made a written statement to the police and testified before the grand jury, was convicted of perjury when -- after being called to testify at the trial of the men charged with the shooting -- he first denied having seen anything happen; then, when shown his signed statement, admitted his signature but said he did not know the contents; and finally, when the statement was read to him, said he did not remember whether any of the events described in it happened or not.[114] The D.C. Circuit affirmed the conviction, stating: While "[d]irect proof that [the defendant] did remember was impossible, [t]he circumstantial evidence that he must have remembered was, if believed, enough to overcome the presumption of innocence

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[113] Claims of inability to remember past events have arisen in obstruction of justice cases as well. See, e.g., United States v. Alo, 439 F.2d 751, 754 (2d Cir. 1971) (affirming obstruction of justice conviction for professed memory loss in connection with SEC Investigation), cert. denied, 404 U.S. 850 (1971); Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 557 (8th Cir. 1992) (affirming sanction for obstruction of discovery where defendant avoided having to disclose information he later claimed not to recall); United States v. Murray, 65 F.3d 1161, 1165 (4th Cir. 1995)(district court properly enhanced sentence on perjury conviction for obstruction of justice where defendant signed statement implicating another individual but testified that she could not remember making statement about other's involvement). Typically, however, feigned forgetfulness is charged as a perjury violation.

[114] See Behrle v. United States, 100 F.2d 714, 715-16 (D.C. Cir. 1938).

and leave no reasonable doubt of guilt."[115]

- Another defendant was convicted of perjury under § 1623 for testifying before a grand jury investigating a drug conspiracy that "he did not recall being in Florida during 1983."[116] But "[t]here was other grand jury testimony, however, that Moeckly had been in Florida, and had stayed with [a co-conspirator] and studied Spanish there."[117] The Eighth Circuit affirmed the conviction.
- A justice of the Michigan Supreme Court was convicted under § 1621 when he testified before a grand jury that "he had no recollection of two conversations with" a co-defendant, but then two days later (after he became aware that some of his activities had been the subject of FBI surveillance) told the grand jury that the conversations had taken place.[118] The Sixth Circuit affirmed the conviction. The court first noted that,

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[115] Id. at 716. Citing Behrle, the Eight Circuit reversed a perjury conviction because the defendant recanted his allegedly false statement. Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943). The defendant had claimed no recollection of ever having filed for naturalization papers or having sworn that he was born in Italy. When shown the original and duplicate of his declaration of intention to become a citizen, which was made 24 years before he made the allegedly perjurious statement, "he promptly admitted it." Id. The court distinguished the case from instances where witnesses recant statements once their perjury is exposed. Id. at 843.

[116] United States v. Moeckly, 769 F.2d 453, 459-65 (8th Cir. 1985), cert. denied, 475 U.S. 1015 (1986).

[117] Id. at 459.

[118] See United States v. Swainson, 548 F.2d 657, 662 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

> [w]hen the alleged perjury relates to the state of mind of the accused, as in the present case ('I have no recollection'), proof of perjury must necessarily consist of proof of facts from which the jury could infer that the defendant must have known or remembered that which he denied knowing or remembering while under oath.[119]

The court found that in this case there was enough evidence that the jury could infer that the defendant "had wilfully failed to answer the questions concerning these conversations truthfully at his first appearance."[120]

- Another defendant had been convicted under § 1621 for 15 counts of perjury before a grand jury investigating illegal card games at a club.[121] Gebhard had been questioned (under a grant of immunity) about his role in the installation and operation of electronic devices placed in the club to enable gamblers to fleece fellow members. In pertinent part, Gebhard's "responses to the questions involved in [certain] counts of the indictment were invariably, 'I don't recall' or 'I don't know' or 'I don't remember.'"[122] The appeals court noted that "[g]iven answers of this nature, it would be difficult to find two witnesses to testify that the defendant did in fact know or believe or recall a matter

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[119] Id. at 662.

[120] Id.

[121] See Gebhard v. United States, 422 F.2d 281, 283-88 (9th Cir. 1970).

[122] Id. at 287.

which he said he did not."[123] The court therefore concluded that circumstantial evidence could be used to prove the case for perjury: "[i]f the government can build up a strong enough set of facts to show what the truth of the matter was and what the defendant must have known, this should be enough to go to the jury."[124]

- In the Watergate-era case mentioned earlier, the defendant (Nixon's Appointment Secretary, Chapin) was convicted under § 1623 for stating "Not that I recall" in answer to a question about whether he had hired a particular aide (Donald" Segretti) to play pranks on the contenders for the Democratic nomination, or had given Segretti "any instructions with respect to any single or particular candidate."[125] The D.C. Circuit affirmed the conviction, noting that the "the falsity of an 'I don't recall' answer must be proven by circumstantial evidence," that in this case the evidence showed that Chapin had given the aide "a large number of instructions about Senator Muskie over a six-month period," and that Chapin's "obvious desire before

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[123] Id. The court also suggested that a contrary admission by the defendant would constitute direct evidence of his state of mind. Id.

[124] Id. at 288.

[125] United States v. Chapin, 515 F.2d 1274, 1274-90 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975). Chapin had in 1971 hired Segretti to play "political pranks" on the contenders for the Democratic presidential nomination. The actual question in full was: "Did you ever express any interest to [Segretti], or give him any instructions with respect to any single or particular candidate?" Chapin responded, "Not that I recall."

the grand jury and the court to put himself as far as possible from the specifics of Segretti's campaign provided sufficient evidence of his motive to conveniently omit recollection of any specific instructions."[126] Even though Chapin argued on appeal that he had believed the question was asking whether he had given any instructions to "zero in" on a particular candidate to the exclusion of others, and that he had not done so, the court rejected the argument, finding that if that had been Chapin's true understanding, "he would not have responded so unequivocally as he did, 'Not that I recall' . . . but would probably have given a flat and emphatic negative," and that "[t]his was too central a matter not to be clear in his mind."[127]

- Another defendant, was convicted of perjury under § 1623 for testifying to a grand jury first that he had been in Florida during a major fire in Lynn, Massachusetts, and later that he could not remember the exact date that he had returned to Lynn.[128] At trial, the government had introduced evidence to show that Goguen had been in Lynn and that, because of the fire's magnitude, it was more than likely that when Goguen appeared before the grand jury he did remember that he had been in Lynn during the fire. The First Circuit affirmed

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[126] Id. at 1284.

[127] Id. at 1283.

[128] See United States v. Goguen, 723 F.2d 1012, 1014-15 (1st Cir. 1983).

the conviction, noting that "while the average person may not remember where he was the day before President Kennedy was assassinated, he surely would remember if he was at the Texas Book Depository in Dallas the day before the assassination."[129]

3. Summary

A review of the case law reveals that perjury convictions for false claims of memory loss are likely where there is either strong circumstantial evidence or other factors tending to show that the witness must have remembered, such as a motive to lie (Behrle; Seltzer, Nicoletti, Ponticelli, Chapin);[130] a reason to remember (Ponticelli, Chapin); a selectively spotty memory (Nicoletti); a suddenly revived memory upon learning of the government's evidence (Swainson);[131] testimony or other evidence confirming the occurrence of an event and the likelihood that the defendant would not have forgotten it (Moeckly, Camporeale,

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[129] Id. at 1021 n.11.

[130] Behrle v. United States, 100 F.2d 714 (D.C. Cir. 1938); United States v. Seltzer, 794 F.2d 1114 (7th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Nicoletti, 310 F.2d 359 (7th Cir. 1962), cert. denied, 372 U.S. 942 (1963); United States v. Ponticelli, 622 F.2d 985 (9th Cir.), cert. denied, 449 U.S. 1016 (1980), overruled on other grounds, United States v. Debright, 730 F.2d 1255, 1259 (9th Cir. 1984); United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975)

[131] United States v. Swainson, 548 F.2d 657 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

Ponticelli, Devitt, Chapin; but see Clizer);[132] or statements by the defendant contradicting the claim (Behrle, Nicoletti). Courts have also considered the chronology of a defendant's statements or inconsistent claims of forgetfulness (Behrle), or proximity in time between the testimony and the event at issue (Nicoletti, Mathern; cf. Fotie, Devitt).[133] Moreover, courts have adverted to the "enormity of the events" as an indication that purported failure to recollect was a lie (Seltzer, Moreno Morales, Ponticelli, Goguen),[134] or have highlighted the repetitiveness of some witnesses' claims of inability to remember (Gebhard).[135] The defendant's uncooperative attitude in testifying before a grand jury is also relevant (Seltzer).

F. Inconsistent Statements Under § 1623(c)

As noted above, under § 1623(c) the government may prosecute a perjury charge based solely upon inconsistent statements (if both of the statements in question were made under oath, before

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[132] United States v. Moeckly, 769 F.2d 453 (8th Cir. 1985), cert. denied, 475 U.S. 1015 (1986); United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975); United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); United States v. Clizer, 464 F.2d 121 (9th Cir.), cert. denied, 409 U.S. 1086 (1972).

[133] United States v. Mathern, 329 F. Supp. 536 (E.D. Pa. 1971); Fotie v. United States, 137 F.2d 831 (8th Cir. 1943).

[134] United States v. Moreno Morales, 815 F.2d 725 (1st Cir.), cert. denied, 484 U.S. 966 (1987); United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983).

[135] Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970).

or ancillary to a court or grand jury).[136] The prosecution need not prove which statement is false, but need only prove beyond a

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[136] Section 1623(c) of Title 18 provides:

> Any indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if --
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> (1) each declaration was material to the point in question, and
>
> (2) each declaration is made within the period of the statute of limitations for the offense charged under this section.
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> In any prosecution under this section, the falsity of the declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury.

This provision is the result of a 1970 amendment to § 1623 that was intended to "provide[] specifically for the prosecution of a false declaration in the case of irreconcilable contradictory statements without the necessity of specifying which of the declarations is false." H.R. Rep. No. 1549, 91st Cong., 2nd Sess., reprinted in 1970 U.S.C.C.A.N. 4007 (emphasis added). Of course, both statements must be made under oath before or ancillary to a court or grand jury. See United States v. Jaramillo, 69 F.3d 388, 390 (9th Cir. 1995) ("To take advantage of § 1623(c)'s lesser requirement of proof, the government must demonstrate, inter alia, that both contradictory declarations are within the scope of 18 U.S.C. § 1623(c)."); cf. United States v. Harvey, 657 F. Supp. 111, 113-14 (E.D. Tenn. 1987) (including as an element of crime under § 1623(c) that the statements "were made before or ancillary to a federal court or grand jury proceeding").

Section 1623(c) also provides that "[i]t shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true." 18 U.S.C. § 1623(c)(2).

reasonable doubt that the statements are irreconcilably contradictory (and material to the case).[137]

G. Perjury Trap Defense

The so-called "perjury trap defense" has been discussed by many courts, but adopted by few.[138] In theory, "[a] perjury trap is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury."[139] The essence of this theory is that by using its power to compel testimony toward this end, particularly when the perjured information is neither material nor germane to the legitimate ongoing investigation of the grand jury,[140] the government violates the Due Process clause of the Fifth Amendment and that this conduct requires dismissal of the indictment.[141] Criminal defendants often argue that their indictments should be dismissed for improprieties surrounding the requirement that they give grand jury testimony.

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[137] See United States v. Porter, 994 F.2d 470, 473 n.4 (8th Cir. 1993). Thus, in order to sustain a conviction under § 1623(c), based upon inconsistent statements the government must prove the following elements beyond a reasonable doubt: (1) a defendant, under oath; (2) made two or more declarations; (3) which were irreconcilably inconsistent; (4) each of which was material to the point in question, and (5) each of which was made within the statute of limitations.

