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Clients From Hell

Mr. President, you should have listened to us.

By [Michael McMenamin](#)

The decision in the Paula Jones case came as a big surprise. It shouldn't have. Heaven knows we here at REASON tried to do our civic duty, unpleasant as it was, nearly four years ago—we told President Clinton how he could beat the rap with minimal political fallout. (See "[Defending The President](#)," August/September 1994.)

Did he listen? Judge for yourself. Rather than fork over the price of a REASON subscription, Clinton chose (a) to hire one of Washington's highest-priced lawyers with, at the time he was hired, precious little experience in sexual harassment law, and (b) to spend in excess of \$4 million in legal fees for what should otherwise have been a routine case costing him less than \$100,000. In the process, Clinton has placed his presidency in peril. And for what? While it couldn't happen to a more deserving guy, it didn't have to be this way. At REASON, we don't need hindsight to conclude that Clinton unwisely chose to utilize Nixonian strategy and tactics while ignoring his strongest issue—sexual harassment law was on his side, even if Paula was telling the truth. Indictment or impeachment looms large over his lame-duck presidency as a consequence.

What REASON said on quid pro quo harassment: *Jones claims [she was given] a job transfer and failed to receive merit pay increases in retaliation for having turned Clinton down. Most of what we will need should be found in Jones's personnel file with the Arkansas state government. If it contains a legitimate, non-discriminatory reason for her transfer, we are halfway home....As for the pay claim, there already have been news reports that Jones received at least one merit increase and three cost-of-living increases in less than two years. If we can prove all this, her quid pro quo claim is in deep trouble.*

What Judge Susan Wright said: "The Court has carefully reviewed the record in this case and finds nothing in plaintiff's employment records, her own testimony, or the testimony of her supervisors showing that plaintiff's reaction to Governor Clinton's alleged advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment."

What REASON said on hostile environment sexual harassment: *Our argument here is that what Clinton is claimed to have done is not, repeat not, illegal sexual harassment. Boorish, bad taste, clumsy—but not illegal....Clinton's alleged conduct is obviously more egregious [than that of Clarence Thomas and Robert Packwood] but still eminently defensible under existing law. But our real ace in the hole, what's going to get us out of this case quickly, is one additional and critical fact: It only happened once. Not one federal court has ever found a single incident to be sufficiently severe to constitute a hostile environment, even though some federal courts have admitted that a single severe incident—for example, rape or violent sexual assault—could do so.*

What Judge Wright said: "While the alleged incident in the hotel, if true, was certainly boor-

ish and offensive, the Court has already found that the Governor's alleged conduct does not constitute sexual assault. This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state the claim of hostile work environment sexual harassment."

OK, you say, if it was that obvious four years ago how strong Clinton's legal position was (and it was that obvious), why did the case take so long? Two answers: Bad strategy. And even worse tactics.

REASON's advice on strategy: *We're talking strategy, not public relations. And our strategy is simple. It's to win. At the earliest possible time. And before the plaintiff has much opportunity to take sworn testimony from potentially embarrassing witnesses like state troopers, Gennifer Flowers, and other Clinton mistresses.*

Clinton's strategy: It's not clear, even in hindsight, that Clinton and his legal team had a coherent strategy other than stall, stonewall, delay, and win at the last possible moment, all the while ignoring that such a course could inflict maximum damage on the presidency.

REASON's advice on asserting presidential immunity: *What about presidential immunity? The technical legal phrase is "the Nixon gambit." Should we use it? Well, we could....But it would be wrong, that's for sure. It's a delaying tactic, and it's bad public relations....All that guarantees is that this case is going to be around for the next two years, through the 1996 presidential election. So keep in mind our strategy: It's win, stupid, as soon as we can. We don't need delays.*

What Clinton did: Well, he couldn't resist pulling a Nixon. So the Supreme Court knocked him down 9-0, and the case hung around long enough for Lewinsky and Tripp to surface. And now he's making the same Nixonian mistake again by claiming executive privilege in connection with Ken Starr's criminal obstruction of justice investigation involving, among other things, someone close to Clinton preparing "talking points" for Monica to deliver to Tripp to change her testimony about Kathleen Willey. When this reaches the Supreme Court, Clinton will again lose 9-0.

