

2551

Tab 81

(Cite as: 1998 WL 551961 (E.D.Ark.))

Paula Corbin JONES, Plaintiff,
v.
William Jefferson CLINTON and Danny Ferguson,
Defendants.

No. LR-C-94-290.

United States District Court,
E.D. Arkansas,
Western Division.

Sept. 1, 1998.

MEMORANDUM AND ORDER

SUSAN WEBBER WRIGHT, District Judge.

*1 On May 6th, 1994, the plaintiff in this case, Paula Corbin Jones, filed suit against William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, seeking damages for alleged actions beginning with an incident that is said to have occurred in a hotel suite in Little Rock, Arkansas, on May 8th, 1991. The case ultimately made its way to the Supreme Court of the United States where it was determined that plaintiff's lawsuit could proceed while the President is in office. See *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945(1997). Following that decision, and following this Court's partial denial of the President's and Ferguson's subsequent motion for judgment on the pleadings, see *Jones v. Clinton*, 974 F.Supp. 712 (E.D.Ark.1997), formal discovery commenced. Because of the salacious nature of much of the discovery and the media's intense and often inaccurate coverage of this case, this Court, on October 30th, 1997, entered a Confidentiality Order on Consent of all Parties, thereby imposing limits on the dissemination of information concerning a large portion of discovery and placing under seal court filings dealing with discovery. The Court took this action to help ensure that a fair and impartial jury could be selected in the event this matter went to trial by limiting prejudicial pre-trial publicity. Following entry of the Confidentiality Order, various media entities filed a Motion for Leave to Intervene, Motion to Modify and/or Rescind Confidentiality Order and Motion for Access to Court Records and Discovery. [FN1] Other parties also sought rescission of the Confidentiality Order and for access to Court records and discovery. By

Memorandum and Order dated March 9th, 1998, this Court denied the motions seeking to rescind and/or modify the Confidentiality Order. In its Memorandum and Order, the Court pointed out the need to ensure a fair trial and, further, that there existed a need to protect the privacy interest of third-party witnesses pursuant to Fed.R.Civ.P. 26(c). [FN2] The media entities appealed. Following the filing of the notice of appeal but before the Court of Appeals for the Eighth Circuit could issue an opinion on the matter, this Court granted the President's and Ferguson's motions for summary judgment and entered judgment dismissing this case. See *Jones v. Clinton*, 990 F.Supp. 657 (E.D.Ark.1998). The Eighth Circuit subsequently issued an order dismissing the media entities' appeal and directing this Court to consider on remand the need for keeping its Confidentiality Order in place in view of the grant of summary judgment. See *Jones v. Clinton*, 138 F.3d 758 (8th Cir.1998). The Eighth Circuit's mandate was filed in this Court on June 3rd, 1998. In accordance with the Order of the Eighth Circuit, this Court, by Order dated June 8th, 1998, asked the parties to file briefs setting forth their positions, if any, on the need for keeping in place the Confidentiality Order. Following submission of the briefs outlining the parties' respective views, this Court, by Memorandum and Order dated June 30th, 1998, vacated in large part the Confidentiality Order and directed that a substantial portion of the record in this matter be unsealed. In so ruling, the Court determined that the Confidentiality Order shall remain in effect with respect to the identities of any Jane Does who may be revealed in the Court record, in any materials in possession of the parties that have not been filed of record, and in any public statements. In addition, the Court determined that all videotapes of depositions taken in connection with this lawsuit shall remain under seal. Now before the Court is a motion by the President for reconsideration of this Court's decision to partially unseal the record and to stay the June 30th Memorandum and Order. The plaintiff and the media have responded to the President's motion and the President has filed a reply to the plaintiff's and the media's responses. Having considered the matter, the Court grants in part and denies in part the President's motion for reconsideration.

I.

*2 The President argues that this Court should

reconsider the June 30th, 1998 Memorandum and Order because this Court may not have been aware of all the discovery material that remains under seal, much of which he says was not filed with the Court or attached to any motion; there is no right of access to the material at issue; the parties' fair trial interests would be prejudiced and that prejudice cannot be mitigated by the passage of time; the privacy interests protected are too narrow; and unsealing would permit plaintiff, the media and others to misuse the Court's processes and Court files for profit or political gain.

In response, the media entities argue that the President's motion raises no new issues and should be denied for that reason alone. They further argue that this Court's order represented a proper exercise of its discretion in balancing privacy rights against the interest of the media and the public in full and accurate disclosure of the history of this case and the course of the discovery process, and that there is no basis for the President's contention that much of the record in this litigation over serious allegations of official misconduct should be concealed from public view long after any circumstances require it.