[138] See Wheel v. Robinson, 34 F.3d 60, 67-68 (2d Cir.1994).

[139] United States v. Chen, 933 F.2d 793, 796 (9th Cir. 1991).

[140] See United States v. Crisconi, 520 F. Supp. 915, 920 (D.Del.1981).

[141] Id. at 67 (quoting Chen, 933 F.2d at 796-97).

Insofar as the doctrine exists, "any application of the 'perjury trap' doctrine" is precluded if there is a "legitimate basis" for an investigation and for the particular questions answered falsely.[142] When testimony is elicited before a grand jury that is "attempting to obtain useful information in furtherance of its investigation"[143] or "conducting a legitimate investigation into crimes which had in fact taken place within its jurisdiction,"[144] the perjury trap defense cannot succeed.

Furthermore, no perjury trap defense is available simply because the government anticipated that the defendant would commit perjury in testifying before the grand jury. Even if the government anticipates that a defendant would give false testimony, the government is entitled to hope "that [the defendant] ... might provide information about the pending investigation"[145] and to anticipate that a witness will testify truthfully once placed in the solemn atmosphere of the grand jury room. "[F]or many witnesses the grand jury room engenders an atmosphere conducive to truthtelling, for it is likely that upon

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[142] Wheel, 34 F.3d at 68; see also United States v. Regan, 103 F.3d 1072 (2nd Cir.1997), cert. denied, 117 S.Ct. 2484 (1997).

[143] United States v. Devitt, 499 F.2d 135, 140 (7th Cir. 1974), cert. denied, 421 U.S. 975(1975).

[144] United States v. Chevoor, 526 F.2d 178, 185 (1st Cir.1975), cert. denied, 425 U.S.(1976). See United States v. Chen, 933 F.2d 793, 797 (9th Cir. 1991); see also United States v. Brown, 49 F.3d 1162, 1168 (6th Cir. 1995).

[145] United States v. Caputo, 633 F. Supp. 1479, 1487 (E.D.Pa.1986), rev'd on other grounds, 823 F.2d 754 (3d Cir. 1987).

being brought before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses feel obliged to do just that."[146]

II. Obstruction of Justice -- 18 U.S.C. § 1503

The obstruction of justice statute applicable to cases involving a defendant's false swearing or obstructive conduct is 18 U.S.C. § 1503.[147] Section 1503 provides:

> (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate,

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[146] United States v. Washington, 431 U.S. 181, 187-88 (1977).

[147] Section 1505 of Title 18 applies to pending "department or agency" proceedings, not to pending judicial or grand jury proceedings. While "mere 'police investigation[s]'" do not constitute proceedings for purposes of the statute, "agency investigative activities are proceedings within the scope of § 1505 [where they] involve[] agencies with some adjudicative power, or with the power to enhance their investigations through the issuance of subpoenas or warrants." United States v. Kelley, 36 F.3d 1118, 1127 (D.C. Cir. 1994)(citation omitted).

In the D.C. Circuit, § 1505 applies only where the defendant influenced another person to violate the law. In United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), the court applied a "transitive" reading to § 1505 and held that, "[a]s used in § 1505 . . . the term 'corruptly' is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress." Id. at 379. The court thus narrowed § 1505 "to include only 'corrupting' another person by influencing him to violate his legal duty." Id. (emphasis added). The court observed, however, that the "language of § 1505 is materially different from that of § 1503." Id. at 385. The transitive Poindexter reading of § 1505 does not apply to § 1503. United States v. Russo, 104 F.3d 431, 435-47 (D.C. Cir. 1997); United States v. Watt, 911 F. Supp. 538, 545-47 (D.D.C. 1995).

> in the discharge of his duty, . . . or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).[148]

The underlined "'Omnibus Clause' serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute."[149] Put differently, the omnibus clause "prohibits acts that are similar in result, rather than manner, to the conduct described in the first part of the statute."[150]

The Court of Appeals for the District of Columbia Circuit has characterized the offense of § 1503 obstruction of justice as having three main elements: (1) the government must prove that the defendant engaged in conduct or behavior or endeavored to engage in conduct or behavior; (2) that the defendant engaged in such behavior corruptly and with specific intent; and (3) that the defendant's intent was to impede the due administration of justice.[151] In order for § 1503 to apply, there must be judicial proceedings pending at the time of the defendant's conduct, such

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[148] 18 U.S.C. § 1503 (emphasis added).

[149] United States v. Aguilar, 515 U.S. 593, 598 (1995).

[150] United States v. Howard, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

[151] United States v. Bridges, 717 F.2d 1444, 1449 n.30 (D.C. Cir. 1983), cert. denied, 465 U.S. 1036 (1984); see also Pyramid Securities Ltd. v. IB Resolution Inc., 924 F.2d 1114, 1119 (D.C. Cir.), cert. denied, 502 U.S. 822 (1991).

as a grand jury investigation.[152] Finally, knowledge of the pending judicial proceedings is required.[153] Other courts have combined these elements as follows:

> [T]he elements of obstruction of justice, pursuant to the omnibus clause of section 1503, are (1) a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding in its due administration of justice.[154]

A. Elements of § 1503 Further Defined

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[152] Pyramid Securities Ltd., 924 F.2d at 1119.

[153] Aguilar, 515 U.S. at 599. It bears noting that materiality is not an element of the offense under § 1503. E.g. United States v. Rankin, 1 F.Supp.2d 445, 454 (E.D. Pa. 1998) (citing United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989)).

[154] United States v. Grubb, 11 F.3d 426, 437 (4th Cir. 1993); see also United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993); United States v. Williams, 874 F.2d 968, 977 (5th Cir. 1989). The Model Jury Instructions for "Obstructing the Due Administration of Justice" under D.C. Code § 22-722(a) are:

> 1. That the defendant acted corruptly, by means of threat or force, [obstructed or impeded] [endeavored to obstruct or impede] the due administration of justice in the ____ Court of the District of Columbia; and
>
> 2. That the defendant acted with specific intent to obstruct or impede the due administration of justice.
>
> You are instructed that the term 'corruptly' means with an improper motive. The term 'endeavor' means any effort, whether successful or not. The term 'threats' means any words or actions having a reasonable tendency to intimidate the ordinary person.

Criminal Jury Instructions for the District of Columbia (4th ed. 1993) 4.81(B). The Comment provides that pendency of formal court proceedings and a showing of knowledge are also required.

1. Pending Judicial Proceeding

A pending investigation by a grand jury is a judicial proceeding for purposes of § 1503.[155] Similarly, a civil proceeding is a pending judicial proceeding for purposes of § 1503.[156]

2. Knowledge of Pending Judicial Proceeding

"[A] defendant may be convicted under section 1503 only when he knew or had notice of [the] pending proceeding."[157] In Aguilar, the Supreme Court held that a judge's utterance of false statements to an FBI agent "who might or might not testify before a grand jury is [not] sufficient to make out a violation of the catchall provision of § 1503."[158] The Court indicated that the government must show the defendant "knew that his false statement would be provided to the grand jury"; evidence that the defendant

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[155] Wood, 6 F.3d at 696. The Third Circuit has held that a grand jury proceeding is pending once a "subpoena [has been] issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before [a regularly sitting] grand jury." United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975).

[156] United States v. Lundwall, 1 F.Supp.2d 249, 251 (S.D.N.Y. 1998). Section 1503 has been applied in a wide variety of civil matters. United States v. Muhammad, 120 F.3d 688 (7th Cir. 1997) (civil juror solicits bribe from litigant); United States v. London, 714 F.2d 1558 (11th Cir. 1983) (lawyer presents fraudulent civil judgment to client); Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956) ("obstruction of justice statute is broad enough to cover attempted corruption of a prospective witness in a civil action").

[157] United States v. Frankhauser, 80 F.3d 641, 650 (1st Cir. 1996).

[158] 515 U.S. at 600.

was aware of the proceeding is usually not sufficient.[159] "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[160]

3. Specific Intent

The term "corruptly" in the omnibus clause connotes specific intent.[161] Courts have, however, defined the term "corruptly" in somewhat differing terms.[162] "[S]uch intent may be inferred from proof that the defendant knew that his corrupt actions would obstruct justice then actually being administered."[163]

In Haldeman, the D.C. Circuit approved a jury instruction for obstruction of justice which charged that the jury "must find, in addition to the other elements, that [the defendant] had the specific intent to obstruct, impair, or impede the due

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[159] Id. at 601.

[160] Id. at 599; cf. Grubb, 11 F.3d at 437 (false statement to FBI agent supported obstruction of justice conviction where defendant "was well aware of the existence of the grand jury investigation when interviewed").

[161] See United States v. Haldeman, 559 F.2d 31, 114 (D.C. Cir. 1976) (per curiam), cert. denied, 431 U.S. 933 (1977).

[162] See, e.g., United States v. Partin, 552 F.2d 621, 641-42 (5th Cir.) (improper motive or with evil or wicked purpose), cert. denied, 434 U.S. 903 (1977); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981) (with purpose of obstructing justice), cert. denied, 454 U.S. 1157 (1982); United States v. Barfield, 999 F.2d 1520, 1524 (11th Cir. 1993) (knowingly and intentionally undertaking act from which obstruction was reasonably foreseeable result).

[163] United States v. Buffalino, 727 F.2d 50, 54 (2d Cir. 1984).

administration of justice and that his endeavor was not accidental or inadvertent."[164] The district court defined the term "corruptly" as used in § 1503 as "having an evil or improper purpose or intent."[165]

In Aguilar, the Supreme Court stated that, under the "very broad language of the catchall provision" of the omnibus clause, "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the Court's or grand jury's authority."[166] The Court further observed that "[s]ome courts have phrased this showing as a 'nexus' requirement -- that the act must have a relationship in time, causation or logic with the judicial proceedings. . . . In other words, the endeavor must have the natural and probable effect of interfering with the due administration of justice."[167]

Even if one is acting from a seemingly benign motive, a jury may nonetheless conclude that the acts were done corruptly. For example, one court reviewed the conviction of a defendant who had altered and defaced certain corporate records relating to an

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[164] Haldeman, 559 F.2d at 114; see also Caldwell v. United States, 218 F.2d 370, 372 (D.C. Cir. 1954) ("The only intent involved in the crime is the intent to do the forbidden act."), cert. denied, 349 U.S. 930 (1955).

[165] Haldeman, 559 F.2d at 115 n.229;.

[166] Aguilar, 515 U.S. at 599.

[167] Id. (quotations omitted).

ongoing grand jury investigation of Medicare fraud. Faudman argued that he lacked the requisite intent because he intended by his acts only to "protect his brother and the company he had spent his life building."[168] The jury rejected this defense and the court affirmed his conviction, concluding that his conduct was "corrupt" conduct covered by the omnibus clause of § 1503.[169]

B. False and Evasive Testimony as Obstruction of Justice

1. Generally

"[S]tatements . . . made directly to the grand jury itself, in the form of false testimony or false documents," may provide a basis for § 1503 liability.[170] For false statements to form the basis of obstruction, however, the government must prove the person making the statements had the intent to impede or effect of impeding the due administration of justice.[171] Likewise the D.C. Circuit recently concluded that "anyone who intentionally lies to a grand jury is on notice that he may be corruptly

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[168] United States v. Faudman, 640 F.2d 20, 21 (6th Cir. 1981).

[169] Id. at 23.

[170] Aguilar, 515 U.S. at 600 & n.2 (collecting cases); see also United States v. Norris, 300 U.S. 564, 574 (1937) ("Perjury is an obstruction of justice; its perpetration may well affect the dearest concerns of the parties before a tribunal.").

