

What Do We Really Want to Learn about the President?

George Anastaplo

[The doctrine of "the last clear chance"], about which there has been little agreement and endless discussion, had its origin in 1842 in the English case of *Davies v. Mann*, in which the plaintiff left his ass fettered in the highway, and the defendant drove into it. It was held that the plaintiff might recover, notwithstanding any negligence of his own, if the defendant might, by proper care, have avoided injuring the animal.

Prosser and Keeton on the Law of Torts (1984), pp. 462-63

The current White House controversy raises legitimate questions (1) about the wisdom of permitting civil suits against a sitting President to go forward, (2) about the usefulness of the Independent Counsel Act, and (3) about the ethics of the mass media. It should be evident, as we consider each of these sets of questions in turn, that there is plenty of blame to go around for the political soap opera we have had to endure since January.

It should also be evident that politics combines, in unexpected ways, the grand and the petty, the probable and the improbable, and the high and the low. It should be evident as well that the country would probably have been better off if the President had been able to avoid this controversy, preferably by having earned a reputation for behaving himself. Unfortunately, we are confronted by such dilemmas as that posed by a recent editorial in an American newspaper: "Bill Clinton already has been revealed as one of the most morally tawdry men ever to occupy the White House. He may also be guilty of a crime. The question for Ken Starr and the nation is: What is it worth in collateral damage to try to prove it?" ("Questions of Cost and Value," *Chicago Tribune*, February 15, 1998, sec. 1, p. 22.) Before the current White House controversy became public, an English newspaper published this assessment of the President:

Like the tragic central character in a Schiller historical drama, Bill Clinton has reached the point in his career where his public greatness and his private weakness seem to stand in pointed and profound contrast. On the one hand he is the nearest thing in the modern world – and certainly in post-war America – to a philosopher president. On the other hand he is starting to endure an unimaginable personal indignity of the sort that no serious leader in the modern world has ever had to face.

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Martin Kettle, "Clinton Addresses His Presidential Legacy," *Guardian Weekly*, January 25, 1998, p. 6. The "unimaginable personal indignity" referred to here was, curiously enough, *not* any impending publicity about Monica Lewinsky, but rather "last weekend's deposition in the [Paula] Jones case." (*Ibid.* See, also, Peter Baker, "Clinton Questioned in Sex Claims Case," *Guardian Weekly*, January 25, 1998, p. 13.) And this was before the details of Kathleen Willey's accusations against the President became public in March.

A President in Court

An argument of sorts against having permitted the Paula Jones Case to go forward at all is that made recently by one of the President's lawyers in the ill-fated litigation in the United States Supreme Court. "The chickens have come home to roost," he said. "Any private lawsuit against the President was bound to become much more than a private case." (See Joan Biskupic, "Consequences Unseen by the Court," *Washington Post*, Jan. 29, 1998, p.A12.) It remains hard to see, however, what the constitutional basis could have been of any ruling but that which was issued by a unanimous Supreme Court last year in the Paula Jones Case. (See *Clinton v. Jones*, 117 S. Ct. 1636 [1997].) It is also hard to see what the constitutional basis is for the oft-repeated assertion that a President can only be impeached, not indicted, for any crime he may commit. (See the Letter to the Editor appended to this article.)

The connection between the Paula Jones Case and the Monica Lewinsky Case can be said to be accidental. It is because of the Paula Jones Case that there are subpoenas, perjury charges and the like so much in evidence these days. But it should be remembered that the Gennifer Flowers Case, in 1992, did not depend upon litigation or any criminal offenses, but rather upon gossip and revelations which raised substantial doubts about a would-be President's appetites, character, and hence reliability.

The critical issue in the present controversy is not whether there will be a criminal indictment or an impeachment of the President. Rather, the critical issue is what the standing of the President is apt to be if and when the facts are fully exposed - and how the Congressional leaders of the President's party find themselves obliged to respond to that exposure and its political consequences in the 1998 and 2000 elections.

