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Charles J. Ogletree, Jr.

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# Personal and Professional Integrity in the Legal Profession: Lessons from President Clinton and Kenneth Starr

Charles J. Ogletree, Jr.\*

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### I. Introduction

Throughout 1997 and early 1998, public debate about the legal system centered on two competing and troubling figures: President Bill Clinton and Independent Counsel Kenneth Starr. With months of impeachment hearings, year-long denials, and Barbara Walters's interviews, the country had an over-consuming dose of the Monica Lewinsky affair. Today, the American public has had enough of the denials, news commentary, and legal analysis of the case. Yet for the broader legal community, there is one issue that we have failed to examine closely: the personal and professional ethical lessons we should learn from the Clinton/Starr dilemma. This essay explores the ethical dynamics surrounding our Commander-in-Chief and his chief adversary and the extent to which their activities can produce valuable lessons for the profession.

Even before this ethical quagmire took center stage, the general diagnosis of the state of legal ethics was dire.<sup>1</sup> Everyday Americans questioned the professionalism, trust, and honesty of lawyers, while legal critics noted the increased mistrust and suspicion among attorneys themselves.<sup>2</sup> What has created this bleak impression of lawyers involves the same elements that have permeated the behavior of President Clinton and Kenneth Starr: a decline in civil and courteous conduct, frequent lapses of appropriate ethical and professional behavior, and an increasingly aggressive and competitive drive to "win at all costs."<sup>3</sup> Although it is certainly the case that lawyers have never enjoyed lofty reverence,<sup>4</sup> lawyers previously had a greater claim to integrity and virtue.<sup>5</sup> Indeed, the Civil Rights Movement and its progeny inspired many citizens "to view law as a shining sword with which to vanquish the long-

1. See Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344 (1997) ("The vast majority of commentators generally agree that the level of 'professionalism' displayed by attorneys has declined dramatically in the last twenty-five years.").

2. See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 806 (1998) (observing that "the lawyer contrives enforceability to supplement the failing supply of reciprocity, moral obligation, and fellow-feeling").

3. Daicoff, *supra* note 1, at 1344.

4. See Myrna Oliver, *Lawyers Losing the Verdict in the Court of Public Opinion*, L.A. TIMES, Oct. 19, 1987, at A3 ("Lawyers have suffered a poor image, despite their high status, since Biblical days when Jesus admonished: 'Woe unto you, also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.'" (quoting *Luke* 11:46)).

5. See Galanter, *supra* note 2, at 811 ("What is singular about the current sense of decline is the high elevation from which descent is measured. The period around 1960 may well have been the historic high point of public regard for law and lawyers. . . . Lawyers were riding a wave of favorable regard of the whole panoply of social institutions.").

festering problems of exclusion, poverty, and oppression," and Americans saw lawyers as "valiant and dedicated warriors for justice."<sup>6</sup> Poignantly, though perhaps ironically, it was the Watergate scandal that resulted in the end of the high regard of the law and the beginning of the continuing decline of the lawyer-statesman and lawyer-social engineer.<sup>7</sup> During the past two decades, public opinion of lawyers has been plummeting even more;<sup>8</sup> after the Lewinsky affair, public opinion of lawyers may have reached an all time low.

## II. *A Tale of Two Men*

One of the tragic realities about the Lewinsky affair and the independent counsel investigation is that prior to these events both Bill Clinton and Ken Starr would have enjoyed lasting legacies as virtuous public servants. In an October 1996 televised presidential debate with Bob Dole, for example, President Clinton correctly declared that:

[C]ompared to four years ago, [the country is] clearly better off. We've got 10.5 million more jobs. The deficit's been reduced by sixty percent. Incomes are rising for the first time in a decade. The crime rates, the welfare rolls are falling. We're putting 100,000 more police on the street. Sixty thousand felons, fugitives and stalkers have been denied handguns. But that progress is only the beginning. What we really should focus on tonight is what we still have to do to help the American people make the most of this future that's out there. I think what really matters is what we can do to help build strong families. Strong families need a strong economy. To me that means we have to go on and balance this budget while we protect Medicare and Medicaid and education and the environment.<sup>9</sup>

After a first term that many will remember as one of the most progressive and economically beneficial of any presidency, Clinton continued to set out a bold plan for delivering what many up until his presidency had thought impossible:

6. *Id.*

7. *See id.* at 812 (discussing role of Watergate on public perception of lawyers). *See generally* GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983) (discussing role of lawyer as "social engineer"); BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* (1999) (analyzing impact of Watergate on subsequent presidential administrations); Julian A. Cook III, *Mend It or End It? What to Do with the Independent Counsel Statute*, 22 *HARV. J.L. & PUB. POL'Y* 279 (1998) (discussing rise of Independent Counsel statute).

8. *See* John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 *VAL. U. L. REV.* 563, 563-70 (1994) (analyzing public opinion surveys and potential causes of public mistrust of lawyers).

9. William J. Clinton, *Presidential Debate Between Bill Clinton and Bob Dole* (NBC television broadcast, Oct. 16, 1996), available in Westlaw, NBCPROT Database, 1996 WL 11748783.

a balanced budget and strengthened Medicare, Medicaid, and Social Security.<sup>10</sup> As he cruised through re-election,<sup>11</sup> President Clinton's leadership moved society closer to the reverence we once had for the lawyer as social innovator of the 1960s. He gave many Americans a hope that the dreams of a more civil, peaceful, and prosperous society were not simple, obscure, unrealistic yearnings but rather attainable desires.

