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CIVIL LIBERTIES By Harvey Silverglate

Clinton v. Starr v. Clinton May Make Court Act

WHEN INDEPENDENT Counsel Kenneth W. Starr's office subpoenaed White House aide and former journalist Sidney Blumenthal to testify to the Whitewater grand jury about his contacts with reporters, lawyers as well as journalists shook their heads at what was widely perceived to be Mr. Starr's overreaching. Even if the White House used the press to discourage Mr. Starr's investigation, this has long been viewed as a protected First Amendment activity.

Anyone who looks at the bewildering array of federal obstruction-of-justice statutes that constitute Chapter 73 of Title 18 of the United States Code, however, will recognize that federal legislation, aided by some remarkably broad executive and judicial interpretations, appears to render Blumenthal's tactics risky.

Mr. Starr's public explanation for his subpoena to Mr. Blumenthal explains his theory quite pointedly: This office has received repeated press inquiries regarding misinformation being spread about personnel involved in this investigation. We are using traditional and appropriate techniques to find those responsible.

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Later amplification disclosed Mr. Starr's unhappiness that some of the dirt dished out by the White House was, in his view, untrue. This prompted him to set forth his remarkable interpretation of the First Amendment. "The First Amendment," he said, "is interested in the truth," and "misinformation and distorted information" are not protected.

Steven Shapiro, national legal director of the American Civil Liberties Union, retorted that the subpoena "raises profound First Amendment issues, and I think that criticism of a prosecutor is not obstruction of justice; it's free speech."

Mr. Shapiro may well be right, but it is also clear that Mr. Starr felt empowered to question Mr. Blumenthal's press contacts because, on their face, federal obstruction statutes appeared to give him that power. Such a conflict between the grand jury subpoena power and the First Amendment has not yet been dealt with head-on by the federal appellate courts, nor by the Supreme Court.

The obstruction statute that most readily comes to mind is 18 U.S.C. 1503, which covers a person who, "corruptly" or by the use of "threats or force, or by any threatening letter or communication," seeks to "influence, intimidate, or impede" any officer of the court, among other categories of officials, or "the due administration of justice." From a common-sense point of view, it is reasonable to conclude that the administration's media assault on Mr. Starr's office indeed aims to discourage the independent counsel's scorched earth assault.

Where To Draw the Line

However, whether this constitutes an attempt to "influence, intimidate, or impede" the investigation within the meaning of this statute, is debatable. Where, one asks, is the line to be drawn between the "corrupt" use of speech to "impede" federal prosecutors, grand juries and witnesses, and the exercise of one's right to complain to the press about the good faith of one's governmental tormentors?

The same might be asked of a recent, even broader obstruction statute—18 U.S.C. 1512. It bars "misleading conduct toward another person, with intent to influence, delay, or prevent the testimony of any person in an official proceeding" and any act that "intentionally harasses" a potential federal witness.

This statute arguably calls into question the White House's media assaults on the character and credibility of witnesses who have publicly accused the president of improper conduct, such as former Arkansas Judge David Hale (in the Whitewater investigation) and Linda Tripp, Kathleen Willey and others (in the Washington sex scandal). While the statute provides that it is an affirmative defense to a prosecution under this section if it can be proven "that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully," the burden is on the defendant to prove it.

There is precious little case law as to the use of these statutes where First Amendment rights have been infringed by overzealous prosecutors and grand juries. The courts have stated that governmental power is not unlimited when there are countervailing First Amendment considerations, but nothing such as we've seen in recent weeks has been the subject of an on-point appellate ruling. Given the no-holds-barred approach of both Mr. Starr and President Clinton, the federal courts may soon be forced to opine. NLJ

Pages A22-A23

- Pollard spy case should nag at legal consciences.
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