

Free Speech and Judicial Neutrality: A Reply to Professor Freedman

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Professor Monroe Freedman, with characteristic insight and grace, defends Judge Posner's *An Affair of State* on First Amendment grounds, arguing that "any limitation on [Posner's] speech would have to withstand 'exacting scrutiny.'" I do not disagree that the First Amendment applies—how could it be otherwise? But Professor Freedman's analysis greatly undervalues the compelling importance of judicial neutrality.

I am pleased that Professor Freedman evidently agrees with me that *An Affair of State* comments extensively on an "impending proceeding." Of course, there is no longer room to take issue with that conclusion. Even accepting Judge Posner's restrictive equation of "impending" with "imminent," it is now obvious that a proceeding—in the form a specially empaneled grand jury—was very much about to happen when *An Affair of State* went to press.¹

Let me make the following points:

1. *An Affair of State* provided a virtual roadmap for the prosecution of Bill Clinton and others, describing in detail how a prosecutor could frame and win a perjury or obstruction of justice case. In my view, the public has a compelling interest in preventing federal judges from influencing potential prosecutions. Professor Freedman sees this as a "virtually bottomless" slippery slope, since a prosecutor's decision "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*." Today's limitation on judges, the argument goes, might somehow morph into a blanket prohibition on the speech of elected officials and journalists.

With all respect, this argument proves nothing more than the exhaustion of the metaphor. There is no incline that runs from the judiciary to the press, and no reason to think that limitations on judicial speech would affect others. Professor Freedman's examples are not comparable, because members of Congress, journalists, editorialists, and law professors are all expected to be active participants in public debates. Indeed, the public may be served when opinion leaders influence the con-

duct of prosecutors, since that is part of the democratic process. The job of a judge, however, is not to be a surrogate for public opinion. Rather, judges are expected to be neutral in such matters. It is the need for institutional neutrality—as opposed to active advocacy—that breaks any possible link between limitations on judges and widespread restrictions on First Amendment rights.

I can prove this point with a simple example. Since 1972, the Code of Judicial Conduct has required judges to refrain from engaging in charitable solicitation, an otherwise protected form of speech. If there were indeed a slippery slope connecting judges to other public officials, journalists, and law professors, surely that restriction would have spread at least a bit over the last three decades. Of course, it has not. There is a clear rationale for the limitation on judges—it is necessary to prevent the appearance or reality of favor-currying or coercion. That rationale, however, does not apply to other professions, and so the limitation has remained confined to the judiciary. In other words, no slippery slope.

2. On the other hand, Professor Freedman worries that the no-comment rule may infringe on a judge's exercise of a "core First Amendment right." The preservation of judicial neutrality, however, requires that judges refrain from certain forms of advocacy, whether or not labeled a "core" right.

Again, I can prove my point with an example. There is no greater "core" First Amendment activity than participation in political campaigns. If any speech is protected by the First Amendment, it would be political endorsement and electioneering. The preservation of an apolitical judiciary, however, requires that judges refrain from endorsing candidates, giving stump speeches, recruiting precinct workers, or otherwise rallying the faithful. I assume that Professor Freedman would not want to see federal judges regularly lined up behind political candidates. If his First Amendment absolutism extends that far, however, I trust that most readers will see the flaws and reject it accordingly.

Footnotes

1. Independent counsel Robert Ray empaneled such a grand jury in July 2000. Moreover, the eventual indictment of Bill Clinton was no remote abstraction. Clinton was so worried about facing charges that he entered a plea deal, surrendering his law license and agreeing to forego the possibility of seeking attorney fees under the independent counsel act. For present purposes, the

latter aspect of the deal is perhaps most significant. If Clinton had not been indicted, he would have been entitled to reimbursement of his attorney fees, probably \$1 million or more, under a provision of the independent counsel act. His willingness to abandon that claim indicates that Clinton understood indictment to be a substantial threat.

In any event, the invocation of “core First Amendment rights” does not advance the discussion, because such rights must give way to legitimate judicial concerns.

3. Which brings us to the precise question: Does the public have a compelling interest in instructing sitting judges to refrain from commenting on pending and impending proceedings? To paraphrase a relevant political figure, it depends on what one’s conception of “compelling” is. In my view, there is a compelling institutional interest in maintaining the detached neutrality of the judiciary. The ideal judge—the one with the most legitimacy and in whom the public will repose the most faith—is the one who follows the law irrespective of self-interest or personal opinion. Thus, the public is best served when judges refrain from certain sorts of overt advocacy.

To be sure, the First Amendment prohibits an absolute gag rule. Nor would I dream of suggesting one, since engagement with social issues is also a requisite for informed judging. The no-comment rule, however, strikes an appropriate balance (even Judge Posner agrees that it is a good rule, differing with me only on the question of immediacy), requiring only that judges abstain from addressing matters that are poised for litigation. In constitutional terms, this is a trivial limitation. It is “closely drawn” to avoid unnecessary restrictions, leaving judges absolutely free to address all other issues of social concern.²

Judge Posner’s recognized brilliance needs no elaboration from me, and Bill Clinton is certainly able to defend himself. But Professor Freedman’s principle cannot be limited to intellectual judges and powerful defendants. As a constitutional rule, it would have to apply equally when a spiteful judge excoriates a vulnerable defendant (so long as the case is in a different court). Surely Professor Freedman, himself a former criminal defense lawyer and our foremost proponent of the adversary system, recognizes the threat to due process inherent in that scenario. Who would have confidence in a system that allows judges to proclaim defendants guilty before trial?



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2. In fact, Professor Freedman’s own proposal sweeps much more broadly, as it would apply to all “issues” that reasonably might come before the judge in a “contested case,” and not merely to identifiable, impending proceedings. It is virtually certain that

perjury cases will come before the Seventh Circuit, no doubt involving the definition of materiality. Thus, Freedman’s rule would actually restrict Judge Posner so long as he remains on the bench, and not merely until the end of the Clinton litigation.