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Free Speech for Judges:

A Commentary on *Lubet et al. v. Posner*

Monroe H. Freedman

Criticism of unethical judicial conduct has been leveled against Richard Posner, the widely respected former chief judge of the United States Court of Appeals for the Seventh Circuit. The critics are two widely respected legal scholars, Professors Steven Lubet and Ronald Dworkin.¹ Judge Posner, in turn, has vigorously defended himself.² Given the intellectual stature of the antagonists, it is not surprising that both sides are right. In my view, however, Judge Posner is more right.

The criticism relates to Judge Posner's book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*. The *New York Times* called it one of the ten best books of 1999, and it was a finalist for the *Los Angeles Times* Book Award. Professors Lubet and Dworkin's questions about judicial ethics relate to Judge Posner's charges that President Clinton and others committed various unlawful acts. For example, Professor Lubet notes Judge Posner's allegation that "Clinton engaged in a pattern of criminal behavior and obsessive public lying, the tendency of which was to disparage, undermine, and even subvert the judicial system of the United States."³ Elsewhere, Judge Posner suggests that President Clinton is guilty of perjury, wire fraud, criminal contempt, the making of false statements to the government, and aiding and abetting a crime.⁴

The basis for questioning Judge Posner's ethics is the Code of Judicial Conduct for United States Judges.⁵ Canon 3A(6) of the Code says that a judge should abstain from public comment about a "pending or impending proceeding in any court" if the comment might reasonably be expected to affect the outcome of the proceeding or impair its fairness.⁶

At the time *An Affair of State* was published, there was known to be an active criminal investigation by the Independent Counsel into President Clinton's conduct; also, professional disciplinary proceedings against the President in Arkansas were clearly foreseeable. Thus, Professor Lubet says, proceedings against Clinton were impending. Judge Posner protests, however, that there was no "impending proceeding" within the meaning of the Canon. He insists that "impending" does not mean "possible sometime in the future." Rather, he says, the word means "about to happen"

or "imminent." In Professor Lubet's view, however, the import of "impending proceeding" is broader, embracing any proceeding "that can be identified . . . as a dispute between recognizable parties over identifiable facts and circumstances," regardless of whether litigation has already been filed in court.⁷

Certainly in the context of the Clinton matter, Judge Posner's contention that there was no impending proceeding is a quibble. Indeed, once the Canon is properly construed, even Professor Lubet's somewhat broader definition of "impending" is also too narrow.

Judge Posner is correct in saying that his book is entitled to First Amendment protection. Moreover, in commenting on a matter of public importance—specifically, criticizing the conduct of the highest public official in the nation—Judge Posner was unquestionably exercising a "core First Amendment right." Accordingly, any limitation on his speech would have to withstand "exacting scrutiny." That means that the government (acting here through the Federal Judicial Conference) must carry the burden of demonstrating a "subordinating interest [that] is compelling." Further, the Conference must show that the regulation of that compelling interest is "closely drawn" to avoid any unnecessary abridgment of First Amendment rights.⁸

Professor Lubet says that one reason for restraining Judge Posner's speech is that "the outspoken opinion of a respected federal judge might influence the prosecutor's decision about whether or not to proceed."⁹ But think about that standard. After all, a prosecutor's decision about whether to proceed in a particular case might be influenced by the outspoken opinion of a respected member of Congress, or of another prosecutor, or of an editorial writer for the *New York Times*, or even by the outspoken opinion of a respected law professor. The slope is not only slippery but virtually bottomless. Indeed, Professor Lubet goes so far as to find it "instructive" that Judge Posner criticized Abner Mikva for publicly attacking the integrity of Kenneth Starr, since Mikva, in Judge Posner's words, was "mantled with the prestige of a former chief judge of a federal court of appeals."¹⁰ Rather than relying on Judge Posner's criticism of

Footnotes

1. E.g., Steven Lubet, *On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings*, COURT REVIEW, Summer 2000, at 4; Steven Lubet, *When Is an Investigation Merely an Investigation?*, COURT REVIEW, Summer 2000, at 7.
2. E.g., Richard A. Posner, *The Ethics of Judicial Commentary: A Reply to Lubet*, COURT REVIEW, Summer 2000, at 6.
3. Lubet, *On Judge Posner*, *supra* note 1, at 5.
4. *Id.* at 4.
5. The Federal Judicial Conference relied upon the ABA's 1972 Model Code of Judicial Conduct when, in 1973, it adopted the Code of Judicial Conduct for United States Judges. In 1990, the ABA issued a revised Model Code of Judicial Conduct. The provision

discussed here, Canon 3A(6) of the Code of Conduct for United States Judges, is in the 1990 Model Code as Canon 3A(9).

