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Starr chamber

The real lesson of the Clinton scandal? You could be next

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Independent Counsel Kenneth Starr is my hero, albeit in a perverse sort of way. Ditto William Jefferson Clinton, who has made himself such a tempting target that he has brought out the worst in Starr. Ditto William H. Ginsburg, the West Coast medical malpractice lawyer representing Monica Lewinsky, whose seeming inexperience with the ways of federal prosecutors has led him to conduct, in full view of the entire nation, tawdry negotiations over how much his client would be willing to say in exchange for how much of a reward.

For many, Starr personifies the phrase *overzealous prosecutor*. But he could also turn out to be a spectacular civics teacher. After all, his methods are no different from those that federal prosecutors have been using, and honing, for decades. Suddenly, during prime time, the American public and the news media are witnessing what can happen to all citizens -- even the president -- who find themselves in the path of the federal law enforcement juggernaut.

Starr's snooping into the sex life of the president might not have seemed so bad had he not also landed so heavily on women, including several not suspected of wrongdoing, who now find their own sex lives the topic of national conversation. (This from a man originally charged with investigating land deals in Arkansas.) But his tactics are all too typical. The bullying of vulnerable citizens, often unrepresented by lawyers, in an effort to turn them into witnesses. The negotiations with these potential witnesses (or their lawyers) to exchange immunity for the testimony the prosecutor wants, even if the prosecutor ends up virtually writing the script for the witness. (As Alan Dershowitz has said, these prosecutors teach witnesses not only to sing, but to compose.) The ugly specter of friends testifying against friends, even surreptitiously recording their most intimate conversations -- their pleas for help, advice, and support. It can easily change, as it has in this case, from an effort to uncover and prosecute serious crimes into a crusade to nail a human target. It is beyond ugly; it is all paid for with our tax money; and, in the end, it is all approved by our lawmakers, by our judges, and, through the ballot box, by you.

Starr has built the powers and the budget (some $25 million spent so far, and mounting rapidly) of the independent counsel's office to a point well beyond what his predecessors achieved. In a just world, he would himself be the subject of a criminal investigation for obstruction of justice and subornation of perjury, not to mention violation of civil rights. But the federal criminal justice system is no longer a just world. It is a world bereft of the checks and balances that used to give the citizen some protection.

Finding oneself the target of such unchecked power can be a frightening experience even when you're the planet's most powerful man. For an ordinary citizen, it is utterly terrifying. But the situation for the average American will not improve until enough of the folks who write and enforce these laws get caught up in the webs they weave for the rest of us.

What has made this case so different, obviously, is the role that the media have played. Thanks to well-placed leaks -- and Ginsburg's very public comments -- we have all been treated to front-row seats.

The media reported widely how Starr's office learned that informant Linda Tripp had recorded confidential conversations (illegally, under Maryland state law) with her "friend" Monica Lewinsky about sex and cover-ups in the Oval Office. Starr's office, we also learned, closed in on Lewinsky and confronted the frightened woman with a roomful of federal prosecutors and FBI agents. There, they reportedly tried to pressure her -- on the spot, without her lawyer present -- to wear a wire and try to entrap Vernon Jordan, or Clinton's personal secretary, Betty Currie, or perhaps even Clinton himself. Had Jordan become ensnared in an effort to corrupt Lewinsky's testimony, then the heat would have been placed on him to turn on his friend Clinton. This technique is called "climbing the ladder."

It did not much matter to Starr and his associates that Tripp had violated a confidence by taping her phone calls, or that she had likely committed a felony in doing so. Tripp may have been a criminal, but she was Starr's criminal. And that made all the difference.

Nor did it matter to the feds that Lewinsky, newly betrayed by someone who had pretended to befriend her, was now being pressured to turn around and do the same thing to others. Personal relationships mean nothing when the hunt is on; arms are twisted to the breaking point. Here in Massachusetts, several years ago, the United States Attorney actually subpoenaed an elderly Italian woman from Somerville to testify against her own son. Her son, a police officer, was then under investigation for accepting bribes. Officials relented only when it was clear that she would sooner go to prison than betray her child, and when the press picked up on the story.

Ginsburg and Starr were seen openly dancing the pas de deux that prosecutors and defense lawyers perform routinely, though ordinarily with more delicacy and less visibility. Indeed, from many lawyers' perspective, the only thing Ginsburg did wrong was to talk about what he was doing. According to a recent Associated Press report, lawyers at the American Bar Association's national convention have been sharply critical of his conduct. "I cannot think of a competent criminal defense lawyer who would lead the public to believe he's negotiating for the testimony of his client," Terence McCarthy of Chicago's Federal Defender Program was quoted as saying. But McCarthy misses the real point: it's not making the negotiation public that compromises the value of a witness's testimony. It's negotiating for testimony in the first place.