REASON's advice on pre-trial tactics: *Clinton's lawyer, Bob Bennett, is in the Washington office of a huge New York law firm known for its hardball, take-no-prisoners litigation style. He might well take the same approach here and harass Jones and her lawyers by burying them in paper with motions, briefs, document requests, interrogatories, requests for admissions, and deposition notices—all the weapons in the modern litigator's arsenal. He might well do that, but it would be a mistake. Why? Keep in mind our strategy. We want a quick victory before Jones's lawyers have a chance to take their own depositions—testimony under oath—of Arkansas state troopers, Gennifer Flowers, and other assorted Clinton mistresses.*

What Clinton did: No weapon in the modern litigator's arsenal was left unused by Clinton's lawyers. And by not going for a quick victory, Clinton had his own deposition taken, exposing himself, so to speak, to Ken Starr's investigation of perjury charges against him.

REASON's advice on seeking an early deposition of Jones: *[W]e promptly take the*

depositions of Jones and the Arkansas state employees who ordered her transfer and granted her pay increases. We limit our questions to the oral-sex request, the transfer and merit pay, and whether the hotel incident affected the way she did her job. We then go to the judge and ask her to dismiss the case on the two substantive legal issues we examined earlier—quid pro quo and hostile environment. We also ask the judge to prohibit Jones's lawyers from taking any potentially embarrassing depositions from troopers or bimbos pending her decision on our request.

What Clinton did: He stalled and delayed, waiting over three years before he deposed Jones. By then, she had changed lawyers, and taken all those “potentially embarrassing depositions from bimbos” we had warned him about. Moreover, giving Jones’s lawyers all this time to research Bill’s past is exactly what led to Monica Lewinsky, Linda Tripp, Kathleen Willey, Jane Does 1 through 4, and a grand jury investigating Clinton for perjury, suborning perjury, and the obstruction of justice.

Why did Clinton choose a defense which ended up jeopardizing his presidency? Who knows? Maybe it was guilt. Or arrogance. Or paranoia. Maybe all three. Trial lawyers have a saying, “Sometimes you win; sometimes the client loses.” It’s true more often than you think. In the Paula Jones case, his lawyer won, but Clinton lost—if not his presidency, then certainly his place in history. Like a marriage, you rarely know what really goes on between a lawyer and his client. While some may believe that Bob Bennett’s inexperience in employment law hurt his client in the early days of the Jones case, Clinton and his wife were sophisticated clients, Yale lawyers both, and no one can doubt they were calling the shots, not their lawyer. “Clients from hell” is the phrase most often uttered by my sisters and brothers at the bar about those who insist on micromanaging every detail of their case. The Clintons got the defense they deserved. It was the country that deserved better.

What Clinton should do now: Put down the drum. Drop the celebratory cigar. Recall Churchill: “In defeat, defiance; in victory, magnanimity.” If Jones appeals, do the honorable thing and settle the case. Pay Jones the damages your lawyers discussed earlier and apologize for the pain the ordeal has caused her. Why? Because Jones has a better than even chance of beating you on appeal. You heard it here first. Sexual harassment law is not what it was four years ago. If the CEO of a Fortune 500 company did today what Clinton is accused of, there are few federal judges who would keep that case from a jury. And the U.S. Court of Appeals for the 8th Circuit has not been a friendly venue for Clinton, even if its record on sexual harassment is a conservative one. As we told you four years ago: *“There’s always a first time for anything, and the Supreme Court of Michigan has already held that a single incident created a hostile environment.”*

So, Mr. President, the choice is yours. Listen to REASON. Or not. Try and get it right this time. You’re not in Arkansas any more.

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