For her part, the plaintiff has altered her previous position on the matter and now argues for the complete unsealing of the record. [FN3] She argues that it is in the best interests of all parties concerned, as well as the rights of the public and media, to disclose all the discovery and evidence relating to the case at this time, with the single exception of the identifying testimony relating to a certain Jane Doe. Plaintiff further argues that this Court has enunciated no rational justification for retaining the seal on videotapes of deposition testimony and that the Court's Order with regard to the videotapes constitutes a taking of her property without just compensation or due process pursuant to the Fifth and Fourteenth Amendments.

II.

At issue are three categories of materials: (1) court filings that are under seal; (2) discovery materials in the hands of the parties that are not filed with the Court but are nevertheless under seal as subject to the Confidentiality Order; and (3) videotaped and transcribed depositions. [FN4] The Court will address these categories in turn.

1.

With respect to the first category of materials--court filings that are under seal--the Court has determined that there are contained in the Court's files matters under seal which do not at this time impact upon the parties' rights to a fair trial or the interests of the Jane Does in maintaining privacy, two interests for implementation of the Confidentiality Order. In that regard, the Court will review all materials on file with the Court and will release on a periodic basis such materials, either in whole or as redacted, that the Court determines will not (1) impact upon the parties' rights to a fair trial and/or (2) do not adversely affect the privacy interests of any Jane Does. In releasing such materials, the Court will attempt to ascertain the negative inferences any such materials may have on one party or the other and will attempt, where possible, to coordinate the release of such materials on equal basis. The Court will not, however, release any materials involving Jane Does, whether in whole or as redacted, without first giving those Jane Does and the parties an opportunity to object to their release. While the President may be correct that such review and/or redaction of the record prior to release may prove to be a burdensome task, this Court must follow its duty notwithstanding the difficulty of any particular course of action.

2.

*3 With respect to the second category of materials--discovery materials in the hands of parties that are not filed with the Court but are nevertheless under seal as subject to the Confidentiality Order--the Court directs that no such materials in the hands of the parties be released or otherwise disclosed without first obtaining Court approval. In approving the release of any materials, whether in whole or as redacted, the Court will utilize the test previously enunciated, i.e. whether the release of any such materials impacts upon the parties' rights to a fair trial and/or whether such materials adversely affect the privacy interests of any Jane Does.

3.

With respect to the third and final category of materials--the videotaped and transcribed depositions of the parties--the Court will maintain under seal the videotapes of any depositions taken in connection

--- F.Supp.2d ----

(Cite as: 1998 WL 551961, *3 (E.D.Ark.))

with this lawsuit, whether they be videotapes of the parties or of non-party witnesses. As the Court has previously noted, the videotapes of the depositions are not judicial records to which any common law right of public access attaches and, with respect to the President, there is a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting President. See *United States v. McDougal*, 103 F.3d 651, 656-659 (8th Cir.1996), cert. denied, --- U.S. ----, 118 S.Ct. 49, 139 L.Ed.2d 15 (1997).

With respect to transcripts of the depositions of the parties, however, the Court will permit these transcripts to be released in their entirety provided, however, that all identifying information of any Jane Does has been redacted and the redaction has been approved by the Court. It should be noted that the plaintiff and Ferguson do not object to their depositions being released in their entirety. Although the President does object, his deposition has largely been made public and has been the subject of intense scrutiny in the wake of his public admission that he was "misleading" with regard to his relationship with Monica Lewinsky. [FN5] That being the case, the Court determines that no fair trial interests are implicated by the release, as redacted and approved by this Court, of the transcripts of his or the other parties' depositions.

III.

Having set forth the procedure this Court will utilize in unsealing a large part of the record, the Court now addresses plaintiff's claim that she has a Fifth Amendment property interest in discovery materials, namely the videotapes of depositions which she noticed. Plaintiff cites no authority for such a proposition and, as correctly noted by the President, the Supreme Court has held that "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Indeed, as a general matter, plaintiff would not have any right to the material at issue but for the discovery procedures set forth in the Federal Rules of Civil Procedure. The Court thus rules that plaintiff has no property interest in the discovery materials she has amassed.