Thus the question remains who or what is responsible for the chickens which have "come home to roost." If the allegations about the personal relations between the President and a twenty-one-year-old White House intern are borne out (but not necessarily in a court of law), they will threaten a talented man who conducted himself recklessly even while he was the target of a notorious lawsuit for what could seem to be similar conduct. Such bad judgment and lack of self-restraint, if shown, might well raise legitimate questions about one's capacity to govern, affecting even how world opinion assesses a beleaguered President's use of his powers as Commander-in-Chief.

The Paula Jones Case did provide tools for opening up the Presidential closet. And, considering the apparent recklessness of this gifted politician in his private life, it would have been prudent for his lawyers to have tried to get rid of the Paula Jones lawsuit as soon as possible, either by a settlement or by a speedy trial, if not even by letting it go to a jury without a contest as to the issues but only as to damages. "Succeeding" as his high-powered lawyers did in having the case drag on for years simply increased the President's exposure and made him ever more vulnerable. But, it should be emphasized, a Monica Lewinsky-type crisis could have emerged in some other way once enough unpredictable chicks had been hatched. After all, a responsible politician is obliged to reckon with how his "private conduct" (or his "own business") is likely to be regarded if it happens to become public.

The Independent Counsel Act

A series of vigorous statements about the role of the Independent Counsel in investigating the President has been issued by Anthony Lewis in his *New York Times* columns. The first of Mr. Lewis's statements, a few days after the Monica Lewinsky matter became public, opens with these observations:

No one can be sure now how the Clinton story will end. But I am sure of one thing. The Constitution was not meant to give us — and we should not want — a system of government in which a roving inspector general with unaccountable power oversees the President of the United States.

That is effectively what we have now. Kenneth Starr, appointed Independent Counsel three years ago to look into an Arkansas land deal, is investigating the President's sex life. Is there any charge against President Clinton that Mr. Starr could not bring within his jurisdiction?

The sordid nature of the present charge – that the President had a sexual affair with a 21-year-old White House intern and told her to lie about it under oath – makes it hard to see the issue of governance. But the dangers of subjecting the Presidency to a permanent prosecutorial inquisition are evident if you think about how this matter has been handled.

“Lord High Executioner,” January 26, 1998, p. A21. See, also, the Lewis columns in the *New York Times*: “Abuse of Power,” February 2, 1998, p. A25; “Decency and Liberty,” February 9, 1998, p. A19, “What Has Gone Wrong,” March 2, 1998, p. A19.

Much of what Mr. Lewis has said about this matter is sound. Certainly, it is hard to avoid the conclusion that the Independent Counsel in the now-much-expanded Whitewater matter has been overzealous for some time now. One happy consequence of all this is likely to be a substantial revision, if not the virtual abandonment, of the Independent Counsel Act when it expires next year.

But just as with the Paula Jones Case, so here: the activities of the Independent Counsel (some of which may include a misuse of his subpoena, investigatory, and grand jury powers) are essentially accidental. It should be remembered that there was no Independent Counsel available when some of President Nixon's partisans attempted a third-rate burglary at the Watergate Hotel in 1972. (The most serious Presidential misconduct since the Second World War has been the kind of unconstitutional usurpation seen in the Vietnam intervention and in the Iran-Contra conspiracy.) What undermined the Nixon Presidency was not the initial misconduct at the Watergate Hotel, but rather the exposure (in the press and elsewhere) of its systematic cover-up.

Here, too, what have put the President in jeopardy most of all are his repeated and seemingly unequivocal denials that anything improper had happened, denials that were delivered weeks after he was first made aware of the Monica Lewinsky “problem.” The firmness and then the vehemence of his deliberate denials testify to a recognition that it was a very risky situation for the President, and not primarily because of any prosecution or impeachment, neither of which seems likely at this time.

