The Rule of Law in the Wake of Clinton

On June 12 the Cato Institute held a conference, "The Rule of Law in the Wake of Clinton." Among the speakers at that conference were Sen. Fred Thompson (R-Tenn.), chairman of the Committee on Governmental Affairs; Roger Pilon, vice president for legal affairs and B. Kenneth Simon Fellow in Constitutional Studies at the Cato Institute; and Theodore B. Olson, a partner in Gibson, Dunn & Crutcher.

Fred Thompson: While some people may question whether Travelgate, Filegate, violations of the Privacy Act, and many other cases truly undermined the rule of law, there is no such ambiguity in the campaign finance scandal emanating from the 1996 presidential election and the way in which it was handled.

Since 1973, we have had a publicly financed presidential campaign system. When candidates receive federal funding, they are required to certify that they will not raise additional campaign cash from other sources.

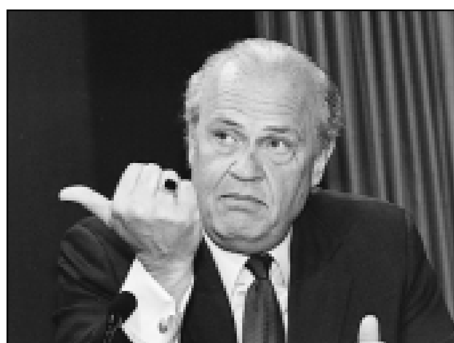
Both President Clinton and Vice President Gore signed such certifications. However, they then proceeded to raise millions of dollars in addition, funneling the money through the Democratic National Committee, having it spent on television ads to benefit their candidacy. The president actually sat in the White House and approved the ads, where they would run, and how often they would run. Before this, everyone believed that that sort of activity was illegal. However, the attorney general decided that this obvious circumvention of the law was, in fact, legal.

Making such a legal determination either way presented her with a conflict of interest—one of the reasons that Louis Freeh, director of the Federal Bureau of Investigation, recommended the appointment of an independent counsel. He pointed out to the attorney general that this circumvention had not even been investigated about two years into it.

He cited Title 18, United States Code, Section 371, which is a conspiracy statute that I used many times as a prosecutor. And it is right on point: 371 prohibits a conspiracy, not only to violate the law, but to defraud the government. The underlying act in the "defraud the government" section does not even have to be a criminal offense, according to the case law.

If, in order to receive federal monies, a candidate certifies something that is not true, and that does not present at least grounds for an investigation under 371, we ought to abrogate the independent counsel statute. However, the attorney general had no problem in finessing this obvious conflict and refusing to appoint an independent counsel.

On July 8, 1997, the Senate Committee on Governmental Affairs, which I chair, began hearings on the 1996 presidential campaign and the abuses in that campaign. Over the next four months, we saw how millions of dollars in illegal campaign contributions had been funneled into the DNC. Much of this money was coordinated by personal friends of the president and the vice president. Much of it was foreign. In fact, there was evidence that at least six of the major coordinators of illegal campaign funds had ties to the Chinese government.



Sen. Fred Thompson (R-Tenn.)

On the first day of our hearings, I stated that the People's Republic of China had tried to influence our elections with illegal campaign money. That was clear to me from the classified material made available to the committee. I cleared my statement with the FBI and the Central Intelligence Agency, and I made it. Nevertheless, for the next four months, the Department of Justice and some Senate Democrats tried to undermine my statement. The subsequent record speaks for itself.

The attorney general had a classic, textbook conflict of interest that required her to use her discretionary authority to call in someone from the outside.

The record shows that the law that was established to deal with scandals such as this was not complied with when it came to the highest officials in the country. The law was not applied consistently, in that there was a lower threshold for activation of the statute for lower-ranking officials.

The ability of the country to have an untainted resolution of the allegations against the president and vice president was thwarted. And the appearance was created that the attorney general was unduly protecting high-ranking officials from the regular legal process that other citizens and other public officials have to undergo, even though the allegations involved extremely serious matters that go to the heart not only of our legal but of our political process.

There can be no clearer example of the undermining of the rule of law. It will forever be a part of the legacy of this administration. Congress needs to look at itself in the mirror and reexamine its institutional role in these matters.

As things stand now, we have demonstrated that we are no longer capable of having a bipartisan investigation of a serious matter, in which both political parties seek the truth in the best interest of the country. Perhaps it is true that we have begun to rely too much on the courts and the legal processes to resolve matters that are best left to the political process. Because, ultimately, that is where it all winds up in a democratic society.

And as frustrating and disheartening as it is to see the breakdown in the rule of law, we know that, in the end, the American people will have the final say. And we will always have the kind of government and the kind of rule of law that we deserve.

However, the pendulum swings. And when our nation faces its next crisis, and when we need leadership and we need direction, who in the government are the people going to be willing to listen to if their leaders have so abused our most cherished institutions? That, to me, is the most important issue facing us today. How we resolve it will play a large part in determining our destiny as a nation.