[171] United States v. Russo, 104 F.3d 431, 435-36 (D.C. Cir. 1997); see also United States v. Perkins, 748 F.2d 1519, 1528 (11th Cir. 1984) (false statement impeding justice); United States v. Watt, 911 F. Supp. 538, 547 (D.D.C. 1995) (while the government must plead and prove that the false testimony impeded the due administration of justice, "no additional act need be alleged in the indictment").

obstructing the grand jury's investigation . . . . Whatever the outer limits of 'corruptly' in § 1503 . . . acts of perjury [are] near its center."[172] Similarly, the district court reasoned that false testimony obstructs justice because it "could cause undue delay, import unnecessary confusion into the grand jury process, and potentially lead to an erroneous indictment."[173]

Even evasive testimony which is literally true may form the basis for an obstruction charge, though this is an unusual occurrence.[174] One district court examined an indictment containing multiple perjury charges and an obstruction charge. The court dismissed a number of the perjury charges as being literally true, given a "precise grammatical reading of the challenged question and answer."[175] Notwithstanding her conclusion that certain of the perjury charges were legally insufficient, Judge Rymer concluded that a § 1503 charge based

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[172] Russo, 104 F.3d at 436 (citations omitted); see also United States v. Watt, 911 F. Supp. 538, 547 (D.D.C. 1995)("the government may charge a defendant under the omnibus clause for making false statements before a grand jury while under oath if the making of such statements obstructs the due administration of justice"). Both Russo, 104 F.3d at 436, and Watt, 911 F. Supp. at 546-47, rejected application of Poindexter's "transitive" reading of § 1505 to § 1503, as, indeed, Poindexter itself foretold, 951 F.2d at 385.

[173] Watt, 911 F. Supp. at 547; see also United States v. Paxson, 861 F.2d 730 (D.C. Cir. 1988) (affirming conviction for making false declarations before a grand jury in violation of 18 U.S.C. §§ 1503, 1623).

[174] United States v. Spalliero, 602 F. Supp. 417 (C.D. Cal. 1984) (Rymer, J.).

[175] Id. at 422 (quoting United States v. Cook, 489 F.2d 286, 287(9th Cir. 1972)); see also Spalliero, 602 F. Supp. at 424 (literal truth in response to double negative question).

upon misleading, but true, statements should not be dismissed. Summarizing her own reservations, she wrote:

> [T]o the extent that defendant's testimony is not perjurious but rather evasive, or misleading, I think that interpreting § 1503 to obtain a result unobtainable under the perjury statute is ill-advised. . . . Although conviction under § 1503 may require proof of intention to impede justice thereby excluding the misleading or non-responsive statement, innocently made, the fear of possible prosecution for evasive or misleading testimony under § 1503 will burden every witness before a grand jury.[176]

Nonetheless, the court concluded that giving evasive answers to a grand jury could violate § 1503 and denied the motion to dismiss.[177]

2. Civil Proceedings

False statements in connection with a pending civil proceeding can also form the basis an obstruction of justice charge under § 1503. We provide two examples:

One defendant was alleged to have given false testimony in a civil forfeiture proceeding relating to the proceeds of narcotics transactions. Thomas denied that he knew a co-defendant, one Ronald Calhoun, by the alias Robert Johnson. The Eleventh Circuit reaffirmed its view that "false testimony can provide the basis for a conviction under section 1503."[178] It emphasized, however, the need

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[176] Id. at 426.

[177] Id. (relying on United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981)).

[178] United States v. Thomas, 916 F.2d 647, 652 (11th Cir. 1990) (citing United States v. Perkins, 748 F.2d 1519, 1527-28

for a "nexus between the false statements and the obstruction of the administration of justice."[179] Thus, the court concluded that it was "incumbent on the government to prove the statements had the natural and probable effect of impeding justice."[180]

Barbara Battalino was a psychiatrist at a Veterans Administration hospital in Boise, Idaho.[181] While working at the hospital she provided psychiatric treatment to a U.S. Army veteran, Edward Arthur. On at least one occasion, on June 27, 1991, while treating Mr. Arthur, Battalino performed oral sex on him. Thereafter, Battalino and Arthur began an intimate affair. Battalino resigned when her supervisor learned of the affair.

Later Arthur filed a complaint against Battalino and the United States alleging that Battalino's sexual conduct with him constituted medical malpractice. Battalino requested that the United States Attorney for the District of Idaho "certify" her under the Federal Tort Claims Act,

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(11th Cir. 1984)).

[179] Thomas, 916 F.2d at 652 (citing In re Michael, 326 U.S. 224, 228 (1945)).

[180] Thomas, 916 F.2d at 652 (citing United States v. Fields, 835 F.2d 1571, 1573 (11th Cir. 1988); United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984)). Because the district court's jury instructions did not enunciate this requirement and because the government's proof was insufficient, the court reversed Thomas's conviction. Thomas, 916 F.2d at 654.

[181] United States v. Battalino, Crim. No. 98-38-S-EJC (D. Idaho April 14, 1998).

("FTCA").[182] Battalino was interviewed by attorneys for the United States and denied that she had engaged in sexual relations with Arthur in her office on June 27, 1991. Based in part on that denial, she was certified for coverage under the FTCA as to her conduct occurring on or before June 27, 1991.

Battalino appealed the United States Attorney's decision denying certification as within the scope of her employment for her conduct after June 27, 1991. At a hearing held before a United States Magistrate on July 13-14, 1995, while Arthur's civil claim remained pending, Battalino was examined as follows:

> Q. Did anything of a sexual nature take place in your office on June 27, 1991?
>
> A. No, sir.[183]

In April 1998, Battalino was charged with a single count information alleging that she had violated 18 U.S.C. § 1503 by "corruptly endeavor[ing] to influence, obstruct and impede the due administration of justice in connection with a pending proceeding before a court of the United States" by making the false and misleading statements quoted

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[182] 28 U.S.C. § 1346 et seq. Under the FTCA, if a federal employee is sued and it is certified that the employee's allegedly tortious conduct occurred "within the scope" of the employee's federal employment, the United States is substituted as a defendant and the employee cannot be held personally liable for damages.

[183] Plea Agreement at 9-12, United States v. Battalino, Crim. No. 98-38-S-EJC (D. Idaho April 14, 1998).

1. Generally

Obstructive behavior can comprise behavior other than the false testimony of a defendant. One who proposes to a witness that the witness lie in a judicial proceeding is guilty of obstructing justice.[189] A conviction for such conduct will be sustained where the evidence shows that the conduct had a "reasonable tendency to impede the witness in the discharge of her duties."[190] The endeavor to influence the witness need not be successful to be criminal.[191]

Several cases are instructive examples of the type of fact pattern that will support a criminal obstruction charge:

> One defendant was convicted of obstructing a grand jury investigation in violation of § 1503, by attempting to influence a witness to lie to the grand jury.[192] He challenged his conviction on the ground that it was not supported by sufficient evidence. The witness, Roeske, admitted to hiding income in a bank under a fictitious name. In Tranakos's obstruction trial Roeske testified:
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> Q. What did Mr. Tranakos tell you?

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[189] United States v. Davis, 752 F.2d 963, 973 n.11 (5th Cir. 1985).

[190] United States v. Harris, 558 F.2d 366, 369 (7th Cir. 1977) (citation omitted).

[191] United States v. Barfield, 999 F.2d 1520, 1523 (11th Cir. 1993); see also Osborn v. United States, 385 U.S. 323, 332-33 (1966).

[192] United States v. Tranakos. 911 F.2d 1422 (10th Cir. 1990).

A. He said that -- he looked at me and he smiled and he said, 'Well you don't own any trusts, do you?' And then he said -- he said, 'You don't have any bank accounts in Montana, do you?' And I took that to mean that all of this flow of paper, this complexity of paper meant that the things legally were not under my control and that was the whole reason for setting up this vast matrix of trusts and that I didn't have control over these things or I didn't own the bank accounts. It was a matter of semantics as far as I understood it at the time.

. . . .

Q. What happened when you appeared before the grand jury then?

A. They . . . asked me if I had any bank accounts in Montana and I said no. Or they might have said, 'Do you know of any bank accounts in Montana?' And I said, 'No.'

. . . .

Q. You used the word 'semantics' a while ago. It was not what he said, it was the way he said it to you, the smile [you] said he had on his face?

A. Yes.[193]

The court readily concluded that this conduct constituted obstruction of justice, inasmuch as the "statute prohibits elliptical suggestions as much as it does direct commands."[194] It therefore held that a reasonable finder of fact could have concluded from this evidence that Tranakos

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[193] Id. at 1431-32 (ellipsis and brackets in original).

[194] Id. at 1432 (citing United States v. Russell, 255 U.S. 138, 141-43 (1921); United States v. Arnold, 773 F.2d 823, 834 (7th Cir. 1985); United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983)).

had suggested to Roeske that he testify falsely to the grand jury.

Former Congressman Mario Biaggi appealed his conviction for (among other charges) obstructing a grand jury investigation, in violation of § 1503, by attempting to influence the testimony of a co-defendant, Meade Esposito.[195] At issue were Esposito's allegedly illegal payment of Biaggi' expenses for trips Biaggi took to St. Maarten and a Florida health spa. As the court recounted the evidence, after Biaggi became aware of a grand jury investigation, he called Esposito:

> There can be no doubt that Biaggi sought to have Esposito impede the investigation. For example, having coached Esposito to characterize the Florida spa trips as emanating simply from an old and dear friend's concern for Biaggi's health (Biaggi: "You knew I had, you knew I had some trouble with my heart?" Esposito: "When?"), Biaggi urged concealment of the St. Maarten trip:
>
> MB [Biaggi]: . . . Uh, don't mention St. Maartens [sic] . . . cause I . .
>
> ME [Esposito]: Oh, I thought you mentioned it.
>
> MB: No, they just, I didn't mention it.
>
> ME: Okay.
>
> MB: Uh, we just mentioned the two times at the spa.
>
> ME: No problem.
>
> Returning to the matter of the spa vacations, defendants agreed:
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> ME: This is not a gift. It's uh, it's a, uh,

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[195] United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988), cert. denied, 489 U.S. 1989).

manifestation of my love for you.

MB: You didn't give it to me because I'm a member, member of Congress.

ME: Nah. Never, no bull. No way.

MB: Have you ever done, have you ever done anything for me?

ME: Have I ever done anything for you?

MB: I, I told them, "No." We say you haven't done anything form me and I haven't done anything for you. . . .

ME: That's right.

MB: And that's the way we're gonna keep it.

On this evidence the court saw "no basis for overturning Biaggi's conviction for obstruction of justice."[196]

While an indictment of one Robert Gulino was pending, a potential witness in that trial, Robert Perry, approached the defendant, Jeremiah Buckley and asked his assistance in making "arrangements for a job outside of the United States so that he, Perry, could not be subpoenaed in" the Gulino case.[197] Perry testified that he told Buckley he would "tell all" at the Gulino trial. Buckley found Perry a job in Mexico and Perry avoided the subpoena. On appeal, Buckley argued that he was not guilty of obstruction in violation of § 1503 because he did not improperly induce the witness to testify, but only responded to Perry's request

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[196] Id. 105 (ellipsis in original).

[197] United States v. Washington Water Power Co., 793 F.2d 1079, 1084 (9th Cir. 1986).

for assistance. The court rejected the argument, applying § 1503 to this form of witness tampering.[198]

Another defendant attempted to subtly influence a potential witness to "hold back" on his grand jury testimony. Defendant suggested to witness that a third party (and common friend) "could do a lot for him," but never explicitly asked the witness to lie.[199] The court held that this was enough to convict under the omnibus clause of § 1503. "'[T]he fact that the effort to influence was subtle or circuitous made no difference. 'If reasonable jurors could conclude, from circumstances of the conversation, that the defendant had sought, however cleverly and with whatever cloaking of purpose, to influence improperly [a witness], the offense was complete.'"[200]

One defendant was also convicted of obstruction of justice for attempting to convince a witness to testify falsely. After trying to convince the witness that the $900,000 payment in question was, instead, a loan, O'Keefe said "[i]f you don't explain this thing right, I'm in jail."[201] The court affirmed the conviction.