Though viewed as a conservative jurist, Kenneth Starr's contributions were equally celebrated within judicial circles. In 1990, the *New York Times* ran a feature article on the forty-three-year-old lawyer, whose "career flourish[ed] remarkably at the intersection of law and politics."<sup>12</sup> At first glance, one might think that the *New York Times* was referring to a then similarly-aged governor of Arkansas. But in fact, the virtuous lawyer was Kenneth Starr, whose meteoric rise to Solicitor General and then to eminent candidate for the high court was considered outstanding and remarkable.<sup>13</sup> The legal community also viewed Starr as a man who had "universal respect for integrity."<sup>14</sup> Even then-Attorney General Dick Thornburg turned to Starr when Thornburg had a problem with leaks in his independent investigations.<sup>15</sup> Moreover, Starr had a reputation for fairness and unpartisan engagement of the law, a reputation that was respected by fellow lawyers as well as by his peers on the D.C. Circuit.<sup>16</sup> Before the Independent Counsel investigations, people from both sides of the political spectrum would have characterized Starr in a diametrically different manner than they do now.

10. See Robert A. Rankin, *Clinton: I'm Ready to Deal with the GOP*, MIAMI HERALD, Nov. 9, 1996, at A1 (discussing Clinton's hopes for country). Clinton was also the first president to make diversity a realizable goal in his administration. His Cabinet did "look like America." See William Raspberry, *Clinton's Cabinet Goes a Long Way Toward Opening System up to All*, ATL. J. CONST., Feb. 11, 1994, at A10 ("Five women, four blacks, two Latinos. And not just in the traditional posts. A Chicano at Transportation, a black man at Commerce, a woman attorney general.")

11. Bill Clinton was the first Democratic president since Harry Truman to win re-election.

12. Neil A. Lewis, *Solicitor General's Career Advances at Intersection of Law and Politics*, N.Y. TIMES, June 1, 1990, at A16.

13. See *id.* ("Every lawyer in the courtroom knew that at the age of 43, Mr. Starr is regarded as one of the two or three leading candidates for the next vacancy on the High Court. Four other Solicitor Generals have gone on to the Supreme Court, including Associate Justice Thurgood Marshall.")

14. *Id.*

15. See *id.* (discussing Dick Thornburg's view of Kenneth Starr).

16. Even liberal judges on the ideologically divided United States Court of Appeals for the District of Columbia Circuit speak of Starr with great warmth. For instance, Patricia M. Wald, former chief judge of the District of Columbia Circuit remarked that Starr was "wholly unambiguous" and never tried "to slip anything by." *Id.* "In an Administration full of straight arrows, Mr. Starr is among the straightest, his friends say." *Id.*

Such praise for Kenneth Starr and Bill Clinton changed very quickly. Just a few weeks after the Monica Lewinsky affair broke, the nation's perception of their lawyer-leaders began to crumble:

A quarter-century ago, a "third-rate burglary" and the crimes that followed it consumed and eventually devoured the second-term presidency of Richard Milhouse Nixon. Today, we see how a tawdry sexual affair with an intern, and the acts that followed it, have consumed – though not yet devoured – the second-term presidency of William Jefferson Clinton. The Lewinsky scandal represents more, much more, than reckless sexual misconduct. It now involves very public and very emphatic lies. Breaches of trust. The subversion of truth. The possibility of criminal wrongdoing. And so we faced the identical question today that we faced a generation ago: is this president – is any president – above the law?<sup>17</sup>

Perceptions of Kenneth Starr were equally unflattering:

You know something? I don't like Ken Starr. I don't like one damn thing about him. I don't like his sanctimony. I don't like his self piety. I don't like the people he runs with. I don't like his suck-up, spit-down view of the world, how he kisses up to the powerful and abuses the life out of regular people. I don't like his legal clients. I don't like the folks who work for him – or the people who apologize for him, either. I don't like the way he smiles at the wrong time. (I never trust a person a smile doesn't come naturally to.) I don't like the way he always compares himself – favorably, of course – to cherished American icons. And I absolutely won't stand for the way he has single-handedly demeaned the Constitution of our great nation. No American should.<sup>18</sup>

Both Bill Clinton and Kenneth Starr fell quickly from the perches of virtuous public servants and legal visionaries. While the two men had their respective defenders, it became clear early in the Lewinsky matter that the two leaders had damaged their legacies and cast themselves and the country into an extended nightmare of political and legal uncertainties. What followed during the early months of 1998, and what has continued through 1999,<sup>19</sup> is an all too familiar reality. Less known are the ethical and professional dilemmas each actor perpetuated.

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17. WILLIAM BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* (1998).

18. See JAMES CARVILLE, . . . AND THE HORSE HE RODE IN ON: *THE PEOPLE V. KENNETH STARR* 9 (1998) (discussing Carville's perception of Kenneth Starr).

19. See Roberto Suro, *Starr is Ready to Resign*, WASH. POST, Aug. 19, 1999, at A1 (discussing reauthorization of investigation and legal uncertainties about Starr's successor).

### III. *The Independent Counsel Investigation – An Ethics Case*

The Office of Independent Counsel (OIC) investigation provides a timely case-study to explore the competing issues of integrity, forthrightness, and ethics in professional advocacy. I argue that although the tactics employed by both sides of this investigation may have been perfectly legal, they reveal one of the central inadequacies of the legal profession: Its failure to live up to moral guidelines of public behavior.