“The attorney general had a classic, textbook conflict of interest.”

—Fred Thompson

Roger Pilon: We want to focus on a single, simple question: Where does Mr. Clinton find authority for what he is doing or what he is proposing to do? The power to enact or execute most of his programs is nowhere to be found in the Constitution. But, in addition to urging, proposing, and signing legislation that exceeds Congress's authority, Mr. Clinton has repeatedly defended such laws, when they've been challenged, by filing briefs in the courts, especially in the Supreme Court.

Although Mr. Clinton may have once said that the era of big government was over, his political agenda and his legal briefs give the lie to any such pronouncement. Both in Congress and in the courts, he has shown an utter disregard for the limits the Constitution sets on federal power, an utter indifference to the rule of law imposed by our founding document.

Mr. Clinton's very raison d'être is to promise more and more from government, not to pare government back to its legitimate scope. Look at his State of the Union addresses, starting with his and his wife's universal health care plan, which would have socialized one-seventh of the American economy. When you go down the list of the hundreds of policies and programs Mr. Clinton has proposed or brought into being over the years—from Americorps, to 100,000 new teachers, to family leave, to protection for tobacco farmers, to a patients' bill of rights, to the Lands Legacy Initiative, to juvenile boot camps, to a flextime proposal, to extended hospital stays for mastectomy patients, to a program to help schools make repairs, and on and on and on—you soon realize that there is no problem too personal or trivial for his, and the federal government's, attention. “Got a problem? We've got a program” is truly the slogan of this administration.

Mr. Clinton continues to fight the Court, every step of the way, in its cautious moves toward limiting federal power. One of the most recent examples can be found in the government's brief in *United States v. Morrison,* in which the Court found that Congress once again had exceeded its authority when it passed the Violence Against Women Act. At its core, the case was about little but the doctrine of enumerated powers. It raised a simple question: Did Congress have power under the Commerce Clause or under section 5 of the Fourteenth Amendment to grant victims of gender-motivated violence a private right of action against their assailants? Despite the relative simplicity of that question, and the all but exclusive focus of the case on the doctrine of enumerated powers, the administration's brief—except in a single footnote, not really on point—never even mentioned “enumerated powers.” Instead of addressing head-on that fundamental doctrine, and the constitutional framework it implies, the brief reads almost like a policy statement: Congress's power to regulate things that affect commerce is virtually plenary, the brief suggests; gender-motivated violence affects commerce; therefore Congress has the power to regulate it. Never mind that at some level everything affects commerce—suggesting that Congress has the power to regulate anything and everything. That implication is simply ignored in the administration's brief. Indeed, at oral argument Solicitor General Seth Waxman, like his predecessor in the position five years earlier, could think of not a single thing Congress could not regulate—until Chief Justice Rehnquist (alluding to the 1995 *Lopez* case) offered the example of guns at schools! To cast the matter more generally, it's as if the rule of law—in particular, the limited power authorized by the Constitution—meant nothing at all.

Roger Pilon, Cato vice president for legal affairs

And on the Fourteenth Amendment rationale for the act, the administration's brief ignores the law as well, this time the plain language of the amendment. Section 1 of the Fourteenth Amendment prohibits states, not private citizens, from violating the rights of citizens. Yet the Violence Against Women Act gave federal remedies against *private* parties, not against states. There was, in short, no authority for it under the powers enumerated in the Fourteenth Amendment. Yet there was Mr. Clinton's Justice Department, defending it all the same.

Mr. Clinton is not alone, of course, in his efforts to expand government by ignoring the limits imposed by the Constitution on the power of Congress. After all, Congress had to play its part too. And previous administrations were also less than solicitous of constitutional limits on federal power. Still, the sheer scope of the Clinton administration's ambition sets it apart from most of its predecessors. Perhaps former solicitor general Drew Days captured it best in his oral argument in *Lopez* when he said that “the commerce power is one of the heads of authority under the Constitution that transformed our country from an agrarian society to one that was a powerful commercial enterprise.” There are doubtless those who believe that it was the federal government, acting under the Commerce Clause, that brought about that transformation. Certainly there are people in Mr. Clinton's administration who act as if they believe it. For them, the rule of law empowers government.

Theodore B. Olson: What will be Attorney General Janet Reno's legacy? I've picked out a few well-publicized incidents that can help us form a conclusion with respect to political influences in the Department of Justice during Reno's tenure.

Item: The Clinton-Gore fund-raising investigation. The investigators veered away any time their investigation seemed to be getting near the president, the vice president, or top White House or Democratic Party officials. Reno decided that Gore's telephone calls on government property to raise campaign funds were not illegal because there was clear and convincing evidence that he was only seeking soft money. According to the *Washington Post,* the DOJ task force was told to stop investigating. When the *Post* and other media subsequently found proof that Gore's calls were in fact raising hard money, Reno declined to appoint an independent counsel to inves-

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tigate because she had determined that the vice president did not know that he was raising hard money.

