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More on Impending Proceedings

In his reply to my commentary on Free Speech for Judges (Winter 2001), Professor Steven Lubet misquotes my proposal.

Making my proposal appear more restrictive on judicial speech than it is in fact, Professor Lubet says: “Professor Freedman’s own proposal sweeps much more broadly, as it would apply to all ‘issues’ in a ‘contested case,’ and not merely to identifiable, impending proceedings.”

Actually, my proposed rule would apply only if there is a reasonable possibility that the same “issue [discussed by the judge] will be contested” in a case that will come before the judge. Thus, to take Professor Lubet’s illustration, it is possible that perjury cases will come before Judge Posner, but it is exceedingly unlikely that the same issue of materiality presented in President Clinton’s case will be contested in a case before Judge Posner.

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