#### A. *Bill Clinton*

In his Paula Jones civil suit deposition, the President testified that he never had "sexual relations" with Monica Lewinsky. However, when he appeared on August 18, 1998 before the grand jury investigating the Lewinsky matter, he acknowledged having "inappropriate intimate contact" with the former intern. Mr. Clinton argued that these two answers were not incompatible and that he did not commit perjury.<sup>20</sup> In his address to the nation hours after his grand jury testimony, a visibly tired but defiant President Clinton declared: "While my answers were legally accurate, I did not volunteer information."<sup>21</sup> Most Americans were completely dismissive of the "legally accurate" defense, and news commentators agreed that the President failed to convince a skeptical public that he had done nothing wrong.<sup>22</sup>

#### 1. *Legal Legalese*

To support his "legally accurate" claim, Bill Clinton said that his Jones testimony was based on a particular definition of "sexual relations." Under the Jones definition, the Clinton defense argued that the President was not having sexual relations with Monica Lewinsky, although she was having sexual relations with him. Perhaps this was "legally accurate" under the definition.<sup>23</sup> But was it the whole truth? Did President Clinton have a greater

20. See generally Michael Isikoff & Evan Thomas, *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 31 (providing interesting analysis and timeline of Monica Lewinsky case and Independent Counsel investigation).

21. For an interesting discussion of the early grand jury testimony and Clinton's speech to the nation, see DAVID MARANISS, *THE CLINTON ENIGMA* 28 (1998).

22. See, e.g., WOODWARD, *supra* note 7, at 444-45 (discussing public reaction to August 18, 1998, Clinton address).

23. Various legal scholars disagree about this matter. Compare John Gibeaut, *Presidential Lessons: The Strategies Bill Clinton's Lawyers Used to Fend off Paula Jones and Ken Starr Are Classic Do's and Don'ts Even Beyond the Beltway*, 4 A.B.A. J. 52, Dec. 1998 (discussing legal ethics and Clinton defense strategy) with Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161 (1999) (analyzing potential motives for Clinton's approach and concluding that his conduct constituted lying).



obligation, either as a defendant testifying under oath or as a public figure entrusted with upholding the laws of the land, to do more than provide "legally accurate" answers? Or should the President be allowed to act in the same manner in which we expect professionally coached witnesses to act when they skillfully evade questions at trial and give technically correct responses to counsel for opposing parties?

## 2. *Misleading the Jury and the Public*

Several commentators argue that the President should have been more forthcoming in his public responses;<sup>24</sup> however, critics of Bill Clinton contend that these kind of legalistic machinations have been one of the Clinton Administration's less admirable tactics, having a tendency to obfuscate the truth.<sup>25</sup> For instance, on January 21, 1998, PBS *NewsHour* anchor Jim Lehrer asked Clinton to verify that he had not had a sexual relationship with Monica Lewinsky. In typical Clintonian style (his critics would contend), the President responded, "There *is* not a sexual relationship."<sup>26</sup> Although technically accurate, the statement appears substantively false. Additionally, in 1992, *60 Minutes* reporter Steve Kroft asked Clinton about the then-growing allegations of an affair between Clinton and Jennifer Flowers. After an unclear response by the President, Kroft returned: "I'm assuming by your answer that you're categorically denying that you ever had an affair with Jennifer Flowers." Clinton responded, "I've said that before, and so has she."<sup>27</sup> Again, his statement was technically accurate but also wholly unresponsive and misleading – the fact that both Clinton and Flowers at one time may have categorically denied the relationship is not dispositive of whether a relationship did in fact exist.

Understandably, this pattern of half-answers and misleading remarks has led many to distrust the president. *Washington Post* reporter Ruth Marcus wrote in 1994, "To borrow a phrase from the law of libel, the Clinton White House often seems to be following a pattern of knowing or reckless disregard

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24. See, e.g., Peter Baker & Susan Schmidt, *As Both Sides Prepare, Clinton Withdraws*, WASH. POST, Aug. 16, 1998, at A1 (describing Clinton's preparations for grand jury proceedings).

25. See BENNETT, *supra* note 17, at 105 ("When for more than a half-year the President – the nation's chief legal officer – repeatedly refused to answer, and repeatedly encouraged others to refuse to answer, serious, credible, criminal allegations made against him, we were entitled to make reasonable judgments about wrongdoing.").

26. Interview by Jim Lehrer with Bill Clinton, *NewsHour* (PBS television broadcast, Jan. 21, 1998), available in Westlaw, TRANSCRIPTS Database, 1998 WL 8056086.

27. Steve Kroft, *60 Minutes Profile: Another Look, January 26, 1992* (CBS television broadcast, Feb. 1, 1998), available in LEXIS, News Library, Transcripts File.

for the truth."<sup>28</sup> *Newsweek* Washington correspondent Joe Klein added: "They haven't gotten him yet. They may never. But a clear pattern has emerged of the delay, of obfuscation, of lawyering the truth."<sup>29</sup> Bill Clinton happens to be a lawyer, and because of his training he knows better than many the way to give legally accurate answers while hiding the full truth. But, notwithstanding this ability, we must ask whether we should expect more from our elected representatives. Living up to the letter of the law is good, but sometimes that is not enough.

### B. Kenneth Starr

While several of President Clinton's actions were ethically suspect and ran afoul of the ethical codes, Kenneth Starr also was criticized for numerous ethical judgments during the course of his investigation.<sup>30</sup> Like Clinton's, Starr's behavior may have been perfectly legal, but it too fell far short of what we require of the virtuous lawyer. Even though less well-known, Starr's purported violations run the gambit as well. The litany is astonishing: first, speaking with Monica Lewinsky in a Virginia hotel without the presence or consent of her lawyer;<sup>31</sup> second, issuing subpoenas to Ms. Lewinsky's mother, to Lewinsky's first lawyer, Frank Carter, to the bookstore where Lewinsky occasionally shopped, and to the Secret Service agents who protect the President;<sup>32</sup> third, having contact with Paula Jones's lawyers without notifying the court;<sup>33</sup> fourth, misleading a federal court as to the likelihood of impeach-

28. Ruth Marcus, *The White House Isn't Telling Us the Truth*, WASH. POST, Aug. 21, 1994, at C9.

29. Joe Klein, *He's Gotta Have It*, MINNEAPOLIS-ST. PAUL STAR-TRIB., May 11, 1994, at 14A.

30. See Cook, *supra* note 7 (discussing actions of Independent Counsel Kenneth Starr). Compare John A. MacDonald & Michael Remez, *Starr Defends His Tactics: Clinton Lawyer Attacks Leaks, Calls Probe 'Overkill'*, HARTFORD COURANT, Nov. 20, 1998, at A1 (outlining Starr's defense of his investigative approach) with Susan Baer, *Focus Shifts to Starr's Conduct; Some of Prosecutor's Actions in Probe Draw Criticism, Investigation*, BALT. SUN, Oct. 19, 1998, at 1A (detailing criticisms of Starr's actions as Independent Counsel).