Item: The White House coffees. In the fall of 1997 the White House finally turned over 44 videotapes of fund-raising coffees to Senate investigators. The White House explained that it had not supplied the videotapes to the Justice Department because the Justice Department had not asked for them. After the fund-raising scandal had been on the front page of the nation’s papers for months, William Safire reported that notorious fundraiser John Hwang had never been interviewed, asked to testify, or required to produce any records.

There have been numerous other cases, such as those of Energy Secretary Hazel O’Leary and Johnny Chung, in which Attorney General Reno has declined to appoint an independent counsel to investigate the administration when there was specific and credible evidence pointing to wrongdoing. Justice waited five years to investigate Nora and Gene Lum—stalled, according to the Associated Press, by Webb Hubbell.

Item: Deputy Attorney General Eric Holder instructs Kenneth Starr to investigate, on the basis of the appearance of a conflict of interest, allegations that Whitewater witness David Hale had received funds from the *American Spectator.* That same standard had been rejected by Reno as an insufficient basis on which to investigate President Clinton. Thus began a long and expensive investigation of the *American Spectator,* a magazine that had broken stories on many of the Clinton scandals.

On numerous occasions the attorney general stated that her decision not to appoint independent counsel to investigate the 1996 Clinton-Gore fund-raising abuses was based on recommendations from career prosecutors. It turns out, however, that FBI director Louis Freeh had strongly urged in writing the appointment of an independent counsel. Her handpicked head of the task force, Charles LaBella, told Ms. Reno “that she had no alternative but to seek the appointment of an independent counsel.” Even the Criminal Division’s Robert Litt, described as a Democratic Party loyalist and friend of Bill, twice urged that an independent counsel be appointed to investigate whether Vice President Gore had lied to investigators with respect to fundraising. Despite the recommendations of all those career people selected by the attorney general to head these investigations—that an independent counsel or special counsel be appointed because the department had a conflict of interest—none of those calls has been heeded.

As President Clinton’s impeachment trial began in the Senate, Attorney General Reno sent to Kenneth Starr a letter informing him that the Department of Justice was opening an investigation of Kenneth Starr with respect to his handling of the Monica Lewinsky matter and the “potentially unethical contact between his office and the Paula Jones sexual harassment suit against Clinton.” As the impeachment proceeding was about to start, Starr was informed that the office that couldn’t investigate the president was investigating the investigator of the president.

In 1997 Attorney General Reno told the Senate Judiciary Committee that there was no federal legal basis for suing the tobacco companies. In January 1999 President Clinton announced in his State of the Union address that he had instructed the Department of Justice to file such a suit. In October of the following year, it was filed.

When the Defense Department leaked information from Linda Tripp’s confidential personnel files to *New Yorker* reporter Jane Mayer following a meeting between Mayer and former White House aide Harold Ickes, the Defense Department’s inspector general conducted an investigation that was turned over to the Department of Justice in June 1998. After two years of silence, the Department of Justice announced it was dropping the investigation.

Reports have recently emerged that Deputy Director William Esposito of the FBI was told early in the 1996 fund-raising investigation by DOJ official Lee Radick that Radick was under a lot of pressure not to go forward with the investigation because Reno’s job might hang in the balance. Another memo revealed that early in the probe the Justice Department tried to avoid using FBI agents to do investigative work and relied on Commerce Department investigators instead.

Finally, on May 10, 2000, the *New York Times*—hardly a member of the right-wing conspiracy—declared in a lead editorial, “Attorney General Janet Reno has consistently failed to enforce the law against top Clinton administration officials. She has an uncanny instinct for ignoring or misreading the evidence and the law when top officials are credibly accused of misconduct.” I think that if the Department of Justice is ever investigated we will be stunned. But we will never learn the full story if the department remains under the control of the same people who have been running it for years. ■

Cato Calendar

Monetary Policy in the New Economy
18th Annual Monetary Conference
Cosponsored with The Economist
Washington • Cato Institute
October 19, 2000
Speakers include Alan Greenspan, Robert D. McTeer Jr., Benjamin Friedman, and Mickey Levy.

Cato University
Montreal • Hotel Omni Mont-Royal
October 19–22, 2000
Speakers include Charles Murray, Alan Charles Kors, and Tom Palmer.

The New Entertainment Era: The Convergence of Technology & Entertainment
Third Annual Conference on Technology and Society
Cosponsored with Forbes ASAP
Reston, Virginia • Hyatt Reston
November 9–10, 2000
Speakers include Christie Hefner, William Schrader, Michael Robertson, and Scott Draeker.

Perspectives on Liberty: Public Policy 2000
New York • Waldorf-Astoria
November 17, 2000
Speakers include P. J. O’Rourke.

13th Annual Benefactor Summit
Cancun • Ritz-Carlton
February 21–25, 2001

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