Another defendant was convicted under the omnibus clause of

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[198] Id. at 1084-85.

[199] United States v. Tedesco, 635 F.2d 902, 903-04 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981).

[200] Id. at 907 (citation omitted).

[201] United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983)(brackets in original).

§ 1503 for "urg[ing] or persuad[ing] a prospective witness to give false testimony."[202] Defendant approached the witness, a bank teller, and advised her that it would be "in her best interest" to forget about any large currency transactions which she may have processed for him.

Misleading conduct or false statements towards an attorney can also constituted criminal obstructive behavior if they may "materially alter" the conduct of a proceeding.[203] Two examples are instructive:

One defendant, Barfield, worked as a DEA informant in connection with the investigation of Donald Flores.[204] After Flores was indicted, Barfield contacted Flores's attorney and provided the attorney with information regarding the factual basis for the indictment of Flores. Thereafter, in an apparent effort to assist Flores's defense, Barfield gave a sworn statement to Flores's attorney that was inconsistent with information he had originally provided. The United States indicted Barfield for obstruction of justice, alleging that his provision of inconsistent information to Flores's attorney was intended to obstruct justice by providing Flores's attorney with a basis for cross-examining

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[202] United States v. Shannon, 836 F.2d 1125, 1128 (8th Cir.) (citing United States v. Risken, 788 F.2d 1361, 1369 (8th Cir. 1986)), cert. denied, 486 U.S. 1058 (1988).

[203] United States v. Field, 738 F.2d 1571, 1574 (11th Cir. 1988).

[204] United States v. Barfield, 999 F.2d 1520, 1523 (11th Cir. 1993).

Barfield and impeaching his testimony at Flores's trial. The Court concluded that the false statement to Flores's attorney was intended to "materially alter [the] government's treatment" of Flores, and thus constituted obstruction of justice.[205]

Two other defendants were officers of the Border Patrol.[206] They were charged with conspiring to secure sexual favors from illegal aliens whom they had encountered. While those charges were pending, they gave documentation to their attorneys which purported to provide them with an alibi and their attorneys provided the documentation to the United States. Subsequent investigation established that the documentation was fabricated, and a superceding indictment added a charge of obstruction of justice in violation of § 1503. Defendants' challenge to the sufficiency of the evidence supporting their conviction was rejected.[207]

2. Civil Proceedings

Obstruction of justice charges may also arise in the context of civil proceedings. For example, in a recent case of some notoriety the defendants were former officials of Texaco, Inc.[208] Texaco was sued in a civil class action employment discrimination

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[205] Id. at 1524 (citation omitted).

[206] United States v. Davila, 704 F.2d 749 (5th Cir. 1983).

[207] Id. at 752-53.

[208] United States v. Lundwall, 1 F.Supp.2d 249 (S.D.N.Y. 1998).

suit, alleging racial discrimination. The defendants were advised of the pendency of the lawsuit and the need to retain documents relevant to the lawsuit. Following a request for document production, the defendants allegedly withheld and then destroyed documents sought by plaintiff's counsel. Defendants were charged with a violation of § 1503. They moved to dismiss the indictment, arguing that the destruction of documents during civil discovery was not covered by § 1503.

The district court rejected the defendants' argument. First, the court broadly construed the term "due administration of justice":

> [T]he words 'due administration of justice' import a free and fair opportunity to every litigant in a pending cause in federal court to learn what he may learn (if not impeded or obstructed) concerning the material facts and to exercise his option as to introducing testimony or such facts. The violation of the law may consist in preventing a litigant from learning facts which he might otherwise learn, and in thus preventing him from deciding for himself whether or not to make use of such facts.[209]

The court thus recognized that § 1503 had been "repeatedly applied in a wide variety of civil matters."[210] It therefore concluded that nothing in the statute limited its application to grand jury proceedings and denied the motion to dismiss.

The court also offered these observations on the use of § 1503 in the prosecution of civil obstruction:

> Of course, there are a great many good reasons why federal prosecutors should be reluctant to bring

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[209] Id. at 252.

[210] Id. at 253.

> criminal charges relating to conduct in ongoing civil litigation. Civil litigation typically involves parties protected by counsel who bring frequently exaggerated claims that, under supervision of a judicial officer, are narrowed and ultimately compromised during pretrial proceedings. Prosecutorial resources would risk quick depletion if abuses in civil proceedings -- even the most flagrant ones -- were the subject of criminal prosecutions rather than civil remedies. Thus, for numerous prudential reasons, prosecutors might avoid entering this area. But that is quite different from concluding that § 1503 precludes their doing so.
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> . . . .
>
> This case, however, goes beyond civil discovery abuse remediable through civil sanctions. Defendants here are not charged with concealing and destroying documents they incorrectly concluded were not sought, or erroneously thought to be irrelevant or burdensome. Rather, they are charged with seeking to impair a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding.[211]

In an earlier Ninth Circuit decision during the course of a civil case, the defendant falsely swore that a written employment agreement existed.[212] He also attempted to induce a witness to testify that she had seen a copy of the written agreement. Roberts was charged with perjury[213] and with obstruction of justice for his effort to influence a witness. He argued that a simple effort to suborn perjury was not a violation of § 1503. The court rejected that argument, holding that the "obstruction of justice statute is broad enough to cover the attempted

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[211] Id. at 254-55. The defendants were subsequently acquitted, following trial.

[212] Roberts v. United States, 239 F.2d 467 (9th Cir. 1956).

[213] Thus, Roberts is another civil perjury case charged as a criminal violation.

corruption of a prospective witness in a civil action in Federal District Court."[214]

A seminal Fourth Circuit case also bears mention.[215] The defendants were charged under the predecessor statute of § 1503,[216] for soliciting false testimony in a civil action. The court said:

> [t]he contention that a violation of section 5339, consisting of obstructing the administration of justice in a civil litigation, between private citizens in a federal court, is not an offense against the United States, need not be discussed at any length. One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the Untied States, in that it prevents or tends to prevent the execution of one of the powers of the government.[217]

It therefore rejected the defendant's demurrer to the indictment.

III. Witness and Evidence Tampering -- 18 U.S.C. § 1512

Although witness and evidence tampering are prohibited by § 1503's general prohibition upon obstruction of justice,[218] they are also specifically prohibited by § 1512. This latter section

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[214] Id. at 470.

[215] Wilder v. United States, 143 F. 433 (4th Cir. 1906).

[216] section 5339, Rev. Stat. (U.S. Comp. 1901).

[217] Id. at 440 (citations omitted).

[218] The House and Senate agree that actions prosecutable under § 1512 can be prosecuted under § 1503 as well. See 134 Cong. Rec. S7446-01 (June 8, 1988) (stating that the amendments are intended "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503") (emphasis added); 134 Cong. Rec. S17360-02 (Nov. 10, 1988) (same).

provides, in part:

> (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct[219] toward another person, with intent to --
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> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to --
>
> (A) withhold testimony, or withhold a record document, or other object, from an official proceeding;
>
> (B) alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . .
>
> shall be fined under this title or imprisoned for not more than ten years, or both.

18 U.S.C. § 1512(b).

A. Elements

Some elements of a § 1512(b) offense vary with the nature of the conduct charged -- for example, whether the person is charged under § 1512 (b)(1) or under § 1512(b)(2), and whether the person is charged with tampering with the witness or evidence through "force," "corrupt[] persua[sion]," or "misleading conduct."

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[219] Misleading conduct is defined by the statute as:

> (A) knowingly making a false statement;
> (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; . . .
> (E) knowingly using a trick, scheme, or device with intent to mislead[.]

18 U.S.C. § 1515(a)(3).

However, because the elements break down into two types -- the defendant must have acted in a certain manner, and must have done so with the specific intent to tamper with a witness[220] -- the courts have generally interpreted the common elements uniformly, without regard to the subsection under which the defendant is charged.[221]

In proving intent to influence a witness's testimony or tamper with evidence, the government need not show that the action (whether corrupt persuasion, misleading conduct, or force) was successful -- or even likely to be successful -- in altering that conduct.[222] Rather, courts have stated that in proving

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[220] See United States v. Gabriel, 125 F.3d 89, 104 (2d Cir. 1997) ("Section 1512(b) has two elements that are germane to the offenses charged: (1) that the defendant engaged in misleading conduct or corruptly persuaded a person, and (2) that the defendant acted with an intent to influence the person's testimony at an official proceeding.").

[221] See, e.g., Gabriel, 125 F.3d at 103 (relying on case construing § 1512(a)(1)(C) to interpret § 1512(b)(1)). Compare the following: In connection with a charged violation of § 1512(b)(2)(B), the government must prove: "the defendant . . . knowingly attempted to use intimidation or to corruptly persuade the person identified in the indictment; and the defendant did so with the intent to cause or induce the person to alter, destroy, mutilate, or conceal an object or impair the object's integrity or availability for use in a federal . . . proceeding." United States v. Mullins, 22 F.3d 1365,1369 (6th Cir. 1994). Similarly, "[i]n order to prove the defendant guilty of the [§ 1512(a)(1)(C)] charge in the indictment, the government must prove each of the following elements beyond a reasonable doubt: First, that on or about the date charged, the defendant used intimidation, physical force, or threats, or attempted to do so; and second, that the defendant acted knowingly and with intent to prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a federal offense." United States v. Stansfield, 101 F.3d 909, 912-13 (3d Cir. 1996).

[222] Gabriel, 125 F.3d at 103-05.

intent under § 1512, "it is the endeavor to bring about a forbidden result and not the success in actually achieving the result that is forbidden."[223] Unsuccessful or inchoate efforts to influence are also covered by the statute, therefore.[224] For example, when a defendant killed a potential witness in violation of § 1512(a), the Government could prosecute him without having to prove that the victim "was willing to cooperate or that an investigation was underway . . . or even [that the victim] had evinced an intention or desire to so cooperate."[225]

B. Pending and Civil Proceedings

Section 1503's prohibition against obstruction of justice applies only when there is a proceeding pending at the time of the offense, but there is no such limitation upon § 1512.[226]

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[223] United States v. Maggitt, 784 F.2d 590, 593 (5th Cir. 1986) (citations omitted)

[224] It is an affirmative defense available to a defendant to show by a preponderance of the evidence "that the conduct [in question] consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce or cause the other person to testify truthfully." 18 U.S.C. § 1512(d). A defendant is not, of course, obliged to present such evidence. See generally United States v. Clemons, 658 F. Supp. 1116, 1123-26 (W.D. Pa. 1987).

[225] United States v. Romero, 54 F.3d 56, 62 (2d Cir. 1995).

[226] The Senate Report notes that the Congress intended in § 1512 to remove the requirements in § 1503 that an inquiry be "pending" and that the witness's testimony be admissible in court. See S. Rep. 97-532, 97th Cong., 2d Sess. § 4.C (1982). Specifically, the Report notes that "(d)(1) obviates the requirement that there be an official proceeding in progress or pending" and that "the scope of the offense should not be limited by concerns about the status of the victim as a person who has testified or will be able to testify in court." See also Stansfield, 101 F.3d at 913 ("The law does not require that a

Furthermore, a person may be charged under § 1512 even when the testimony or record in question is subject to a claim of privilege or otherwise not likely to be admitted at trial.[227] While conviction under § 1512 does not require "proof that the proceeding in question actually was pending . . . it [does] require[] . . . that the defendant 'fear[ed]' that such a proceeding 'had been or might be instituted' and 'corruptly persuaded persons with the intent to influence their possible testimony in such a proceeding.'"[228] In other words, there is still a requirement that the defendant intended to influence any possible future proceeding.[229]

It is also evident that § 1512 permits prosecution for

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federal proceeding be pending at the time or even that it was about to be initiated when the intimidation, physical force or threats were made."); but see United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998) (applying pending investigation limit of § 1503 to § 1512, over dissent citing other circuits to argue that no such limit applies).