31. See Gerald B. Lefcourt, *Thou Shalt Not Contact a Represented Person Behind Her Lawyer's Back*, N.Y. L.J., Feb. 23, 1998, at S3 (comparing recent United States Court of Appeals for the District of Columbia Circuit ethics ruling with Starr's involvement with Lewinsky).

32. See generally David E. Rovella, *One Starr Subpoena Awakens the Defense Bar*, NAT'L L.J., Mar. 2, 1998, at A1 (discussing subpoenas that OIC issued).

33. See Nina Totenberg, *All Things Considered, Tracing the Links* (NPR radio broadcast, Oct. 14, 1998), available in Westlaw, ATCON Database, 1998 WL 3646817 (discussing Starr's early involvement in Jones case and its potential ramifications). See generally Don Van Natta, Jr. & Jill Abramson, *Starr Said to Have Received Tip on Affair Before Call by Tripp*, N.Y. TIMES, Oct. 4, 1998, at A1 (discussing links between Jones's attorneys and Linda Tripp).

ment,<sup>34</sup> and fifth, allegedly leaking secret grand jury information to the press.<sup>35</sup> I will address each of these in turn.

### 1. *Contact with Represented Persons*

When the Office of Independent Counsel staff first surprised Monica Lewinsky at a Ritz-Carlton Hotel in Virginia in mid-January, they spoke to her for hours alone, despite the fact that she had a lawyer, William Ginsburg.<sup>36</sup> In fact, Lewinsky's attorneys allege that although she was "technically free to go," several FBI agents and U.S. Attorneys held Ms. Lewinsky for eight or nine hours.<sup>37</sup> During that time, agents reportedly confronted Lewinsky with evidence of her affair with President Clinton and, in an attempt to strike a deal for her testimony, threatened to implicate her parents.<sup>38</sup>

Interviewing a represented person without the presence or consent of his or her lawyers is ethically barred by the ABA Model Rules of Professional Conduct Rule 4.2.<sup>39</sup> Invoked in the spirit of "fair play," Rule 4.2 is intended to protect the rights of potential criminal defendants from prosecutors. Its rationale is the same as that supporting the rule that police must stop their questioning of an arrested criminal defendant if he or she asks for a lawyer. This process ensures that prosecutors do not convince people to say or to do something that is not in their best interest, legal or otherwise. However, the Department of Justice's (DOJ) current policy exempts its prosecutors from this ethical restraint of not talking with represented people<sup>40</sup> on the grounds that abiding by

34. See generally Stephen Labaton, *Starr Accused of Misleading Appeals Court*, N.Y. TIMES, Oct. 6, 1998, at A20.

35. See Mark Jurkowitz & Brian McGrary, *Furor Erupts over Propriety of Starr's Leaks to Reporters*, BOSTON GLOBE, June 15, 1998, at A1 (discussing grand jury leaks).

36. See *Starr's Tactics Under Attack: Lewinsky's Lawyer Says His Client Was Detained in House Without Attorney; Her Deposition Is Delayed*, SEATTLE TIMES, Jan. 23, 1998, at A1 (claiming Starr detained Lewinsky without her lawyer present and threatened to involve her parents in investigation).

37. *Id.*; see also Laurie Asseo, *Prosecutor's "Squeeze" a Much-Used Tactic*, ASSOCIATED PRESS, Jan. 24, 1998, available in 1998 WL 7379225 (reporting that investigators brought Lewinsky to hotel room and questioned her for hours).

38. *Starr's Tactics Under Attack*, *supra* note 36.

39. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1988) ("[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

40. See, e.g., Elkan Abromowitz, *Ex Parte Contacts from the Justice Department*, N.Y. L.J., Mar. 3, 1998, at 40 (referring to Thornburg memorandum which "set forth the [Justice] Department's intention to 'make clear' through regulations that the 'authorized by law' exception to Rule 4.2 covered all communications by Justice Department lawyers to represented persons").

the rule would tie the hands of prosecution.<sup>41</sup> Although courts have resoundingly criticized this DOJ policy, the DOJ has yet to overturn it. Therefore, the OIC's talking to Ms. Lewinsky without her lawyer present may have been perfectly acceptable under current ethical provisions, despite the adversarial system's requirement that *two* zealous advocates are required for justice to be done. But, again, we must consider whether it was the right thing to do.

## 2. Issuing Subpoenas

The Office of Independent Counsel also issued some highly unusual subpoenas: to Ms. Lewinsky's first lawyer, Frank Carter; to her mother, Marcia Lewis; to her bookstore; and to Secret Service agents assigned to protect the president. Ethical canons and DOJ policy frown heavily on these kinds of subpoenas,<sup>42</sup> and sending subpoenas to lawyers compromises the lawyer-client relationship by invading the zone of confidentiality and trust. Sending subpoenas to family members to testify against targets of an investigation is also disfavored because it seems to violate our basic ideals of fair play. However, while each of these subpoenas may be ethically suspect and seemingly unfair, they are perfectly legal.