6. The first sentence of the Canon is the part that is material here. It reads: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."
7. Lubet, *On Judge Posner*, *supra* note 1, at 4.
8. See *In re Primus*, 436 U.S. 412, 432 (1978) (relating to the regulation of lawyers' speech).
9. Lubet, *On Judge Posner*, *supra* note 1, at 5.
10. *Id.*

Mikva as authority for limiting speech, Professor Lubet should have recognized it as a chilling presage of where his own argument is heading.

Professor Lubet adds, however, that because Judge Posner is a judge, his comments on a matter under investigation might “compromis[e] the neutrality of the federal judiciary.”¹¹ For my own part, I haven’t seen anything like that happen in this case. Nor, more important, does that concern—unsupported by any experience in fact—rise to the status of a “subordinating interest that is compelling.” The independent counsel, after all, was working in Washington, D.C., while Judge Posner sits in Chicago, Illinois. Thus, the judge could have no direct influence over the prosecutor, nor would he have occasion to adjudicate any controverted issue that might result from the Independent Counsel’s investigation.

The previous sentence suggests, however, that there is at least one compelling interest in limiting judges’ speech. If a judge were to comment on a controverted issue in an impending case that later came before that very judge, the judge’s impartiality might be subject to reasonable question. In that event, the judge would be required to recuse himself under the federal judicial disqualification statute.¹² To avoid that situation, Canon 3A(6) should be construed to apply to a controverted issue where there is a reasonable possibility that the issue will be contested in a case that will come before the judge for decision. Otherwise, the judge would be limiting his ability to carry out his judicial responsibilities in the public interest.

In addition, as Judge Posner rightly points out, the Canon protects a judicial candidate in Senate confirmation hearings from being pressured into taking premature positions on controversial cases that might come before her.¹³ Here again, the result would be mandatory disqualification of the judge from hearing those cases. And here again, the judge should be forbidden by the Canon from expressing an opinion on any controverted issue where there is a reasonable possibility that the issue will later come before the judge for decision.

Arguably, Professor Lubet’s expansive reading of the proscription in Canon 3A(6) is correct as a matter of plain meaning.¹⁴ That is, the literal language of the Canon appears to forbid a judge, broadly, from commenting on a proceeding in any court, regardless of how absurd it is to think that the judge might ever preside over that proceeding. What I am suggesting, on the other hand, is that the limitation on judicial speech in Canon 3A(6) be construed narrowly to apply only when there is a reasonable possibility that the proceeding will come before the judge for decision. This narrower reading would avoid uncon-

stitutionally impinging on judges’ speech (or, at least, it would avoid the difficult constitutional issue regarding judges’ core First Amendment speech).

At the same time, I would construe the word “impending” more broadly than either Judge Posner or Professor Lubet has done, so that it covers any controverted issue where there is a reasonable possibility that the issue will later come before the judge for decision.¹⁵ Reading the Canon in that way serves two compelling interests—it discourages mandatory disqualification of judges because of their prior comment on controverted issues in cases that later come before them, and it discourages senatorial pressuring of judges to commit themselves on important issues in advance of deciding those issues in cases that later come before them.

Further, in order to avoid unduly restricting the free speech of judges, as well as to avoid the kind of unfortunate debate that has occurred with respect to Judge Posner’s book, I would urge that the first sentence of Canon 3A(6) of the Code of Judicial Conduct for United States Judges, and of Canon 3A(9) of the ABA’s Model Code of Judicial Conduct, be amended to read as follows:

A judge shall not make any public comment on the merits of a case that is pending before the judge, or make any public comment on the merits of any other issue if there is a reasonable possibility that the issue will be contested in a case that will come before the judge.

Although I believe that the present provision can properly be construed to mean just that, the amendment would resolve an important issue, and resolve it in a way that is consistent with judges’ First Amendment rights and with the public interest.



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11. *Id.* at 7.

12. 28 U.S.C. section 455(a) reads: “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

13. Lubet, *On Judge Posner*, *supra* note 1, at 6.

14. I would argue with him, however, about the impact of the limitation in Canon 3A(6) that the judge’s comment is forbidden only if it “might reasonably be expected to affect [the proceeding’s] outcome or impair its fairness.” My particular concern about that language is that it is not sufficient to avoid a chilling effect on judicial speech, or to avoid the kind of unfortunate debate that

has occurred with respect to Judge Posner’s book.

15. Judge Posner would limit “impending” to mean “imminent.” Professor Lubet would limit it to mean any proceeding “that can be identified . . . as a dispute between recognizable parties over identifiable facts and circumstances.” The latter definition is too narrow to protect a judicial candidate from being pressured to commit herself on, say, the constitutionality of hypothetical abortion or gun-control legislation, when there is no current dispute between “recognizable parties” over “identifiable facts and circumstances.”