Starr's fondest wish, of course, is to have Lewinsky testify that Clinton and his cronies not only lied under oath about the president's sex life, but obstructed justice and suborned perjury by trying to convince witnesses to lie. So Starr bludgeoned the young lady, ultimately through her lawyer rather than face to face in a hotel room: unless she told the "truth" (loosely translated as the story that the feds wanted to hear), she would be sent to federal prison for a good long stretch. The bidding was overt and hard-nosed. Reportedly, Lewinsky was willing to go so far as to admit that she and Clinton had had sex, but was unwilling to say that Clinton had asked her to lie about it. Yet Starr, it was said, held out for the most damning testimony.

When private lawyers use threats to try to get a witness to "cooperate," they open themselves up to being prosecuted for the federal crimes of obstruction of justice, extortion, or subornation of perjury. The reasoning is simple: put people under enough duress to make certain claims, and their testimony -- even under oath -- is no longer reliable. Memory has a way of being clouded by fear.

Indeed, a couple of Boston lawyers, including one former federal prosecutor, Gary Crossen, are being investigated for precisely such an offense: allegedly putting pressure on a witness to cooperate with the losing side in the litigation over the Demoulas family fortune. Crossen apparently forgot that he was no longer a fed. (Full disclosure: the wife of *Boston Phoenix* publisher Stephen Mindich was the judge in the Demoulas case.)

So why isn't it a crime when prosecutors use these tactics? After all, they put potential witnesses under the most severe pressure -- the threat of doing time in federal prison. And there is no principled difference between pressuring or threatening a witness into testifying for the prosecution and doing the same to induce testimony for the defense. The difference is merely a practical one: when prosecutors do it, there is no one to charge them. It's that simple. Even when the victims of these techniques complain to judges, the judiciary turns a deaf ear.

And what about the noxious tactic of recording phone conversations when one party believes that his or her words have been uttered in confidence to a parent, sibling, lover, or friend? Well, it's a crime in many states (including Maryland and Massachusetts), but if someone is doing it to help the prosecutor, it gets overlooked.

And when it's done by a law enforcement agent, it is not even considered a crime. But what happens when the target or the target's lawyer records a call in order to prove later that a government witness, or even an FBI agent, is a liar? It's a felony, and the case is prosecuted.

The feds routinely wiretap phone conversations without either party being aware of it. Every year, they use more wiretaps, and more "body wires" (tiny voice transmitters, such as the one Starr wanted Lewinsky to wear). Indeed, it's almost a joke among those familiar with federal law enforcement that if two people want to have a face-to-face conversation with any assurance of privacy, both have to strip naked. Some years ago, when the FBI was at the height of its investigation of the Mafia, agents attached body transmitters to the one spot where the mobster targets were unlikely to check: around the informants' testicles. Do we really want to become a society where such extraordinary measures have to be taken to guard against Big Brother?

One of the things that makes it possible for the feds to get their claws into so many citizens (read: potential witnesses) is the federal criminal code. This body of laws has been expanding at a prodigious rate, with the addition of ever-broader and ever-vaguer criminal statutes. The federal courts have been doing their part, upholding the most absurdly broad applications that inventive prosecutors can come up with.

Not long ago the Speaker of the Massachusetts House of Representatives, Charles Flaherty, was harassed because he accepted small favors and gratuities -- free time in friends' vacation homes, for example -- from people with interests in pending legislation. In the end, in order to get the feds off his back, he agreed to plead guilty to income tax violations.

And look at what happened to former Massachusetts state senator Joseph Timilty, who went to prison in a real estate deal gone sour rather than accept a deal to testify against friends who he insisted were innocent. He has since written a moving and angry book about the experience of being pressured by his own government to lie.

Indeed, it is getting difficult for the average citizen to make it through a month without arguably committing some federal offense. Sending a dirty picture to a friend over the Internet

becomes interstate trafficking in pornography. Sending a computer program to a friend becomes a criminal violation of the copyright laws, or the interstate transportation of stolen merchandise. It wasn't too long ago that a client of mine, David LaMacchia (then an MIT sophomore), got a felony indictment for similar conduct that did not yield him a single cent.