## 3. Misleading a Federal Appeals Court

In June 1998, Independent Counsel Starr told a federal appeals court that although White House counsel would have a privilege not to testify about advice they gave the president during an impeachment inquiry, impeachment was "too remote" a possibility to consider.<sup>43</sup> However, Starr petitioned a different court for permission to file an impeachment referral to Congress just three days later.<sup>44</sup> The Justice Department is now investigating this very issue.<sup>45</sup>

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41. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 *FORDHAM L. REV.* 355, 367-375 (1996) (discussing Reno Rule, Communications with Represented Persons, 28 C.F.R. § 77 (1995), which expressly preempts contrary state and local laws); U.S. ATTYS. MAN. Rule 9-13.241 (listing exceptions to general rule against communications with represented parties, including Reno Rule).

42. For example, issuing a subpoena to force a parent to testify against a child "is usually reserved for heinous crimes. . . . DOJ guidelines deem it a last resort." Rovella, *supra* note 32. Likewise, the U.S. Attorneys Manual states that "all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney." U.S. ATTYS. MAN. Rule 9-13.410. Nonetheless, the court upheld the Frank Carter subpoena despite a strong legal challenge on grounds of attorney-client privilege.

43. See Labaton, *supra* note 34 (reporting Starr's early opinion that impeachment was likely).

44. *Id.*

45. *Id.*

#### 4. Investigation Leaks

Both the Justice Department and a federal judge are examining whether the OIC leaked secret grand jury information to the news media.<sup>46</sup> After reviewing several news articles that cited "sources in Starr's office," Chief Judge Norma Holloway Johnson of the United States District Court for the District of Columbia appointed a Special Master to investigate the leaks.<sup>47</sup> Federal Rule of Criminal Procedure 6(e) states that prosecutors "shall not disclose matters occurring before the grand jury."<sup>48</sup> If the court finds that Starr did violate Rule 6(e), the court could impose legal sanctions, although the law is rarely enforced.<sup>49</sup> While Starr admitted that he and his aides had spoken to the press about grand jury testimony, he does have a "legally accurate" defense: He told reporters about what *would* happen in the grand jury, but he never told them what actually *did* happen before the grand jury – a minor, but legally important, distinction.<sup>50</sup> Does this kind of reasoning sound familiar?

Notwithstanding the legal and moral dilemmas that President Clinton and the Office of Independent Council created, the sad reality is that the public did not seem to care. Public interest in the OIC matter reached an alarmingly low level early on in the investigation, and President Clinton's approval rating actually increased during the early days of the scandal.<sup>51</sup> Such is a disturbing commentary on the public's expectations of public leaders: We have become too tolerant of immoral behavior and questionable legal tactics. Instead of keeping a critical and watchful eye, the public has affirmed that even with the

46. The Federal Rules of Criminal Procedure provide that "an attorney for the government . . . shall not disclose matters occurring before the grand jury." FED. R. CRIM. P. 6(e)(2). The National Association of Criminal Defense Lawyers passed a resolution on February 7, 1998, condemning leaks from the Office of Independent Counsel and calling on the Department of Justice and appropriate authorities to investigate. *NACDL Board Cite Independent Counsel's Leaks and Unethical Conduct*, 22 CHAMPION 8 (1998).

47. *Outside Expert Reportedly Hired to Investigate Grand Jury Leaks*, N.Y. TIMES, Oct. 4, 1998, at 33.

48. FED. R. CRIM. P. 6(e)(2).

49. *See id.* (stating that "[k]nowing violation of Rule 6 may be punished as a contempt of court").

50. *See Adam Clymer, Starr Admits Giving Reporters Information on Clinton Inquiry*, N.Y. TIMES, June 14, 1998, at A1 (explaining Starr's defense of legality of leaks because leaks did not involve testimony before grand jury); Neil A. Lewis, *Judge Cites Possible Improper Leaks by Starr Office*, N.Y. TIMES, Oct. 31, 1998, at A9 (reporting on Chief Judge Johnson's determination that there had been improper leaks by Starr's office).

51. *See Nearly 3 in 4 Americans Feel President's Doing a Good Job: Approval Rating Higher Than Ever, CBS Poll Shows*, TORONTO STAR, Jan. 31, 1998, at A18 (citing CBS News poll that showed 16 point jump to 73% approval); *see also* Howard Fineman & Karen Breslau, *Sex, Lies and the President*, NEWSWEEK, Feb. 2, 1998, at 20 (citing Newsweek poll that Clinton's approval rating fell from 61% on day scandal broke to 54%).

continuing scandals we will take a flawed Bill Clinton over a virtuous Jimmy Carter. Indeed, the presidency and the state of lawyering has truly changed.

#### IV. *An Idealist View of the Virtuous Lawyer*

Let us continue with a source that many commentators have turned to when grappling with the complexities of law, politics, and ethics: William Shakespeare. In his timeless classic *Henry VI*, Shakespeare displays a vivid example of law and power. The rebels in *Henry VI* knew what had to be done if they were to retain their power; in a statement that has allowed critics of the legal system to giggle with glee, the rebels asserted: "The first thing we do, let's kill all the lawyers."<sup>52</sup>

I am certain that many Americans in 1998 would have loved to do just that – as visions of well-paid attorneys, television-hungry legal analysts, and high-profile law professors easily come to mind. We must remember, however, the context of Shakespeare's words: The lawyers of King Henry's time were thought to be the most virtuous members of society. By killing off the virtuous lawyers, tyranny and rebellion could prosper freely.<sup>53</sup>

Although current public attitudes toward lawyers often rate on par with used-car salesmen,<sup>54</sup> the foundation of our legal system has supposedly been built on the ideal of virtue embodied by Shakespeare – the system that at its best strives to achieve truth, to do justice, and to ensure fair play. For many of us who chose the law as our profession, we can easily recall childhood memories, grounded in literature, movies, and enduring myths, when lawyers represented the weak, fought for justice, and did what was "right for society." Unfortunately, most people now believe that that vision is more the exception than the reality.