That is, it was sensed in the White House that such reactions as that expressed by another *New York Times* columnist, Thomas L. Friedman, would be forthcoming. That reaction opens with these acknowledgments:

I understand that Paula Jones is not a choir girl. I understand that Linda Tripp is motivated by an intense dislike for the President. I understand that Lucianne Goldberg was seeking more than just truth. I understand that Kenneth Starr is a partisan Republican out to get the President. I understand that Monica Lewinsky was a naive 21-year-old intern who may have exaggerated her relationship with Bill Clinton.

“Character Suicide,” *New York Times*, January 27, 1998, p. A23

The Friedman reaction continues, with nary a word about holding either the Supreme Court or the legal system primarily responsible for the President's (and hence the country's) troubles:

I understand, and detest, all the putrid smoke surrounding this story. But what I don't understand is the spark of fire that ignited it. I don't understand how someone entrusted with the opportunity to lead this country at such a great time, how someone whose political agenda was so substantively appealing – on issues from abortion to education to the global economy – could risk it all on a dalliance with a White House intern.

Yes, I know we don't know the full story. I know we haven't heard the President's full disclosure. But I've heard enough non-denial denials to know that whether this was an "emotional" relationship, a "special" relationship, a "not improper" relationship or some sort of backroom clothes-on relationship, the President was involved with someone in a way he should never have been and by doing so he has let down all of those who believed, if not in him personally, in the policies he was elected to implement.

The irresponsibility, if not injustice, of political suicide is suggested by what then follows in this Friedman column, the lament of a supporter of the President's policies who considers himself among those who have been betrayed:

Those who identified with many of the domestic, and some of the foreign, policies of the Clinton agenda made a Faustian bargain. We overlooked Mr. Clinton's past indiscretions — he was hardly the first politician with testosterone overload — on the condition that he pursue his agenda and postpone his next dalliance until after he left the White House. But he broke the bargain. I knew he was a charming rogue with an appealing agenda, but I didn't think he was a reckless idiot with an appealing agenda.

Some will be tempted, perhaps unfairly, to extend the title of "reckless idiot" to include some of the more knowledgeable advisors of the President during the past year, especially in how they responded to possible conduct which combined aspects of two suicidal addictions, to alcohol and to gambling. (See, e.g., Matthew Cooper and Karen Breslau, "For Better and For Worse," *Newsweek*, February 9, 1998, p. 40; Elizabeth Austin, "How Could He? How Can She?," *Chicago Tribune*, February 15, 1998, sec. 2, p. 1; Rosa Terrill and Gary Alan Fine, "Problem Husbands," *Chicago Tribune*, March 2, 1998. See, also, Anastoplo, "Private Gambling and Public Morality," *Representative American Speeches 1996-1997*, Logue, Ed.) If one "must" stray from home, the merits of a single, discreet, middle-aged mistress become apparent in these circumstances.

Mass Media Ethics

A *New York Times* columnist could speak, as we have seen, of "the putrid smoke." This can be said to characterize how the mass media have responded to all this, often prematurely and without an adequate grounding in facts. But this sort of journalism can be expected today and one should conduct oneself accordingly if one ventures into public life. One can even doubt that what the mass media do today in exposing the shortcomings of politicians is really worse than what comic playwrights such as Aristophanes did more than two millennia ago in holding the leading Athenian politicians up to ridicule. For better and for worse, this sort of abuse can be expected in a wide-open democratic regime. This is not to deny that various purveyors of dubious information should be recognized and condemned for the desperate people that they often are. But, again, it is important to retain a sense of proportion in such matters. It is this which can help us identify the root cause of the current commotion. That cause, if the facts should bear out the strong suspicions that the public naturally has, is simply the recklessness (if not even the arrogance) of the President, far more than the ineptness of the Supreme Court, the abuse of power by the Independent Counsel, or the venality of the mass media.

