When Is an Investigation *Merely* an Investigation?

A Response to Posner

Steven Lubet

The basic problem with *An Affair of State* is epitomized by Judge Posner's statement that "[t]here was merely an ongoing investigation by the Independent Counsel, which might or might not lead someday to an actual case." Posner apparently believes that it is acceptable for a sitting federal judge to comment publicly on the guilt of individuals who are, in his own words, subject to an "ongoing investigation." I disagree. There is simply no good reason for a judge to declare people guilty of felonies while they are still under active investigation.

According to Posner's reply, *An Affair of State* only discussed "the possibility that the President committed perjury and other obstructions of justice." But the book went much further than that. Posner asserted time and again that Clinton (and "possibly" others, including Betty Curry, Vernon Jordan, and Sidney Blumenthal) committed various felonies, providing a virtual roadmap for prosecution. None of this is remedied by Posner's empty disclaimer that his book should not be taken to "prejudge any future criminal or civil proceeding," since the book is, in fact, all about judgment. "Clinton's violations of federal criminal law . . . were felonious, numerous, and nontechnical," Posner says. And indeed, he makes an extremely compelling case—which is precisely why the chief judge of the Seventh Circuit should have abstained from comment until the conclusion of the investigation.

The main point, which Posner declines to acknowledge,[1] is that a book like *An Affair of State* may influence the "ongoing investigation," or appear to, thus compromising the neutrality of the federal judiciary. Posner is one of the most prominent and important judges in the United States; any diligent prosecutor would have to take some account of his insistence that Clinton's lies were material, and therefore indictable as perjury.

Turning to events in Arkansas, Posner says that his book did not comment on the disbarment proceedings. In fact, however, he did observe that Clinton engaged in conduct that "would ordinarily result in disbarment." He also declared repeatedly that Clinton committed obstruction of justice, which is exactly the gist of the disciplinary charge ("conduct prejudicial to the administration of justice") in the Arkansas proceeding. Posner's position seems to be that a judge may pronounce a defendant factually culpable, so long as he does not mention the forum in which the matter is pending. On that theory, a federal judge could have proclaimed Clinton guilty (or innocent) of perjury at the very height of the Senate trial, so long as there was no explicit reference to impeachment. Perhaps I am naive, but I think it is essential that judges refrain from holding forth on the facts of a case while the matter is in progress.

The prestige of the federal judiciary should not be employed on one side or the other in pending litigation, but Posner's words have already been invoked at least once in support of disbarment. Surely that was not his intention, but it was certainly predictable.

Posner says that "limiting judicial free speech raises a First Amendment issue," although he does not elaborate. In his reply to Dworkin, however, Posner stated that the "no-public-comment rule is a good one," so he evidently agrees that the First Amendment allows some meaningful restrictions on judges' speech.

In order to accept Posner's rationale, one has to characterize the continuing work of the Independent Counsel as "merely" an investigation. One would also have to agree that my essay, in effect, called upon judges to refrain from "commenting publicly on any matter that might give rise to a lawsuit." I trust that most readers will find both positions untenable.[2] Ultimately, the question is pragmatic. Should federal judges

1. Posner's complaints about a reference to my treatise are insubstantial: (1) The elision that disturbed Posner is trivial. The omitted phrase—"in some palpable manner"—obviously changes nothing, since there has been no more palpable controversy in recent legal history. (2) I cited the 1990 edition in my *National Law Journal* article in order to show that the definition was proposed long in advance of the controversy over Posner's book. (3) The treatise discusses judicial commentary on impending cases in the context of confirmation proceedings because that was the only context in which the question had previously been raised. Until the publication of *An Affair of State*, no one imagined that a sitting judge would write a book about the legal issues in ongoing criminal investigation. The definition in the treatise, however, was clearly based on Canon 3A(6) of the Code of Judicial Conduct and was not limited to confirmation hearings.
2. Posner's equation of "impending" proceeding with "imminent" filing is unworkable as well, especially with regard to matters under investigation, since it requires an unerring prediction of the prosecutor's undisclosed intentions. Neither is his first-definition-in-the-dictionary principle a viable maxim of statutory construction. For example, "legal action" is the *sixth* definition of "proceeding" in my dictionary, though it is obviously the meaning intended by the Canon 3A(6). WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY at 1434 (2nd ed. 1983). Moreover, the first definition of "imminent" itself is "hanging over," with "about to happen" as the second. *Id.* at 909. Of course, other dictionaries vary the order—which is precisely why definitional sequence is a poor guide for legal analysis.

be immediate participants in hotly disputed public controversies, including those under active review by prosecutors? Or are the values of the judiciary better served by observing a reasonable period of restraint?

In conclusion, my criticism of *An Affair of State* is not that it was written by a sitting judge, but rather that it was published too soon. Under federal law, the Office of Independent Counsel must eventually announce the conclusion of every investigation, accompanied by a written report. Thus, there was bound to be a definite end, one way or another, to the Clinton investigation (as well as to the Arkansas disciplinary proceeding). Nothing would have been lost if Judge Posner had waited for that to happen before publicly pronouncing judgment on these issues and events.[3]

I have great respect for Richard Posner as a scholar and jurist, but in this instance he is just plain wrong.

3. While this essay was going to press, it was revealed that the Office of Independent Counsel had convened a new grand jury, which, according to the *New York Times*, would "consider whether Mr. Clinton should be charged with perjury or obstruction of justice after he leaves office." Thus, there is now in fact a pending proceeding in the Clinton matter—which was obviously impending during the publication of *An Affair of State*. Perhaps Judge Posner still denies that this turn of events was a foreseeable possibility. Readers will draw their own conclusions.

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