An essential part of this idealistic vision of the law and of lawyers stems from the attorney's duty to act as a servant of the court. As servants, lawyers represent their clients, while also upholding the larger values represented by the judiciary. Alexis De Tocqueville eloquently expressed this idea when he

52. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, line 63 (Michael Hattaway ed., 1991).

53. See DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS?* 29 (1994) (stating that "lawyers tend to be a stable, lawful government's first line of defense, to have a successful revolution you must get rid of the lawyers").

54. See Samuel Levine, *Introductory Note, Symposium on Lawyering and Personal Values-Responding to the Problems of Ethical Schizophrenia*, 38 CATH. L.W. 145, 145 (1998) (noting that "the public views lawyers, at best, as being of uneven character and quality"); see also Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuses*, 96 COLUM. L. REV. 1618, 1630 (1996) ("It is common belief among laypersons that lawyers are not constrained by moral principles. This belief has caused considerable distress within the profession, and provided a lot of good material for Jay Leno and David Letterman.").

noted that American lawyers were reasoned advocates who could safeguard the growing democracy.<sup>55</sup> The ABA Model Rules of Professional Conduct define a lawyer as "a representative of clients, an officer of the legal system and a public citizen having *special responsibility for the quality of justice*."<sup>56</sup> Ultimately then, it is the lawyer's job and duty to ensure that our democracy remains a "government of laws and not of men."<sup>57</sup> Why and how so many of our profession have forgotten this beginning is complex and disputed. Some argue that this reality was never the case – even in Shakespeare's time – and that lawyers have always had a quasi-negative relationship to society,<sup>58</sup> while less cynical commentators note that the influential nature of our current adversarial system has destroyed the humanity of the profession.<sup>59</sup>

### V. *The Realistic View of the Lawyer in Our Adversarial System*

A realistic inquiry must begin with an objective look at the system. Can the law ever truly be a cooperative, justice-seeking enterprise when bound by an adversarial constraint?<sup>60</sup> Guided by the framework of "zealous advocacy," prosecutors and defense attorneys have different obligations that inevitably come into conflict with the utopian view of lawyers I have advanced in earlier articles.<sup>61</sup> On the one hand, prosecutors have an obligation to uphold and enforce the law.<sup>62</sup> As Justice Sutherland noted decades ago, the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . . As such, he is in a peculiar and very definite sense the servant of the law . . . . He may prosecute with earnestness and vigor – indeed, he should

55. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (Phillips Bradley ed., 1945) ("When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors.").

56. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1998) (emphasis added).

57. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (citing Part the First, Article XXX, of Massachusetts Constitution of 1780).

58. See Galanter, *supra* note 2, at 807-15 (stating that "[i]n the year following the revolution 'there existed a violent universal prejudice against the legal profession as a class'").

59. See Daicoff, *supra* note 1, at 1342-46 (pointing to increased competition and pressure to win as evidence of decline in level of "professionalism" over past 25 years).

60. See, e.g., SOL LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 9 (1994) (stating that "[o]ne owed loyalty to one's client, but first one owed deference to the court and ambivalence to the law").

61. See generally Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

62. Cf. *Berger v. United States*, 295 U.S. 78, 88 (1935) (White, J., concurring in part and dissenting in part) (stating that U.S. Attorney's interest in "a criminal prosecution is not that it shall win a case, but that justice shall be done").

do so."<sup>63</sup> Still, the discretion to choose who will and will not be prosecuted is a vast and dangerous power that should be exercised with care.<sup>64</sup> And while the criminal prosecutor has all the resources of the government at her disposal, sometimes justice is best served by a decision not to prosecute. Regardless of whether she decides to pursue a particular case, "the prosecutor must accept personal responsibility for the accomplishment of justice."<sup>65</sup>

On the other hand, defense attorneys safeguard a defendant's constitutional rights and should not – and cannot – be held to this different standard of enforcing the law. Even the Supreme Court itself recognized that "defense counsel has no . . . obligation to ascertain or present the truth."<sup>66</sup> The Court continued: "Our interest in not convicting the innocent permits [defense] counsel to put the state to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth."<sup>67</sup> It seems as if the defense attorney can use anything in her arsenal to create reasonable doubt, but some attorneys contend that there are "some situations in which perfectly nice lawyers are constrained to act like sleezeballs . . . [as lawyers] engage in the kind of aggressive, zealous advocacy required to make our adversarial system function properly."<sup>68</sup>

Our adversarial system of law functions on the premise that with two zealous advocates, each working tirelessly and single-mindedly for her separate but equally important cause, the just outcome will occur. While some people openly admit that "lawyers are hired guns: they know they are, their clients demand that they be, and the public sees them that way,"<sup>69</sup> others say that "[i]t is possible to be a zealous advocate and simultaneously act in a principled, ethical manner."<sup>70</sup> The incredibly difficult question facing lawyers on both sides of the bar is when, if ever, the ends justify the means. Given the current state and framework of our legal society, how do we develop the virtuous lawyer? What are his parts? How is she made?

63. *Id.* (White, J., concurring in part and dissenting in part) (quoting Justice Sutherland).

64. See generally R. Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys*, Apr. 1, 1940 (providing interesting and timely account of vast power of federal prosecutors).

65. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 702.

66. *United States v. Wade*, 388 U.S. 218, 256 (1967).

67. *Id.* at 257-58.

68. Yablon, *supra* note 54, at 1620.

69. RICHARD L. ABEL, *AMERICAN LAWYERS* 247 (1989).

70. Joseph F. McSorley, "Criminal Lawyers" or "Lawyer Criminals"? *Ethics of the Criminal Defense Bar Under Attack*, 72-FEB. FLA. B.J. 35, 38 (1998).