It is well to keep in view here the old-fashioned doctrine, familiar to students of law, of the "last clear chance," a doctrine illuminated by "the spark of fire that ignited [the putrid smoke]." This brings us back, of course, to the alleged personal misconduct of the President, misconduct which does not depend upon any law or legal institution for its recognition and repudiation, misconduct which he was in the best position to control from the outset. It is useful, with so influential an office as the Twentieth Century Presidency has become, that the President, more than most of us, be disciplined by being required to walk a straight line in his private life during the years he happens to be in the Oval Office. Even worse for us than an unseemly interest by the public in the sordid details of a politician's private life would be a "sophisticated" public completely unconcerned about such conduct. (See William J. Bennett, "Why It Matters," *Wall Street Journal*, March 8, 1998, p. A14. Am I, by the way, alone troubled upon seeing the Bennett Brothers so prominently at odds in this controversy?)

An indication of the latent public concern in all this is given by the analysis of the President's situation by one of his most trusted aides, a friend from childhood:

He can't say, "I'm doing a good job, so cut me some slack about telling the truth." He can't say that. He has assured the American people that he has not had sexual relations with this woman and that he never told her not to tell the truth. But if what he has said ends up not being the straight story, the American people will be troubled. They will await further explanations, but they will want to hear what the deal is.

Roger Simon, "Despite Polls, Clinton Aides Fear Mood Turnabout," *Chicago Tribune*, February 13, 1998, sec. 1, p. 1

This aide, who conducts the daily White House briefings, then added that he personally believes that the President is telling the truth:

I believe exactly what he has said. He didn't have sexual relations with her and didn't ask her to lie. And truth to the contrary would be very troublesome to me, to the press and the American people.

Ibid. See, also, Roger Simon, "'Telling the Truth Slowly': Press Secretary Recounts Strategy," *Chicago Tribune*, Feb. 17, 1998, sec. 1, p. 1. Compare Roger Simon, "All's Fare in White House Follies," *Chicago Tribune*, February 22, 1998, sec. 2.1.

Another Presidential supporter, a Congressman from Chicago, has put this problem thus:

I've got my fingers crossed. I am rooting for the President. He deserves every presumption of innocence. If he directly lied to the American people, I think it would be very difficult for him to maintain the fundamental trust that a President has with the people. It would be hard for him to perform his duties.

William Neikirk, "'Eerie Quiet' on the Hill as Political Winds Swirl," *Chicago Tribune*, February 15, 1998, sec. 1, pp. 1, 21.

Even so, the President, if shown to be guilty of the sexual relations in question, could eventually be regarded as having "suffered enough," particularly if he should come to be both ridiculed and pitied as a Lothario who had been gleefully displayed as a trophy among the friends of his twenty-one-year-old "conquest." The risk remains, however, of the President's so having conducted himself that he opens the way, if only after his term expires, to a puritanical backlash which could in turn call conventional morality itself into question. (For a questionable moral tone in attacking the President, see George F. Will, "Willey's Words," *Washington Post*, March 17, 1998, p. A21.)

Conclusion

It remains to be seen how this dismal soap opera plays out. That will depend, in part, upon what comes to be generally believed by the public at large in the months ahead. That public may want eventually to consider measures to rein in both sensationalist journalism and improper investigations, something that would be much easier to do if the current set of charges against the President comes to be regarded as grossly unfair. But the ultimate control in such matters has to remain in the hands of the highly privileged politicians who are at risk, politicians who now find it difficult if not impossible to stand on the old-fashioned and salutary principle that they will simply not discuss their private affairs in public.

The most serious charge against the President today is the apparent breach of faith with his supporters, a betrayal of those who have sacrificed for the causes that he represents and who have depended upon him to be sensible enough in his personal conduct so as to avoid one "unimaginable personal indignity" after another. Some of his most devoted supporters, if not also members of his own family, may begin to feel that they have been exploited by an oddly brazen and yet curiously vulnerable man, so much so that they may even come to wonder whether they are being held in contempt.*

Professor Anastaplo will discuss the implications of the dismissal of Paula Corbin Jones' lawsuit against the President on the Independent Counsel's investigation in the next issue of PILR.