*4 Likewise, the Court rejects any assertion by

plaintiff that this Court is impeding upon First Amendment interests in the discovery materials she has amassed in this case. See *Seattle Times*, 467 U.S. at 33-37 (holding that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information," and that "where a protective order is entered on a showing of good cause as required by Rule 26(c) [of the Federal Rules of Civil Procedure], is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment").

IV.

One final matter concerns motions by two Jane Does to intervene and to reconsider the Court's June 30th, 1998 Memorandum and Order, both of which were filed for purposes of protecting their privacy interests, a motion by non-party deponent Dolly Kyle Browning for a Protective Order in which she requests that certain portions of her deposition transcript and exhibits remain sealed to protect the privacy of persons with little or no connection with the facts underlying this action and to preserve proprietary information, and a motion by the Office of Independent Counsel ("OIC") to maintain the confidentiality of its March 27th, 1998 filing, i.e., "In Camera Submission of the United States in Support of [the United States'] Motion for Limited Intervention and a Stay of Kathleen Willey's Further Deposition." The motions of the two Jane Does to intervene are granted. [FN6] Those portions of their motions to reconsider are granted to the extent set forth in today's Memorandum and Order. The motion of Dolly Kyle Browning for a Protective Order is granted as well. If and/or when the record in this matter is unsealed (either in whole or part), [FN7] the Court will address the concerns set forth in Ms. Browning's motion at that time. Finally, the Court grants OIC's motion and will maintain the confidentiality of its March 27th, 1998 filing, i.e., "In Camera Submission of the United States in Support of [the United States'] Motion for Limited Intervention and a Stay of Kathleen Willey's Further Deposition."

V.

The parties are hereby given until and including Tuesday, September 15th, 1998, in which to file a

notice of appeal from today's decisions. Assuming an appeal is filed, today's decision will be stayed in its entirety pending the resolution of any such appeal. If no appeal is filed, the Court will proceed to unseal the record as set forth above. All court filings unsealed in accordance with today's decision will be posted on the Court's website beginning on Monday, September 28th, 1998, at the following address: www.ark.uscourts.gov. Future documents unsealed in accordance with today's decision will be posted at the same address. Because it may be necessary for the Court to periodically have phone conferences to address any objections that may be raised to the release of a particular document, the Court cannot provide a precise schedule setting forth the times that any documents will be released. Accordingly, the Court will not announce any such postings in advance, and neither the Court nor the Clerk's Office will answer media inquiries about the timing of any such postings. The Court will be reviewing documents for possible unsealing and a barrage of calls could interfere with this process.

VI.

*5 For the foregoing reasons, the Court grants in part and denies in part the President's motion for reconsideration. The Confidentiality Order is hereby modified as set forth above. The motions of the Jane Does to intervene and to reconsider are granted to the extent set forth above, and the motions of Dolly Kyle Browning and OIC are granted as well.

IT IS SO ORDERED this 1st day of September, 1998.

FN1. The media entities that joined in this motion are as follows: Pulitzer Publishing Company, The New York Times Company; Associated Press, USA Today, a division of Gannett Satellite Information Network, Inc.; Cable News Network, Inc.; Newsday, Inc.; National Broadcasting Company, Inc.; CBS, Inc.; American Broadcasting Companies, Inc.; Time Inc.; Little Rock Newspapers, Inc.; and The Reporters Committee for Freedom of the Press. Following the filing of

this motion, two additional media entities, Fox News Network, LLC, and The Society of Professional Journalists, filed a motion seeking the same relief.

FN2. Rule 26(c) provides that "[u]pon motion by a party or by the person from whom discovery is sought ... and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...."

FN3. Plaintiff initially took no position on the unsealing of the record but later submitted a pleading that argued for the need to keep in place the Confidentiality Order. In her most recent pleading, plaintiff withdraws her consent to the Confidentiality Order and argues for the complete unsealing of the record.

FN4. Portions the transcribed depositions of parties and various witnesses have been made part of the Court record by virtue of the briefing on the President's and Ferguson's motions for summary judgment, or by motions involving discovery issues. The latter motions currently remain under seal pursuant to the Confidentiality Order.

FN5. Although the Court has concerns about the nature of the President's January 17th, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt.

FN6. Because the Court is allowing all Jane Does the opportunity to object to the release of information which may affect their interests, the Court hereby sua sponte grants leave of all other Jane Does permission to intervene in this matter.

FN7. Assuming an appeal is filed, the Court will, of course, await the resolution of any such appeal prior to unsealing any part of the record in this case. See Section V, *infra*.

END OF DOCUMENT