### A. Current Ethical Guidelines – The Law Is Not Enough

Legal ethics alone cannot bring us back to the utopian, Shakespearean vision of the law. In practice, ethical guidelines and enforcement procedures "more often [succeed] in furnishing guidance about how far a lawyer [can] go in a situation without incurring sanctions, rather than instilling – or exhibiting – an appreciation of ethical standards."<sup>71</sup> The Clinton-Starr case is a perfect example of this dilemma. Both parties worked tirelessly to do just enough (or not too much) to walk that fine line of legal ethics. Professional guidelines instructed Starr and Clinton on what they could legally get away with.

Moreover, in 1993, Yale Law School Dean Anthony Kronman surveyed the health of the legal profession and declared that the profession now stands in danger of "losing its soul."<sup>72</sup> Though offering a bleak report on the moral values of the attorney-servant, he concluded that the same ethical ideals that guide and govern personal life must be maintained in professional life as well.<sup>73</sup> Dean Kronman also elaborated on the sources of this change in the professional landscape, pointing as well to the current nature of legal education.<sup>74</sup> He argued that law schools and the dominant case method of legal education ultimately teach the incommensurability of values and a moral relativism that seems to strip young lawyers of the ability to discern what makes one judgment wiser than another.<sup>75</sup> "The culture and values inculcated within the law school do not support a vision of lawyering that takes into account that lawyering involves responsibility to and relationships with others."<sup>76</sup>

Dean Kronman followed many others, including Chief Justice William Rehnquist, who a decade before lamented both the disappearance of the lawyer-statesman and the general decline of lawyer ethics.<sup>77</sup> Chief Justice

71. Judith S. Key, *Enhancing Competence and Professional Ethics: The Lawyer's Responsibility*, TRIAL, June 1988, at 44.

72. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION I* (1993).

73. See *id.* (concluding that one must incorporate personal ethics into professional ethics).

74. See *id.* at 113; see also Beverly Balos, Comment, *The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves*, 4 CLINICAL L. REV. 129, 140 (1997) ("The attributes advanced for the successful lawyer in the profession mirror those characteristics fostered in the law school classroom: adversariness, argumentativeness, zealotry, and a view that 'lawyers are the only means through which clients accomplish their ends – what is 'right' is whatever works for this particular client or this particular case.'").

75. See KRONMAN, *supra* note 72, at 113 (discussing justifications for casebook method of teaching law).

76. Balos, *supra* note 74, at 140.

77. See KRONMAN, *supra* note 72, at 11-12 (discussing Rehnquist's views on role of lawyer in society). See generally William H. Rehnquist, *The Lawyer-Statesman in American*

Rehnquist explained the diminishing role that the lawyer-statesman now plays in American society as a function of changes in the way that law is practiced as well as taught.<sup>78</sup>

Today's reality of a lawyer's life, while perhaps "invok[ing] an exalted set of grand words [has been] lived by a consistently crude set of professional rules that would not, and [do] not, get in the way of getting ahead."<sup>79</sup> But the wise and public-spirited lawyers who served for their contemporaries as models are to be copied and admired.<sup>80</sup> Professor Mary Ann Glendon noted the decline of the "wise counselor," knowledgeable and well-rounded lawyers who gave advice and deliberated with clients about the best course of action, and the rise of the now much more common and highly-specialized technocrats, who unquestioningly carry out a client's desires.<sup>81</sup>

### B. Justice O'Connor's View

As the call for a reformulation of the role of the lawyer is becoming a more frequently repeated refrain, Justice Sandra Day O'Connor also has argued most forcefully against the current system. For example, Justice O'Connor has maintained that "[l]awyers must do more than know the law and the art of practicing it. They need as well to develop a consciousness of their moral and social responsibilities . . . . Merely learning and studying the Code of Professional Responsibility is insufficient to satisfy ethical duties as a lawyer."<sup>82</sup> Following Justice O'Connor's charge, all of us – as citizens, lawyers, law students, voters, and future public servants – must challenge ourselves to decide what we will expect of our elected representatives and of the legal profession. Where will we draw the line? When, if ever, do the ends justify the means? We must articulate a vision of public conscience for our-

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*History*, 9 HARV. J. L. & PUB. POLICY 537 (1986) (discussing role of lawyers in shaping society and illustrating with individual historical examples).

78. See Rehnquist, *supra* note 77, at 537; see also Balos, *supra* note 74, at 139 ("Law school inculcates the culture, attitudes, behavior, and values of the legal profession. It may be the first contact students have with the myriad roles of the lawyer and the values of the legal profession. The law school experience has a profound influence on students' professional values and their understanding of the practice of law and the role of lawyers in our society.").

79. Levine, *supra* note 54, at 147.

80. See KRONMAN, *supra* note 72, at 1.

81. See MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 35 (1994).

82. Sandra Day O'Connor, Commencement Address at Georgetown University Law Center, May 1986, reprinted in *Making a Difference: Excerpts from Commencement Address*, RES IPSA LOQUITUR (Georgetown University Law Center), Summer 1986, at 4.

selves and express it in our daily lives. To achieve this end, I offer one thing that is lacking in many of the recent evaluations of the health of the legal profession: a set of heroes/lawyers who embody the principles of virtue, honor, a strong moral code, a sense of civic obligation, and a commitment both to high ideals and to society. I contend that we can learn about moral and social responsibility through the lives of two virtuous lawyers: Abraham Lincoln and Charles Hamilton Houston.