The Senate Report also states that "(d)(2) makes explicit the theory that section 1512 is meant to protect the integrity of the process. It is not for the alleged violator to determine what is, or is not, legally privileged evidence or what evidence may prove to be legally inadmissible. These findings are made by the court, not someone who seeks to withhold the evidence." S. Rep. No 97-532 at § 4.C.

[227] 18 U.S.C. § 1512(e).

[228] United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996) (quoting United States v Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994)) (some brackets in original).

[229] Cf. United States v. Aguilar, 515 U.S. 593 (1995) (reversing conviction for witness tampering under § 1503 -- which does have pending proceeding requirement -- where court found defendant had not intended to influence grand jury proceeding but had intended only to misdirect separate FBI investigation that did not count as "proceeding" under § 1503).

witness or evidence tampering in a civil matter as well as in a criminal one, because § 1512(i) provides for enhanced penalties when the conduct in question occurs in the context of criminal proceedings -- enhancements that would be unnecessary if the general statute did not apply to the civil context.

C. Intent

To sustain a tampering charge, the government must prove intent. The type of proof needed depends upon whether the tampering was performed through force, corrupt persuasion, or misleading conduct.

1. "Misleading Conduct"

Section 1512(b)(1) prohibits engaging in misleading conduct in order to influence testimony before a grand jury or other investigative body. "The most obvious example of a section 1512 violation [for misleading conduct] may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury."[230]

Such a violation occurred when the Governor of Guam (Ricardo Bordallo), who was accepting bribes and keeping the money for his personal use, told the person paying the bribes (Johnny Carpio)

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[230] See United States v. Rodolitz, 786 F.2d 77 (2d Cir. 1986) (dicta describing statute). An unpublished disposition extended Rodolitz by holding that "[t]he witness tampering statute is offended not only by making false statements but also by providing potential witnesses with incomplete information in an attempt to hinder a prosecution." Kliczak v. United States, 940 F.2d 660 (Table), 1991 WL 132499 (6th Cir., July. 19, 1991).

that the money was being used to help the poor. The Governor was convicted of witness tampering under § 1512, and the Ninth Circuit upheld the jury verdict, stating: "The jury could have concluded that Bordallo initially knowingly misled Carpio, intending that Carpio would offer Bordallo's explanation concerning the funds to the FBI."[231]

Analogously, several cases have held that a defendant violates § 1512 by falsifying a handwriting exemplar with the intent to mislead a handwriting expert into testifying that the exemplar did not match the handwriting on the sample.[232]

2. "Corruptly Persuades"

The term "corruptly persuades" was added to the statue in 1988, when Congress amended § 1512 in order to reach actions that reflected an intent to tamper with a witness but did not fall within the definition of "misleading conduct."[233] The difference between the two turns more upon the witness's level of knowledge and upon the defendant's degree of honesty. As explained above,

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[231] See United States v. Bordallo, 879 F.2d 519, 525 (9th Cir.) (citing Rodolitz), amended on other grounds, 872 F.2d 334 (9th Cir. 1988).

[232] See, e.g., United States v. Yusufu, 63 F.3d 505 (7th Cir. 1995) (giving obstruction-of-justice sentence enhancement under 3C1.1 to defendant who so falsified his handwriting; citing three other cases doing same).

[233] See H.R. Rep. No. 100-169, at 13 n.27 (100th Cong., 1st Sess., 1987). The revision was necessary because some circuits had held that the 1982 version of § 1512 did not prohibit simply asking a witness to lie, reasoning that doing so was neither "misleading" nor "intimidating." See, e.g., United States v. King, 762 F.2d 232 (2d Cir. 1985); United States v. Kulczyk, 931 F.2d 542, 547 (9th Cir. 1991).

when a defendant lies to a witness hoping the witness will believe the falsehood and pass it on to investigators, this is "misleading conduct." But when a defendant simply asks a witness to lie (and the witness knows that he is being asked to lie), then the defendant is "corruptly persuading" that witness.

Several cases have recently discussed the meaning of "corruptly persuades."

- The D.C. Circuit comprehensively reviewed the interpretation of the term "corruptly persuades" in a 1991 case.[234] The defendant in that case, Morrison, had been charged with attempting to prevent a witness from testifying truthfully at trial because he had asked her to tell "anyone who asked" that he had been living with her for the past year (which he had not). Morrison argued on appeal that the term "corruptly persuades" excluded from its coverage a "simple request to testify falsely."[235] He also argued that the term

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[234] See United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996).

[235] Id. at 629.

required a "transitive" reading, referring to the "manner of influencing another, not the motive for influencing another."[236] The court agreed that the term "corruptly persuades" has a transitive meaning under § 1512, but concluded that asking a person to lie did constitute corrupt persuasion because it constituted "'corrupt[ion' of] another person by influencing him to violate his legal duty."[237] The Court therefore concluded that the evidence was sufficient to support Morrison's conviction. As the Court said: "while Morrison assuredly didn't use the word 'testify' or 'trial' when he attempted to influence Holmes' behavior, the clear import of this request was that 'anyone who asked' should be deceived." [238]

- In another case, the defendant spoke to the mother of his friend Brian shortly after FBI agents had visited her.[239] He

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[236] Id. (relying on the "transitive" reading given to the term "corruptly persuades" in the D.C. Circuit's interpretation of § 1505, see United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1992)).

[237] Id.

[238] Id. at 630; see also United States v. Hernandez-Limon, 15 F.3d 1092, 1994 WL 2543 at **1, **7 (9th Cir. 1994) (unpublished) (upholding conviction of defendant who told witness: "Tell the truth, that if you didn't know anything, I knew even less," as a corrupt attempt to persuade a co-defendant to lie).

Courts have rejected challenges to the use of the phrase "corruptly" in § 1512 as unconstitutionally vague. United States v. Schott, 145 F.3d 1289, 1998 WL 384047 at *9-*10 (11th Cir. July 10, 1998)(collecting cases).

[239] See United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996).

advised her to "clean out everything that's upstairs in Brian's room, get rid of everything because the FBI will be back with a search warrant," and admonished her: "Do you want to be responsible for putting your son in jail?"[240] On appeal, the First Circuit affirmed his conviction for violating § 1512(b)(2)(B). Construing the phrase "corrupt persuasion," the court held that a defendant must "act knowingly and with intent to impair an object's availability for use in a particular official proceeding."[241]

• In another D.C. Circuit case, the court held that the jury must "be reasonably able to infer from the circumstances that [defendant], fearing that a grand jury proceeding had been or might be instituted, corruptly persuaded persons with the intent to influence their possible testimony at such a proceeding."[242]

IV. Conspiracy -- 18 U.S.C. § 371

A. Generally

Title 18 U.S.C. § 371 provides, in pertinent part, that it is a crime:

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[240] Id. at 646.

[241] Id. at 651.

[242] United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994). See also United States v. Mullins, 22 F.3d 1365 (6th Cir. 1996) (finding intent proven where government showed that defendant had instructed various employees to alter their log books prior to producing them in response to a grand jury subpoena, because intent encompassed the "general intent of knowledge as well as the specific intent of purpose to obstruct").

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy . . . .

The essence of the crime of conspiracy is a criminal partnership, that is, an "agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy."[243] "[T]he gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond mere aiding, abetting, counseling to completion of the offense."[244]

Section 371 is violated when two or more persons conspire or agree to engage in conduct which is prohibited by a substantive federal statute, and one does an act in furtherance of that agreement. This includes federal statutes prohibiting obstruction of justice and false statements.[245] A single

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[243] United States v. Falcone, 311 U.S. 205, 210 (1940).

[244] Pinkerton v. United States, 328 U.S. 640, 649 (1946) (Rutledge, J. dissenting) (emphasis added).

[245] See, e.g., United States v. Fulbright, 105 F.3d 443, 446 (9th Cir. 1997) (conspiracy to obstruct justice); United States v. Kelley, 36 F.3d 1118 (D.C. Cir. 1994) (conspiracy to obstruct justice and tamper with witnesses in violation of 18 U.S.C. §§ 1503, 1512); United States v. Ballis, 28 F.3d 1399, 1403 (5th Cir. 1994) (conspiracy to obstruct justice); United States v. Mullins, 22 F.3d 1365, 1367 (6th Cir. 1994) (same); United States v. Cure, 804 F.2d 625, 628 (11th Cir. 1986) (conspiracy to make false statements in violation of 18 U.S.C. § 1001); United States v. Jeter, 775 F.2d 670, 682-83 (6th Cir. 1985) (conspiracy to obstruct justice under 18 U.S.C. § 1503); United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985) (conspiracy to make false statements in violation of 18 U.S.C. § 1001); United States

conspiracy may involve the violation of many statutes.[246]

Because it is the criminal partnership agreement itself which is the crime, the success of the conspiracy or the attainment of its objective is immaterial. The crime is complete once the agreement is reached and a reasonably foreseeable overt act is committed in furtherance of the objective of the conspiracy by one of its members.[247] Moreover, because the agreement is a crime in and of itself, a defendant may be convicted of both the conspiracy and the substantive offense which is the object of the conspiracy.[248]

A conspirator is criminally liable not only for his or her own acts but "all of the acts of his coconspirators undertaken in furtherance of the conspiracy and reasonably foreseeable to" the defendant.[249] Thus, if a co-conspirator commits a crime that (1) furthers the object of the conspiracy that (2) the defendant could have reasonably foreseen, the defendant is criminally

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v. Heldt, 668 F.2d 1238, 1250-51 (D.C. Cir. 1981) (describing conspiracy to obstruct justice under § 1503 and upholding conviction); United States v. Shoupe, 608 F.2d 950, 956 (3d Cir. 1979) (upholding conviction for conspiracy to obstruct justice under § 1503); United States v. Franklin, 598 F.2d 954, 955 n.1 (5th Cir. 1979) (per curiam) (conspiracy to obstruct justice).

[246] See, e.g., United States v. Richerson, 833 F.2d 1147, 1153-54 (5th Cir. 1987).

[247] See United States v. Kibby, 848 F.2d 920, 922 (8th Cir. 1988); United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir. 1982).

[248] See Pinkerton, 328 U.S. at 645-46.

[249] United States v. Doyle, 121 F.3d 1078, 1091 (7th Cir. 1997); see also United States v. Casiano, 113 F.3d 420, 427 (3d Cir. 1997).

liable as if he or she had committed the crime personally.

B. Elements of § 371

To sustain a conviction for conspiracy, the government must prove three elements: (1) that there was an agreement to commit a federal offense; (2) that the defendant knowingly and voluntarily joined the agreement; and (3) that at least one overt act was committed in furtherance of the object of the agreement.[250]

1. Existence of an Agreement

In general, a conspiracy requires an agreement or understanding to violate the law. This criminal partnership or meeting of the minds "need not be proven by direct evidence; a common purpose and plan may be inferred from a 'development and

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[250] See United States v. Mullins, 22 F.3d 1365, 1368 (6th Cir. 1994); accord United States v. Dean, 55 F.3d 640, 647 (D.C. Cir. 1995); United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985). The model federal jury instructions denote the elements thus:

> 1. The conspiracy, agreement, or understanding to violate one or more federal statutes or defraud the United States was formed, reached or entered into by two or more persons;
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> 2. At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed an overt act in order to further or advance the purpose of the agreement;
>
> 3. At some time during the existence or life of the conspiracy, agreement or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement or understanding.