A joke posted on a computer bulletin board becomes a terrorist threat; college students around the country have been caught in this trap. It's best not to be too rambunctious on the Internet, now that Uncle Sam is policing cyberspace.

A few errors on a income tax return of ungodly complexity become tax evasion. A misstatement or an evasive answer to an FBI agent, not even under oath, becomes a "false statement to a federal officer" punishable by up to five years in prison.

Or take the case of former Clinton secretary of housing and urban development Henry Cisneros. He was indicted by another independent counsel for the crime of lying to FBI agents while not even under oath: he had admitted to having a mistress to whom he paid $10,000 in hush money, but it turned out that the sum was actually much more. This was deemed a "material false statement" in connection with his Senate confirmation hearings. Now, because he failed to treat an FBI agent as his closest confidant, his life lies practically in ruins.

Indeed, Clinton's current nightmare, while in a larger sense brought on by his own atrocious personal conduct, was a direct product of just such a legal morass: the Paula Jones sexual harassment lawsuit, which has consumed vast financial and judicial resources. (The case has been pending for years in the lower federal courts, and has already been to the Supreme Court and back.) Even if Ms. Jones's allegations are essentially true, a sensible person would expect the case to have been dismissed in five minutes. After all, when she refused then-governor Clinton's request to give him oral sex, she was not fired or demoted. She didn't sue until he became a national figure. Do we really want to allow litigation over every amorous, or even coarsely sexual, misadventure to which the flesh is vulnerable? Are we intent on literally making a federal case of absolutely every human foible and failing?

In only one respect is the independent counsel structure more odious than the day-to-day operations of the FBI and the Department of Justice. Federal prosecutors frequently pick out a target and then go about investigating every inch of that person's life (and, often, that of his family and friends). With independent counsels, on the other hand, the target is selected for them. Ideally, the goal of law enforcement should be to discover that a crime has been

committed, and then to find out who did it. When the reverse becomes the rule, law enforcement becomes very dangerous.

In 1940, President Franklin Roosevelt's attorney general, Robert Jackson (who later sat on the Supreme Court), warned of just this danger in a talk to his assistants in the states, the United States Attorneys:

> *Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filed with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.*

It is doubtful that any attorney general has spoken in these terms for years. If this warning were taken seriously today, a good deal of federal law enforcement would grind to a halt, and all the independent counsels now working would have to return to the job market.

There is a bit of poetic justice here. President Clinton, who has done more to undermine civil liberties than just about any occupant of the White House in recent memory, has suddenly seen the beast turn against him. Clinton is, after all, the president who, at the behest of the FBI and the Department of Justice, persuaded Congress to enact legislation requiring manufacturers of telecommunications equipment to modify phone systems so as to enhance FBI wiretapping capabilities. It was Clinton who supported government controls over the content of communications on the Internet. Clinton is currently fighting to have Congress outlaw the use by private citizens of encryption programs that make it virtually impossible for the FBI to snoop into computerized communications. He has not been good for the privacy rights of American citizens.

When the Supreme Court upheld the independent counsel statute during the Reagan administration, Justice Antonin Scalia warned of the consequences. "How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile," he wrote in a dissent. Scalia was particularly disturbed that this tremendous power, with its high potential for abuse, was not subject to the normal checks and balances that, at least in theory, are supposed to keep the Department of Justice under control. And he was right. But when the feds come after John Q. Citizen, it is a much more unevenly matched contest. Even the normal checks and balances no

longer work, because prosecutors, legislators, judges, and, alas, presidents all seem to be on the same speeding locomotive, with our civil liberties lying on the tracks.

Yet John Q. Citizen is not likely to get more protection from the law until some of the lawmakers and law enforcers have experienced what Bill Clinton is now undergoing. What is happening to him has happened to countless citizens, often at the hands of his government. Bill Clinton and Kenneth Starr indeed deserve each other.

We can only hope that Clinton will now engage Starr in such a titanic battle that the full panoply of federal prosecutorial techniques -- the tools not only of Starr but of virtually every federal prosecutor and FBI agent -- will come under serious scrutiny at last. Perhaps the federal courts, which in recent decades have refused to interfere with these tactics no matter how odious, will begin to put some brakes on a system long out of control. It might even come to pass that Congress will impose some limitations not only on federal prosecutors, but on the scope and breadth of federal criminal and civil statutes as well.

And it may be that Clinton and his successors in the White House will suddenly see the benefits of civil liberties, and that legislators will stand in awe as they see the devastation wrought by the laws they have so offhandedly forced upon us all.