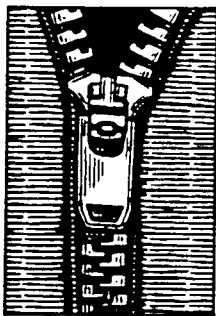


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### ZIPPERGATE UPDATE

## Attorney-client privilege: A dead issue?



The banner headlines blared **CASE DISMISSED** last week, and the dismissal of **Paula Jones's** sexual-harassment suit against **President Clinton** was the topic of a sea of analysis. All but lost was another potentially huge development: the Supreme Court agreed to consider whether independent counsel **Kenneth Starr** can see notes of a conversation between the late **Vincent Foster** and his lawyer, **James Hamilton**.

Hamilton's three pages of notes could be far more explosive, from a legal point of view, than even the worst imaginable outcome of the Jones case. Starr has contended that he needs the notes in connection with his investigation of the role that the Clintons, especially **Hillary**, played in the 1993 sacking of White House Travel Office personnel to make room for Clinton cronies from Arkansas. This involved an attempted use of the FBI to scare workers out of their jobs by conducting bogus criminal investigations. Such abuse of power might be an impeachable offense for Bill and a felony for Hillary, especially because she has denied under oath having any part in the ugly affair.

That the court is even considering whether a lawyer's conversation with a client can be revealed is surprising from a civil-liberties perspective. Attorney-client confidentiality is one of the oldest privileges known in the system of common law that the United States inherited from England. (Also protected are conversations with clergy and confidences between husband and wife.) The theory behind this privilege is that unless a client is absolutely certain what he tells his attorney will be kept secret, the client will not be able to speak honestly with the lawyer, thereby compromising the constitutional right to obtain effective legal advice.

But in a decision that shocked the legal world, a three-judge panel of the US Court of Appeals in Washington ruled last August that when the client has died, the privilege may not survive: the question is decided through a delicate "balancing test" that weighs the reasons for preserving the privilege against a prosecutor's need for information. The decision went against the vast weight of precedent in both state and federal courts. Here in Massachusetts, the Supreme Judicial Court upheld the sanctity of the lawyer-client privilege in 1990, after the Suffolk County DA had tried to force disclosure of the substance of statements that accused wife-murderer **Charles Stuart** made to his lawyer before committing suicide.

It could well be a year before the Supreme Court rules on whether Starr is entitled to see Hamilton's notes, but the delay is of no concern to Starr, whose mandate under the independent counsel law has no time limit. Civil libertarians and others are worried that the court will eviscerate a privilege that is essential to the proper functioning of the legal system. The educated betting, however, is that the justices will find the privilege absolute. If not, the Clintons may wish that a sex scandal was their worst problem.



**FOSTER:** will he speak from the grave?