### *C. Moral Responsibility: An Example from Another President*

Abraham Lincoln became a lawyer at age 27, practiced actively for twenty years, and handled thousands of cases.<sup>83</sup> As an attorney, he was renowned for his unfailing honesty. In lectures Lincoln gave in 1850, he offered the following advice for lawyers:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common – almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.<sup>84</sup>

One question left open is whether Lincoln's absolute commitment to honesty might violate the modern understanding of zealous advocacy when he represented a client he believed was guilty.<sup>85</sup> This is an unresolved tension that should be considered in the discussion of what characteristics belong to the virtuous lawyer.

### *D. Social Responsibility: An Example from Charles Hamilton Houston*

Charles Hamilton Houston has been referred to as the chief architect of *Brown v. Board of Education*.<sup>86</sup> Born on September 3, 1895, Houston was

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83. Jerome J. Shestack, *Abe Lincoln, Lawyer*, 18-FEB PA. LAW. 25, 25 (1996).

84. ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 51 (Don Fehrenbacher ed., 1964).

85. See Andrew L. Reisman, *An Essay on the Dilemma of "Honest Abe": The Modern Day Professional Responsibility Implications of Abraham Lincoln's Representations of Clients He Believed to Be Culpable*, 72 NEB. L. REV. 1205, 1207 (1993).

86. See MCNEIL, *supra* note 7, at 3.

totally committed to "finding and wielding levers of change to free black Americans from racial oppression."<sup>87</sup> Erwin Griswold, former Dean of Harvard Law School, said that "[i]t is doubtful that there [was] a single important case involving civil rights . . . in which Charles Houston [did] not either participate . . . directly or by consultation and advice."<sup>88</sup> Houston preached the lawyer's basic duty of social engineering, arguing that "a lawyer's either a social engineer or . . . a parasite on society."<sup>89</sup> To Houston, a lawyer's duties as a social engineer included serving as "the mouthpiece of the weak and a sentinel guarding against wrong."<sup>90</sup> Houston held himself to high personal and professional standards, and he measured the integrity of his work by basic moral-jurisprudential principles, including the fundamental beliefs that "[t]he law and constituted authority are supreme only as they cover the most humble and forgotten citizen."<sup>91</sup> Houston always remembered that human beings are equally entitled to life, liberty, and the pursuit of happiness and that those struggling for elemental justice must take risks, be courageous, and be fully committed to their goals.<sup>92</sup>

As the Vice Dean of Howard Law School, Houston was equally committed to legal education and to the development of young lawyers, further carrying out what he believed to be his obligation to society by training an entire corps of social engineers.<sup>93</sup> His students included many future civil rights advocates, particularly Thurgood Marshall and Oliver Hill.<sup>94</sup> The late Chief Judge Emeritus A. Leon Higginbotham wrote of Houston's work: "Because of his tenacity and genius, he deserves a stature in our nation as significant as that specially reserved for Thomas Jefferson, George Washington, Patrick Henry, or Chief Justice John Marshall."<sup>95</sup> Indeed, through his legal work and teachings, Houston endeavored and succeeded in transforming the values of society.<sup>96</sup>

87. Robert L. Carter, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2149, 2149 (1998).

88. MCNEIL, *supra* note 7, at xxiv.

89. Genna Rae McNeil, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2167, 2169 (1998).

90. *Id.*

91. *Id.* at 2171.

92. See MCNEIL, *supra* note 7, at 89-100 (commenting on Houston's view of human nature).

93. See McNeil, *supra* note 89, at 2169.

94. See MCNEIL, *supra* note 7, at 82.

95. A. Leon Higginbotham, *Foreword to MCNEIL, supra* note 7, at xvii (1983).

96. See *id.*

### VI. Final Thought and Challenges

There are two justifications behind this call for a virtuous lawyer, a lawyer with a sense of moral and social responsibility. The first is an obligation to the profession and to society, as remarked upon by Dean Kronman, Justice O'Connor, and Chief Justice Rehnquist; the second is an obligation to oneself. Indeed, the law can be a route to deep personal fulfillment. Justice Oliver Wendell Holmes, Jr. articulated such as he posed this question:

What is all this to my soul? . . . [W]hat have you said to show that I can reach my own spiritual possibilities through such a door as this? How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?<sup>97</sup>

Justice Holmes answered that the spiritual possibilities of a life in the law are not to be found in the pursuit of reason and knowledge for their own sake. Instead, the joy of the lawyer's life comes from the knowledge that "a hundred years after he is dead and forgotten, [those] who never heard of him will be moving to the measure of his thought."<sup>98</sup> The joy of the lawyer's life comes from establishing a bond with others of common dedication and common ideals. It is about having the "desire to take on the system and prevail, even in the face of overwhelming odds."<sup>99</sup>

All of us involved in the study and teaching of law must realize that the law books do not provide any real ethical guidance to aspiring lawyers or to people in general. Whatever else we take from the Clinton-Starr case, we can take this lesson: We cannot look to the law (or current practitioners) to provide a moral compass. The famed Russian dissident, Alexander Solzhenitsyn, said it best:

[A] society with no other scale but the legal one is . . . less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses.<sup>100</sup>

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97. OLIVER W. HOLMES, *The Profession of the Law: Conclusion of a Lecture Delivered to Undergraduates of Harvard University on February 17, 1886*, in COLLECTED LEGAL PAPERS 29, 29-30 (1920).

98. *Id.* at 32.

99. Ogletree, *supra* note 61, at 1243.

100. Alexander Solzhenitsyn, *Commencement Address at Harvard University* (June 8, 1978), in VITAL SPEECHES OF THE DAY, Sept. 1, 1978, at 680. See generally BENNETT, *supra* note 17.

It is we – as American citizens – who must guide the law to ensure that the lawyers and politicians, those we trust to represent our interests in the public sphere, live up to our highest expectations. Again, I challenge each of us to articulate that vision for ourselves and to act upon it. We are the ones who can bring virtue back into our national public life. We are the ones who must do it.

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JOHN RANDOLPH  
TUCKER LECTURE

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