

# The Ethics of Judicial Commentary:

## A Reply to Lubet

Richard A. Posner

I am grateful to the editor for inviting me to comment on Professor Lubet's article. This is the second piece in which he has asserted that my book *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (1999) violates Canon 3A(6) of the Code of Judicial Conduct for United States Judges.<sup>1</sup> The canon prohibits federal judges from commenting publicly (with an immaterial exception) on "pending or impending" cases. Lubet charges that my book, in violation of the canon, comments on (1) the prosecution of President Clinton for perjury, should he be prosecuted, and (2) the proceeding to disbar him in Arkansas.

Let me take the second charge first. The book does not comment on disbarment proceedings. Lubet argues that, even so, the book's discussion of the President's misconduct is a public comment on facts that might warrant disbarment. But that is not commentary on a "pending or impending" case—or if it is, judges will have to stop commenting publicly on any matter that might give rise to a lawsuit, which in this litigious society of ours means any matter.

The first charge is more serious, since the book does discuss the possibility that the President committed perjury and other obstructions of justice. The question then becomes whether a prosecution for these crimes is "impending." Lubet claims to have answered this question in his treatise on judicial ethics by defining an impending proceeding as "one that can be identified...as a dispute between recognizable parties over identifiable facts and circumstances," whether or not a case has been

filed. I am disturbed by the ellipses; the omitted words, "in some palpable manner," qualify the claim. I am merely puzzled why in his piece in the *National Law Journal* Lubet cited the first edition of his book, rather than the current one, but the relevant language is unchanged.<sup>2</sup> But I am astonished at his failure to reveal the context of the quoted language. His treatise does not discuss judicial comment on impending cases. The quoted language is from a discussion of what judicial nominees can properly be required to testify about at a confirmation hearing. For obvious reasons, the term "impending" cases should be very broadly construed in that context, to prevent the nominee from having to take a position on the entire range of cases that may come before him as a judge. Protecting a judge from being harassed by his senatorial inquisitors in this fashion and forced to decide in advance as it were all the "hot" cases that he is likely to encounter as a judge is different from preventing a judge from commenting on public issues that, as in the case of a prosecution of President Clinton, could not come before the judge's own court. Prohibiting judicial free speech raises a First Amendment issue; protecting him from being forced to speak does not. Lubet does not mention the First Amendment.

But all this to one side, Lubet's definition does not embrace the discussion of the President's conduct in *An Affair of State*. There was not, when the book was published (which was after the President's acquittal by the Senate), a recognizable legal dispute<sup>3</sup> between recognizable parties. There was merely an ongoing investi-

gation by the Independent Counsel, which might or might not lead someday to an actual case.

Lubet construes his definition more broadly, to encompass any case that might be brought. But this ignores the dimension of imminence. "Impending" does not mean "possible sometime in the future." It means (at least that is its primary meaning) "about to happen" or "imminent."<sup>4</sup> A prosecution of President Clinton, while conceivable as a theoretical matter, is not imminent and in fact will almost certainly never happen, despite some rumblings in the press. It thus is not an impending case.

Alluding to the remote possibility that Clinton might some day be prosecuted, *An Affair of State* says that should this happen his guilt or innocence would be decided on the basis of the evidence presented at his trial, not the evidence compiled by the Independent Counsel and discussed in my book, and therefore "nothing in the book should be taken to prejudice any future criminal or civil proceeding arising out of the matters discussed in it."<sup>5</sup> I hope this will reassure anyone who thinks that my book will influence a court in the unlikely event that the President is someday prosecuted for conduct arising out of the Lewinsky affair.



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### Footnotes

1. The first, entitled "Ethics Clash of Two Giants," appeared in the April 3, 2000, issue of the *National Law Journal*.
2. See JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 12.05, p. 424 (3d ed. 2000).
3. I take it that by "dispute between recognizable parties" he means legal dispute, rather than just disagreement; otherwise a judicial nominee could refuse to testify about any controversial matter, such as the perennial controversy over originalist and purposive

interpretations of the Constitution.

4. That is the definition in *Webster's Third International Dictionary*. The *Oxford English Dictionary* defines "impending" as "about to fall or happen; 'hanging over one's head'; imminent; near at hand." When I wrote *An Affair of State*, the prosecution of President Clinton was not near at hand; it still isn't. The *American Heritage Dictionary* gives as one meaning of "impending" "to menace," but the first definition it gives is "to be about to take place."
5. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 7 n. 13 (1999).