Edward J. Devitt, Charles B. Blackmar & Kevin F. O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.03 (1990).

collocation of circumstances.'"[251] "Conspiracy can be proven circumstantially; direct evidence is not crucial. . . . Seemingly innocent acts taken individually may indicate complicity when viewed collectively and with reference to the circumstances in general."[252] "Because a conspiratorial agreement is often reached in secrecy, the existence of the agreement or common purpose may be inferred from relevant and competent circumstantial evidence."[253]

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[251] Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Khoury, 901 F.2d 948, 962 (11th Cir. 1990).

[252] United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) (citations omitted).

[253] United States v. Ballard, 663 F.2d 534, 543 (5th Cir. 1981). Thus courts charge juries:

> A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.
>
> A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.
>
> To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all the details of the understanding. . . .
>
> The government must prove that the defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would (violate some law(s)) by means of some common plan or course of action. . . . It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS

For example, "coordinated actions of the co-defendants are strong circumstantial evidence of an agreement."[254] The jury "may infer the existence of a conspiracy from the presence, association, and concerted action of the defendant with others."[255] The government need merely prove that the "defendant knew the essential objective of the conspiracy;" it need not prove that the defendant knew the details or played an extensive role.[256]

A tacit or implicit understanding is sufficient to fulfill the agreement requirement; the conspirators need not formally contract with each other.[257] The existence of an implicit agreement "may be inferred from acts done with a common purpose."[258] The government may establish an implicit agreement

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§ 28.04.

[254] United States v. Hernandez, 876 F.2d 774, 777 (9th Cir. 1989).

[255] United States v. Gonzales, 121 F.3d 928, 935 (5th Cir. 1997).

[256] See United States v. Suba, 132 F.3d 662, 672 (11th Cir. 1998).

[257] See United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991); United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988) ("A tacit or mutual understanding between or among the alleged conspirators is sufficient to show a conspiratorial agreement."); United States v. Ayotte, 741 F.2d 865, 867 (6th Cir. 1984) ("Proof of some kind of formal agreement is not necessary to establish a conspiracy").

[258] Ayotte, 741 F.2d at 867; accord United States v. Alvarez, 548 F.2d 542, 544 (5th Cir. 1977).

by showing "[t]he coordinated actions of the co-defendants,"[259] or by "acts done with a common purpose."[260] A jury can conclude that the defendant was part of an implicit agreement from evidence that the conspirators "acted as a team" or by a defendant's "knowledge of the scope of the operation."[261]

For example, the Sixth Circuit found an implicit agreement to commit health insurance fraud by misrepresenting the identity of the patient even though the defendant (the patient) was unconscious and injured when the conspiracy began. The court held that the defendant "furthered the conspiracy" by responding to the name of a person with insurance, and "signed various forms." "These acts sufficiently established a tacit and mutual understanding . . . and show conspiratorial agreement."[262]

2. Membership in the Conspiracy

The prosecution must also prove a defendant's membership in a conspiracy. The evidence need not prove that the defendant knew all the details of the conspiracy or the identities of all the participants.[263] Mere presence or association, however, is

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[259] United States v. Hernandez, 876 F.2d 774, 788 (9th Cir. 1989).

[260] United States v. Milligan, 17 F.3d 177, 183 (6th Cir. 1994).

[261] Boone, 951 F.2d at 1543.

[262] Milligan, 17 F.3d at 183.

[263] See United States v. Massa, 740 F.2d 629, 636 (8th Cir. 1984); United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979).

not sufficient to establish membership in a conspiracy.[264]

The acts and declarations of co-conspirators are admissible to prove a defendant's membership in a conspiracy.[265] To admit a co-conspirator statement or act, the prosecution need only show by a preponderance of the evidence to the trial judge there is "evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made in the course and in furtherance of the conspiracy."[266] The trial

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[264] See United States v. Cintolo, 818 F.2d 980, 1003 (1st Cir. 1987); United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984). Thus, the standard charge to the jury is:

> the evidence . . . must show beyond a reasonable doubt that the defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.
>
> If the evidence establishes beyond a reasonable doubt that the defendant knowingly and deliberately entered into an agreement . . . the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.
>
> Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.05.

[265] Fed. R. Evid. 801(d)(2)(E) ("A statement is not hearsay if . . . [it is] a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.").

[266] Bourjaily v. United States, 483 U.S. 171, 173-79 (1987) (citing Fed. R. Evid. 104).

court's inquiry at this stage "is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issue."[267]

Once the government demonstrates that a conspiracy exists, its burden in showing that any particular defendant was a member of that conspiracy is light. The government need merely present "slight evidence . . . to implicate a defendant."[268] "[E]vidence which established beyond a reasonable doubt that a defendant is even slightly connected with the conspiracy is sufficient to convict him of knowing participation in the conspiracy."[269]

3. Overt Act

To sustain a conviction of conspiracy the government must also prove beyond a reasonable doubt that an overt act was done in furtherance of the conspiracy. The government need not prove that the defendant personally committed an overt act in furtherance of the conspiracy. The government need only prove

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[267] Bourjaily, 483 U.S. at 175. The prosecutor need not produce evidence independent of the statements themselves to show the existence of a conspiracy for evidentiary purposes, rather any evidence, except privileged communications, may be considered by the trial court, including the very statements being offered into evidence. Id. at 177(overruling the "independent evidence" holdings of Glasser v. United States, 315 U.S. 60 (1942), and United States v. Nixon, 418 U.S. 683 (1974)).

[268] United States v. Milligan, 17 F.3d 177, 183 (6th Cir. 1994).

[269] United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991).

"that one of the co-conspirators did one or more overt acts in furtherance of the conspiracy."[270]

C. Withdrawal Defense

Withdrawal from the conspiracy can be a conditional or an absolute defense to the crime of conspiracy, depending on when the withdrawal occurs. If the defendant withdraws from the conspiracy before any of the co-conspirators commits an overt act in furtherance of the conspiracy, the withdrawal is an absolute defense and the defendant cannot be convicted of the conspiracy. If a single overt act has occurred, withdrawal is not an absolute

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[270] United States v. Holloway, 128 F.3d 1254, 1257 (8th Cir. 1997). Thus the pattern jury instruction reads:

> that one of the members to the agreement knowingly performed at least one overt act and that this overt act was performed during the existence or life of the conspiracy and was done to somehow further the goal(s) of the conspiracy or agreement.
>
> The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.
>
> Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.
>
> The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.07; see also United States v. Hermes, 847 F.2d 493, 495 (8th Cir. 1988) ("government need show that only one of the conspirators engaged in one overt act in furtherance of the conspiracy, and the act itself need not be criminal in nature").

defense to the conspiracy charge.[271]

Withdrawal after the commission of an overt act, on the other hand, is a conditional defense. Such withdrawal excuses the defendant from liability for all criminal acts committed by the co-conspirators after the date of the withdrawal.[272] The defendant remains liable, however, for all reasonably foreseeable crimes committed by co-conspirators in furtherance of the conspiracy before the date of withdrawal, as well as for the conspiracy itself.

To demonstrate withdrawal from the conspiracy, the defendant must prove (1) that he or she has taken affirmative steps, inconsistent with the objectives of the conspiracy, to disavow or to defeat the objectives of the conspiracy and (2) that he or she has made a reasonable effort to communicate those acts to the co-conspirators or that he or she has disclosed the scheme to law enforcement authorities.[273] The burden of proof of withdrawal rests on the defendant.[274] The Eleventh Circuit has characterized the defendant's burden as "substantial."[275]

Mere physical distance from the co-conspirators is

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[271] See United States v. Sarault, 840 F.2d 1479, 1487 (9th Cir. 1988).

[272] See United States v. Lash, 937 F.2d 1077, 1083-85 (6th Cir. 1991).

[273] See United States v. Dabbs, 134 F.3d 1071, 1083 (11th Cir. 1998) (citation omitted).

[274] See United States v. Payne, 962 F.2d 1228, 1234-35 (6th Cir. 1992).

[275] Dabbs, 134 F.3d at 1083.

insufficient to demonstrate withdrawal. If, however, the defendant completely severs ties with the conspiracy, a court will find that the defendant withdrew absent evidence of continued acts in furtherance of the conspiracy or evidence that the defendant continued to receive benefits from the conspiracy.[276]

Even if the defendant takes affirmative action contrary to the objectives of the conspiracy, his or her withdrawal may be ineffective if he or she acquiesced in the conspiracy after the affirmative act. Thus, "[c]ontinued acquiescence negates withdrawal, leaving [the defendant] liable for the continuing acts in furtherance of the conspiracy by the other conspirators."[277]

V. Aiding and Abetting -- 18 U.S.C. § 2(a)

A. Generally

Title 18 U.S.C. § 2(a) governs liability for aiding and

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[276] Id.; see United States v. Antar, 53 F.3d 568, 582-83 (3d Cir. 1995).

[277] Lash, 937 F.2d at 1084. As the model federal jury instructions put it:

> In order to withdraw from the conspiracy the defendant must take some definite, decisive, and affirmative action to disavow (himself) (herself) from the conspiracy or to defeat the goal or purpose of the conspiracy.
>
> Merely stopping activities or cooperation or merely being inactive for a period of time is not sufficient to constitute the defense of withdrawal.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.11; see, e.g., United States v. Nerlinger, 862 F.2d 967, 974 (2d Cir. 1988).

abetting in the commission of a federal crime. This section provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

This section is premised on the common law view that a person who does not personally commit a crime but orders or assists another in committing that crime is as guilty as if he or she had committed the crime personally. The quintessential case of aiding and abetting is the getaway driver for a bank robbery. Although the getaway driver does not personally rob the bank, his or her assistance in the crime is sufficient to warrant his or her prosecution for the crime of bank robbery itself.[278]

In an aiding and abetting case, the person who actually commits the crime is called the principal. If the jury finds, beyond a reasonable doubt, that the aider and abettor aided, abetted, counseled, commanded, induced, or procured the principal to commit a federal crime, it should find the aider and abettor guilty. The aider and abettor is then subject to the same criminal penalties as the principal would be.

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[278] Also of potential applicability to conduct of this general nature is the misprision of felony provision, 18 U.S.C. § 4 which provides:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned for not more than three years, or both.

Defendants have been charged with aiding and abetting the obstruction of justice on numerous occasions.[279]

In one case, the Sixth Circuit affirmed a conviction for aiding and abetting the obstruction of justice when a defendant attempted to convince a witness to tell a false story to federal investigators to keep a third person from being prosecuted for a weapons violation. This charge was affirmed despite the fact that the third person was not charged with the weapons violation.[280]

B. Elements of § 2(a)

The crime of aiding and abetting has three elements. The government must prove beyond a reasonable doubt (1) an act by a defendant that (2) contributes to the execution of a federal crime (3) committed with the intent to aid in the commission of that crime.[281]

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[279] See, e.g., United States v. Fulbright, 105 F.3d 443 (9th Cir. 1997) (allowing the charge, although finding insufficient evidence); United States v. Morris, 1997 WL 331784, at *1 (4th Cir. June 18, 1997) (per curiam); United States v. Ballis, 28 F.3d 1399, 1403 (5th Cir. 1994); United States v. Rankin, 870 F.2d 109, 110 (3d Cir. 1989); United States v. McKnight, 799 F.2d 443, 445 (8th Cir. 1986); United States v. Franklin, 598 F.2d 954, 955 n.1 (5th Cir. 1979); Hornick v. United States, 891 F. Supp. 72, 73 (N.D.N.Y. 1995); United States v. Tota, 672 F. Supp. 716, 723-24 (S.D.N.Y. 1987); United States v. Louie, 625 F. Supp. 1327, 1331 (S.D.N.Y. 1985).

