

## Op-Ed: The Irony and Flaws in the Federal Case Against Hastert

Former House speaker should have learned something from other D.C. scandals.

Andrew D. Herman, The National Law Journal

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The old adage warns, "Those who do not learn from history are doomed to repeat it." But what of those who make the history and still don't learn from it? They're doomed as well. Just look at Dennis Hastert.

Despite playing an integral role in the most infamous presidential sex scandal of our time — that involving Bill Clinton — Hastert failed to heed the primary lesson of that experience: It's far easier to get in trouble for what you say than for what you've done. Now, faced with a federal indictment stemming from the most technical of legal violations — charges that deal not with his alleged misdeeds but his attempts to cover them up — Hastert must surely wish he'd stayed mum. Still, until we have additional information, Hastert is entitled to the presumption of innocence.

The rise and fall of Hastert's political prospects eerily presage his personal travails. Hastert's career as speaker of the House was bookended by other members' ethics scandals. In November 1998, when Hastert was elected to a seventh term in the House of Representatives, no political pundit could have predicted that the Illinois Republican would soon ascend from deputy whip to the top position in that chamber.

Yet that December, longtime speaker Newt Gingrich stepped down after suffering his own ethics problems. Then Bob Livingston, Gingrich's presumptive replacement, was forced to decline the position because of his own extramarital affair. Hastert quickly acquired the backing of House Republican leaders and assumed the speakership without challenge. At the time, many attributed Hastert's selection as speaker to the perception that, after a series of Republican scandals, the former teacher and wrestling coach from the far-western Chicago suburbs seemed a safe choice to marshal impeachment proceedings against President Clinton.

After becoming speaker, Hastert did just that, directing the passage of two articles of impeachment — one related to charges of lying to a federal grand jury about his affair with Monica Lewinsky and the other an obstruction of justice charge for inducing others to lie.

Another sex scandal served as a catalyst for the end of Hastert's career in the House. In December 2006, the House Ethics Committee determined that Hastert and other congressional leaders had been "willfully ignorant" in failing to adequately address early warnings about Representative Mark Foley's misconduct with congressional pages. The following year, with Republicans back in the minority, Hastert resigned from Congress in the middle of his term.

In light of Hastert's role in those events, some pundits are proclaiming that Hastert has received his just desserts. Certainly, questions regarding his long-ago conduct as a teacher and coach remain to be answered. (Charges related to the alleged sexual misconduct are unlikely to be brought, given the applicable statute of limitations.)

## TENUOUSNESS OF ALLEGED CRIMES

Regardless of those claims, there should be little debate about the tenuousness of the legal and factual bases for the current federal charges. The criminal indictment issued on May 28 charges Hastert with two federal crimes. The government's decision to charge him with "structuring" — essentially making multiple bank withdrawals to remain under the federal reporting threshold of \$10,000 — is open to criticism. This charge, made available to law enforcement as part of the Patriot Act shepherded through Congress after Sept. 11, 2001, by then-Speaker Hastert, is generally used against terrorists, drug dealers and other nefarious actors.

It is hard to believe that lawmakers intended for the ban to apply in these circumstances. Whether or not Hastert is guilty of the rumored crimes, the government's legal right to know about the private affairs of two consenting citizens is an entirely separate question.

The second federal charge, that Hastert made false statements to FBI agents, emanates from the government's inquiry into his bank withdrawals. Given the questionable legal basis for the "structuring" count, the false statements charge should be treated with similar skepticism. The thin factual support for those statements further undermines the government's charge. As recounted by the indictment, Hastert's purported lie was prompted by an "agents' question confirming whether the purpose of the withdrawals was to store cash because he did not feel safe with the banking system, as he previously indicated." In response, Hastert stated: "Yeah ... I kept the cash, that's what I'm doing."

In other words, Hastert's alleged false statement apparently arose in response to prompting by the FBI. If that response represents the full extent of Hastert's falsities, the government is straining to make this charge. When confronted with embarrassing questions about personal conduct, one's natural inclination is to obfuscate and elude. But, as with his former nemesis, Clinton, Hastert would have been prudent to resist the temptation to mislead, or even engage with, his inquisitors. Just as the impeachment proceedings against Clinton related not to the affair but to the cover-up, the federal charges against Mr. Hastert have little, at least in a legal sense, to do with his alleged past misconduct. Once the FBI came knocking, Hastert should have recognized that his attempt to bury his past had failed.

Rather than facing the disclosure of embarrassing but legally ineffectual claims, Hastert now finds himself playing the far less desirable role of criminal defendant.

*Andrew D. Herman is counsel to Miller & Chevalier in Washington.*

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