[280] See United States v. Winkelman, 1996 WL 665379 (6th Cir. Nov. 15, 1996).

[281] See United States v. Stanley, 765 F.2d 1224, 1242 (5th Cir. 1985). The model federal jury instructions denote it thus:

> In order to be found guilty of aiding and abetting the commission of the crime charged in . . . the indictment, the

1. Act

The statute itself lists several acts, all in the nature of instruction, that are sufficient to support liability.[282] Therefore, if the defendant directs the principal to commit the crime, that fact in and of itself is sufficient to satisfy the act element of aiding and abetting.

Besides instruction, the aider and abettor may simply perform some act that assists the principal in completing the crime. This occurs when the defendant "does not do all of the things which causes a crime to be complete but only a portion of the various items that are required to complete the crime."[283] The defendant must have "committed some overt act designed to facilitate the success of the criminal venture," and the act must

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> government must prove beyond a reasonable doubt that the Defendant:
>
> One, knew that the crime charged was to be committed or was being committed,
>
> Two, knowingly did some act for the purpose of (aiding) (commanding) (encouraging) the commission of that crime, and
>
> Three, acted with the intention of causing the crime charged to be committed.

Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff & Kevin F. O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.01 (1992).

[282] See 18 U.S.C. § 2(a) ("counsels, commands, induces or procures").

[283] United States v. Waller, 607 F.2d 49, 51 (3d Cir. 1979) (approving jury instructions).

"contribute[] to the execution of a crime."[284]

2. Crime Committed

The principal need not be convicted and punished for the aider and abettor to be charged. In fact, the Supreme Court has held that a conviction for aiding and abetting should be upheld even if the principal has been acquitted of that offense.[285]

Nonetheless, the jury must be convinced that the federal crime, in fact, did occur.[286] Thus, showing that the government failed to prove beyond a reasonable doubt that a completed federal crime was committed is a complete defense to aiding and abetting.

3. Intent

Central to the crime of aiding and abetting is the aider and abettor's affirmative desire to see that the federal crime actually be committed. An unknowing participant in a crime, who assists without knowledge of the principal's criminal intentions, is not guilty of aiding and abetting.

The aider and abettor must share with the principal "a community of unlawful purpose at the time the act is

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[284] United States v. Stanley, 765 F.2d 1224, 1242 (5th Cir. 1985).

[285] See Stanfeder v. United States, 447 U.S. 10, 14-20 (1980).

[286] See United States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997); United States v. Waller, 607 F.2d 49, 52 (3d Cir. 1979).

committed."[287] The aider and abettor must wish that the crime occur and must seek by his or her acts to make it succeed.[288]

The sharing of criminal intent need not rise to the level of an agreement that would support a conspiracy charge.[289] Similarly, the "aider and abettor need not know every last detail of the substantive offense."[290] As the Eighth Circuit has put it: "Participation is wilful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something that the law requires to be done."[291]

C. Defenses and Limitations

The government may not convict a defendant for aiding and abetting merely because the defendant was present at the scene of the crime or was known to associate with the principal.[292] As explained above, the government must show that the defendant intended for the crime to be committed and assisted in its

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[287] Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952).

[288] See United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990).

[289] See Nye & Nisen v. United States, 336 U.S. 613, 618 (1949).

[290] United States v. Sanborn, 563 F.2d 488, 491 (1st Cir. 1977).

[291] United States v. McKnight, 799 F.3d 443, 446 (8th Cir. 1986) (approving jury instruction).

[292] See United States v. Oberle, 136 F.3d 1414, 1422 (10th Cir. 1998).

commission by some act.

Aiding and abetting is a specific intent crime.[293] As a result, for example, voluntary intoxication is a defense to the crime of aiding and abetting.[294] This is true even if voluntary intoxication is not a defense to the underlying crime.[295]

VI. Use of an Intermediary -- 18 U.S.C. § 2(b)

A. Generally

Traditional aider-and-abettor liability under 18 U.S.C. § 2(a) requires that the principal and the defendant share criminal intent. Because a defendant using an innocent dupe to commit a crime is no less culpable than a defendant assisting another in the commission of a crime, Congress passed 18 U.S.C. § 2(b) to criminalize the use of an intermediary to commit a crime. This section provides:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The quintessential case is an employer who instructs an employee to mail a fraudulent document. Even though the employer did not use the mails directly, he or she still is guilty of mail

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[293] See United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997); but see United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989).

[294] See United States v. Hatatley, 130 F.3d 1399, 1404-05 (10th Cir. 1997).

[295] See Id. at 1404 (voluntary intoxication is not a defense to voluntary manslaughter but is a defense to aiding and abetting voluntary manslaughter).

fraud.[296]

The primary burden of the government is to show that the defendant "willfully cause[d] an act to be done by another which would be illegal if he did it himself."[297] The actions of the intermediary must be such that, had the defendant done them personally, the defendant would have committed a crime.

B. Intent

Unlike traditional aider-and-abettor liability, the government need not prove that the intermediary had any criminal intent.[298] The intermediary's mental state is wholly irrelevant; the government need not prove that the intermediary was innocent either.[299] The government must prove that the defendant had the mental state that would be required for a violation of the underlying offense.[300]

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[296] See Pereira v. United States, 347 U.S. 1 (1954).

[297] United States v. West Indies Transport, Inc., 127 F.3d 299, 307 (3d Cir. 1997).

[298] See, e.g., United States v. West Indies Transport, Inc., 127 F.3d 299, 307 (3d Cir. 1997); United States v. Walser, 3 F.3d 380, 388 (11th Cir. 1993) ("an individual is criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime"); see also United States v. Laurins, 857 F.2d 529, 535 (9th Cir. 1988).

[299] See United States v. Rapoport, 545 F.2d 802, 806 (2d Cir. 1976).

[300] See United States v. Gabriel, 125 F.3d 89, 99, 101 (2d Cir. 1997); United States v. Trie, 1998 WL 427550 at *4- *6 (D.D.C. July 17, 1998) (holding same but noting elements of such proof would be higher in federal election law context); United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994) (same).

C. Particular Cases

Courts have allowed charges for using an intermediary to commit a perjury or false statements offense.[301]

- The Eleventh Circuit found that a defendant was guilty of perjury where he gave a witness a false document and then allowed the witness to introduce it into evidence at a trial. Even though the defendant was not under oath and the witness did not commit perjury because he was not aware that the document was false, the defendant's actions were sufficient to trigger criminal liability under § 2(b).[302]
- In another case, the Second Circuit found sufficient evidence to support a conviction where the defendant used an intermediary in filing a false report. There, the defendant knew that the intermediary was preparing the report, "knew that the portfolio reports were false and misleading," and failed to provide correct information though requested to do so by the preparer. This evidence was found sufficient to support the conviction.[303]

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[301] See, e.g., United States v. Nolan, 136 F.3d 265 (2d Cir. 1998) (filing false reports under 18 U.S.C. § 1027); United States v. West Indies Transport, Inc., 127 F.3d 299, 307 (3d Cir. 1997) ("When a defendant uses an innocent intermediary to . . . make false statements to the government, the criminal intent of the intermediary is not an element of the crime."); United States v. Gabriel, 125 F.3d 89, 99 (2d Cir. 1997) (false statements in violation of 18 U.S.C. § 1001); United States v. Walser, 3 F.3d 380, 388 (11th Cir. 1993) (perjury).

[302] See Walser, 3 F.3d at 389.

[303] Nolan, 136 F.3d at 272.

- In a third case, a jury found a defendant guilty of making false statements in the form of false packing slips. The court found that evidence that the defendant "had some influence" over the slip preparers and "used that influence to cause [the preparers] to prepare the false slip" was sufficient to support criminal liability.[304]

VII. Evidentiary Issues

We briefly summarize in this section certain evidentiary principles that appear to bear on the conduct described in this Referral. It is, of course, for Congress to assess the evidence as it sees fit. These principles, however, bore upon the Office's own judgment as to the substance and credibility of the information presented.

A. Circumstantial Evidence

Courts distinguish "direct evidence" from "circumstantial evidence." A witness may provide direct evidence of a fact by stating the fact in testimony based on personal knowledge.[305] For example, a witness might provide direct evidence that a defendant destroyed documents by testifying that he or she saw the defendant shred them.

A witness may supply circumstantial evidence of a fact by

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[304] See Gabriel, 125 F.3d at 100.

[305] See Black's Law Dictionary 460 (6th ed. 1990) (defining direct evidence as "testimony from a witness who actually saw, heard or touched the subject of questioning").

testifying about circumstances from which the jury may infer the fact.[306] For instance, a witness may provide circumstantial evidence that the defendant destroyed documents by testifying that the documents were intact when the defendant went to examine them, but were found shredded immediately afterward. Although the witness did not see the defendant destroy the documents, the jury may infer that the defendant shredded them based on the witness's testimony.

One Court of Appeals has explained the difference between direct evidence and circumstantial evidence as follows:

> The distinction between these two types of evidence is that with direct evidence, the jury does not have to draw inferences to decide whether the fact asserted exists, the evidence directly supports the existence or non-existence of the fact and the jury's involvement is to decide whether they believe what the witness says. With circumstantial evidence the jury must decide whether to draw the inference or connection between the evidence presented and the fact asserted.[307]

Even though the two types of evidence may be distinguished they are of equal probative weight.[308] A jury may convict a

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[306] Black's Law Dictionary, at 243 (defining circumstantial evidence as "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.").

[307] United States v. Henderson, 693 F.2d 1028, 1031 (11th Cir. 1982).

[308] Thus, the standard jury instruction on the consideration of evidence reads:

> There are two types of evidence you may consider. One is direct evidence -- such as testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of circumstances that tend to prove or disprove the existence or nonexistence of

defendant of a crime based solely on circumstantial evidence, provided that the evidence proves the defendant guilty of each of the elements of the crime beyond a reasonable doubt.[309] For example, in one case a jury convicted the defendant of obstruction of justice based solely on circumstantial evidence that he had altered documents sought by a subpoena. Although the defendant denied wrongdoing, the court stated: "A reasonable jury was entitled to believe the government's circumstantial evidence and disbelieve [the defendant]."[310]

Civil proceedings usually require proof only by a preponderance of the evidence. Because circumstantial evidence can prove guilt beyond a reasonable doubt, it naturally also can satisfy this lower standard.[311] As the Supreme Court stated in one civil case, "direct evidence of a fact is not required.

> certain other facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.03.

[309] See Holland v. United States, 348 U.S. 121, 139-140 (1954). At one time, some courts held that a jury could convict based solely on circumstantial evidence only if the evidence excluded "every reasonable hypothesis except that of guilt." Johnson v. United States, 408 F.2d 1097, 1098 (5th Cir. 1969). All of the circuits, however, now have rejected that rule. See United States v. Bell, 678 F.2d 547, 549 n.3 (5th Cir. 1982) (en banc) (listing cases), aff'd 462 U.S. 356 (1983).

[310] United States v. Brooks, 111 F.3d 365, 373 (4th Cir. 1997).

[311] See Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 469 & n.21 (1972).

Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[312]

B. Inferences from False Exculpatory Testimony

Criminal suspects often make exculpatory statements to investigators or to the courts (an alibi, for example). The courts have held that, if a jury determines that the exculpatory statement was false, it may draw an inference adverse to the suspect. In particular, the jury may consider the false statement to be circumstantial evidence that the defendant had a consciousness of guilt.[313] The jury may draw this inference because an innocent person generally does not have a reason to fabricate a description of his or her conduct.[314]

One defendant, for example, told the police that he could not have committed a robbery because he was at a different location when the robbery occurred. The prosecution later produced evidence contradicting this statement. The court of appeals held that the trial judge properly had instructed the jury that, if it found the defendant's testimony false, it could infer that the defendant was conscious of his guilt.[315]

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[312] Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960).

[313] See Government of Virgin Islands v. Testamark, 570 F.2d 1162, 1168 (3d Cir. 1978).

[314] See United States v. Littlefield, 840 F.2d 143, 148 n.4 (1st Cir.), cert. denied 488 U.S. 860 (1988).

[315] United States v. Ingram, 600 F.2d 260, 262 (10th Cir. 1979).

C. Willful Blindness

The term "willful blindness" refers "to a situation where the defendant tries to avoid knowing something that will incriminate."[316] The federal courts equate willful blindness with knowledge.[317] As a result, if a federal criminal statute requires a defendant to have knowledge of a fact, proof of deliberate ignorance of the fact generally will suffice to establish proof of knowledge of the fact.[318]

For example, a participant in a drug smuggling operation deliberately avoided determining that a secret compartment in an automobile contained marijuana.[319] He argued that a jury could not convict him of knowingly importing drugs into the United States because he did not actually know that the compartment contained drugs. The Ninth Circuit rejected this argument, holding that "deliberate ignorance and positive knowledge are equally culpable."[320]

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[316] Black's Law Dictionary 1600 (6th ed. 1990).

[317] See United States v. Campbell, 977 F.2d 854, 858-59 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); United States v. Antzoulatos, 962 F.2d 720, 724 (7th Cir.), cert. denied, 506 U.S. 919 (1992).

[318] See Leary v. United States, 395 U.S. 6, 46 n.93 (1969) (adopting Model Penal Code rule that "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

[319] United States v. Jewell, 532 F.2d 697, 698 (9th Cir.), cert. denied, 426 U.S. 951 (1976).

[320] Id. at 704.

Federal judges may instruct juries about willful blindness when the facts warrant. "A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance."[321]

D. Testimony of a Cooperating Witness

In general, courts agree that the testimony of a witness who has been immunized or entered into a plea bargain in return for the his or her cooperation must be viewed with caution. Caution, however, does not equate to disregard and courts are equally clear that a cooperating witness's testimony is competent and forms a lawfully sufficient basis for conviction if the finder of fact determines it to be credible.[322]

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[321] United States v. Gruenberg, 989 F.2d 971, 974 (8th Cir.) (quoting United States v. Long, 977 F.2d at 1264, 1271 (8th Cir. 1992)), cert. denied 510 U.S. 873 (1993). The court in Gruenberg approved the following jury instruction on willful blindness:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

989 F.2d at 974.

[322] Thus, the standard jury instruction reads:

The testimony of an immunized witness, someone who has

Giving this type of instruction is generally considered "the better practice."[323] However, this cautionary instruction is not mandatory; failure to give such an instruction is not usually considered reversible error.[324]

Indeed, notwithstanding the cautionary instructions recommended, there "is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe

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> been told either that (his) (her) crimes will go unpunished in return for testimony or that (his) (her) testimony will not be used against (him) (her) in return for that cooperation, must be examined and weighed by the jury with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the government.
>
> _____ may be considered to be an immunized witness in this case.
>
> The jury must determine whether the testimony of the immunized witness has been affected by self-interest, or by the agreement (he) (she) has with the government, or by (his own) (her own) interest in the outcome of this case, or by prejudice against the defendant.

Devitt, Blackmar, Wolff, & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.03 (1992).

[323] Caminetti v. United States, 242 U.S. 470, 495 (1917) ("better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence").

[324] United States v. McGinnis, 783 F.2d 755, 758 (8th Cir. 1986); see also United States v. Braxton, 877 F.2d 556, 565 (7th Cir. 1989) (better practice is to instruct but failure to do so is not reversible error if corroborating evidence exists); United States v. Shriver, 838 F.2d 980, 983 (8th Cir. 1988) ("no absolute and mandatory duty is imposed upon the court to advise the jury by instruction that they should consider the testimony of an uncorroborated accomplice with caution")(internal quotations and citation omitted); but see United States v. Morgan, 555 F.2d 238, 242-43 (9th Cir. 1977) (defendant entitled to cautionary jury instruction).

them."[325] Decisions as to the credibility of a cooperating witness's testimony remain for the jury to make.[326]

In addition, courts agree that evidence of a cooperating witness's duty to testify truthfully as part of the plea agreement may be admitted into evidence.[327] Thus, evidence concerning a plea agreement and its provisions may have both a bolstering effect (because of the truthfulness requirement) and an impeaching effect (because of the promise of leniency) on the witness's credibility.[328] Hence, the entirety of the plea agreement allows the jury to accurately assess the witness's credibility.[329]

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[325] Caminetti, 242 U.S. at 495 (citation omitted); see also United States v. Winter, 663 F.2d 1120, 1134 n.24 (1st Cir. 1981) (approving instruction that reads, in part, "[o]ne who testifies with the benefit of immunity, with a promise from the government that he will not be prosecuted, does not become an incompetent witness"), cert. denied, 460 U.S. 1011 (1983).

[326] McGinnis, 783 F.2d at 758.

[327] See, e.g. United States v. Lord, 907 F.2d 1028, 1029-31 (10th Cir. 1990) (collecting cases); cf. United States v. Sobamowo, 892 F.2d 90, 95 n.3 (D.C. Cir. 1989) (witness' testimony that he was ordered by the court to cooperate as part of plea bargain was admissible). The only dispute is whether evidence of the truthfulness requirement of a plea agreement may be admitted on direct examination of the witness, as the majority of circuits permit, or whether it may only be offered as evidence in rebuttal to a challenge to the credibility of the witness, as a minority of the circuits require. See Lord, 907 F.2d at 1029-31 (describing majority rule of First, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits and contrasting with minority rule of Second and Eleventh Circuits).

[328] United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989); United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986).

[329] United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988).

E. Testimony of the Accused

As with the testimony of a cooperating witness, courts agree that the testimony of an accused who has an interest in the resolution of the allegations made against him must also be viewed with caution. Here too, caution does not equate with disregard and the courts agree that an accused's testimony is competent and may be credited by a finder-of-fact.

Thus, while "[t]he fact that [a witness] is a defendant does not condemn him as unworthy of belief, . . . at the same time it creates an interest greater than that of any other witness, and to that extent [it] affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury."[330] Accordingly courts generally agree that, while it is not mandatory, it is "not improper for [a] district court, in instructing the jury about [a] defendant's credibility as a witness, to point out [the] defendant's vital interest in the outcome of the case."[331] Typical of such instructions is one reminding the jury of a defendants "very keen personal interest in the result of your verdict."[332]

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[330] Reagan v. United States, 157 U.S. 301, 305 (1895).

[331] United States v. Firgurski, 545 F.2d 389, 392 (4th Cir. 1976); see also United States v. Anderson, 642 F.2d 281, 286 (9th Cir. 1981).

[332] United States v. Ylda, 643 F.2d, 348, 352 (5th Cir. 1981); see also United States v. Stout, 601 F.2d 325, 329 (7th Cir. 1979) (accused has a "vital interest in the outcome of his trial"), cert. denied, 444 U.S. 979 (1980); United States v. Vega, 589 F.2d 1147, 1154 n.6 (2d Cir. 1978) (accused's "deep

Tab K

Monica Lewinsky Immunity Agreement

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, DC 20004
(202) 514-8688
Fax (202) 514-8802

AGREEMENT

This is an agreement ("Agreement") between Monica S. Lewinsky and the United States, represented by the Office of the Independent Counsel ("OIC"). The terms of the Agreement are as follows:

1. Ms. Lewinsky agrees to cooperate fully with the OIC, including special agents of the Federal Bureau of Investigation ("FBI") and any other law enforcement agencies that the OIC may require. This cooperation will include the following:

A. Ms. Lewinsky will provide truthful, complete and accurate information to the OIC. She will provide, upon request, any documents, records, or other tangible evidence within her custody or control relating to the matters within the OIC's jurisdiction. She will assist the OIC in gaining access to such materials that are not within her custody and control, and she will assist in locating and gaining the cooperation of other individuals who possess relevant information. Ms. Lewinsky will not attempt to protect any person or entity through false information or omission, and she will not attempt falsely to implicate any person or entity.

B. Ms. Lewinsky will testify truthfully before grand juries in this district and elsewhere, at any trials in this district and elsewhere, and in any other executive, military, judicial or congressional proceedings. Pending a final resolution of this matter, neither Ms. Lewinsky nor her agents will make any statements about this matter to witnesses, subjects, or targets of the OIC's investigation, or their agents, or to representatives of the news media, without first obtaining the OIC's approval.

C. Ms. Lewinsky will be fully debriefed concerning her knowledge of and participation in any activities within the OIC's jurisdiction. This debriefing will be conducted by the OIC, including attorneys, law enforcement agents, and representatives of any other institutions as the OIC may require. Ms. Lewinsky will make herself available for any interviews upon reasonable request.

D. Ms. Lewinsky acknowledges that she has orally proffered information to the OIC on July 27, 1998, pursuant to a proffer agreement. Ms. Lewinsky further

represents that the statements she made during that proffer session were truthful and accurate to the best of her knowledge. She agrees that during her cooperation, she will truthfully elaborate with respect to these and other subjects.

E. Ms. Lewinsky agrees that, upon the OIC's request, she will waive any evidentiary privileges she may have, except for the attorney-client privilege.

2. If Ms. Lewinsky fully complies with the terms and understandings set forth in this Agreement, the OIC: 1) will not prosecute her for any crimes committed prior to the date of this Agreement arising out of the investigations within the jurisdiction of the OIC; 2) will grant her derivative use immunity within the meaning and subject to the limitations of 18 United States Code, Section 6002, and will not use, in any criminal prosecution against Ms. Lewinsky, testimony or other information provided by her during the course of her debriefing, testimony, or other cooperation pursuant to this agreement, or any information derived directly or indirectly from such debriefing, testimony, information, or other cooperation; and 3) will not prosecute her mother, Marsha Lewis, or her father, Bernard Lewinsky, for any offenses which may have been committed by them prior to this Agreement arising out of the facts summarized above, provided that Ms. Lewis and Mr. Lewinsky cooperate with the OIC's investigation and provide complete and truthful information regarding those facts.

3. If the OIC determines that Ms. Lewinsky has intentionally given false, incomplete, or misleading information or testimony, or has otherwise violated any provision of this Agreement, the OIC may move the United States District Court for the District of Columbia which supervised the grand jury investigating this matter for a finding that Ms. Lewinsky has breached this Agreement, and, upon such a finding by the Court, Ms. Lewinsky shall be subject to prosecution for any federal criminal violation of which the OIC has knowledge, including but not limited to perjury, obstruction of justice, and making false statements to government agencies. In such a prosecution, the OIC may use information provided by Ms. Lewinsky during the course of her cooperation, and such information, including her statements, will be admissible against her in any grand jury, court, or other official proceedings.

4. Pending a final resolution of this matter, the OIC will not make any statements about this Agreement to representatives of the news media.

5. This is the entire agreement between the parties. There are no other agreements, promises or inducements.

If the foregoing terms are acceptable, please sign, and have your client sign, in the spaces indicated below.

Date: July 28, 1998

KENNETH W. STARR
Independent Counsel

I have read this entire Agreement and I have discussed it with my attorneys. I freely and voluntarily enter into this Agreement. I understand that if I violate any provisions of this Agreement, the Agreement will be null and void, and I will be subject to federal prosecution as outlined in the Agreement.

Date: July 28, 1998

Monica S. Lewinsky

Counsel for Ms. Lewinsky:

Jacob A. Stein

Plato Cacheris