

Richard A. Posner. *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton.* Cambridge, Mass.: Harvard University Press, 1999. xii + 276 pp. \$24.95, cloth, ISBN 978-0-674-00080-3.



Jeffrey Toobin. *A Vast Conspiracy: The Real Story of the Sex Scandal That Nearly Brought Down a President.* New York: Random House, 1999. 422 pp. \$25.95, cloth, ISBN 978-0-375-50295-8.



Reviewed by R. B. Bernstein

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More than a year after the fact, the impeachment and trial of President Bill Clinton has receded into the past, like a half-remembered nightmare, with no larger significance other than the besmirching of Clinton's likely historical reputation.

While it was unfolding, journalists and politicians attempted to build analogies between the Clinton impeachment to the Watergate crisis of 1972-1974, seeking to plug each of the dramatis personae into the corresponding role of a quarter-century before. These mechanistic analyses collapsed. In the Clinton controversies, unlike Watergate, there were no clear dividing lines between heroes and villains, good guys and bad guys. Moreover, unlike Watergate, in which nearly ev-

ery participant articulated a clear sense of the constitutional gravity of the crisis afflicting the nation and the administration of President Richard Nixon, the constitutional arguments generated by the Clinton impeachment (the first impeachment of an elected President) were side-shows to the tawdry spectacle at the impeachment's core. In sum, the Clinton impeachment was a constitutional train-wreck, a fiasco mismanaged by virtually all involved. Whoever won, the Constitution and the nation lost.

One parallel to Watergate holds firm -- the steady stream of books claiming to illuminate one or another aspect of the history that we have just endured. The two books under review, generally hailed as among the best of the genre, offer nearly

polar perspectives on the Clinton scandals and the constitutional system's fumbling responses to them. Sadly, they also justify Sir Walter Raleigh's warning that no historian should follow history too closely lest it kick out his teeth.

A Vast Conspiracy proposes to recount an excellent journalistic history of the Clinton sex scandals and their political significance. And, indeed, there is much of value in these pages. Jeffrey Toobin, a veteran prosecutor and legal journalist, lambastes virtually everyone involved in the case -- including Clinton himself -- because virtually everyone deserves lambasting. Especially as lawyers played central roles in virtually every stage of the story, Toobin's analysis of the conduct of the lawyers rings true. In particular, his autopsies of the struggles of Independent Counsel Kenneth Starr and his staff are devastating. Toobin demonstrates that Starr, inexperienced in the world of federal prosecutions, largely left key decision-making to his staff; whereas in the early stages of his stewardship his key staffers were skilled, veteran prosecutors, by the time Linda Tripp and then Monica Lewinsky appeared on the horizon Starr was relying on third- and fourth-string attorneys united only by their moral zeal and their hatred for Clinton and his administration. The only person who emerges as an honorable figure is Judge Susan Webber Wright, the federal district judge who presided over Paula Corbin Jones's sexual-harassment lawsuit and sought desperately and courageously to keep the case against Clinton on at least a partly dignified level.

Toobin's reconstruction of the case's evolution is admirably clear. He shows that the history of the Clinton impeachment was shot through with contingencies -- foolish choices, bad judgment calls, decision-making warped by vindictive zeal on one side and defensive rage on the other side. In many ways, this book is reminiscent of two classic journalistic histories of scandals in the entertainment industry: Steven Bach's *Final Cut*:

Dreams and Disaster in the Making of "Heaven's Gate" and David McClintick's *Indecent Exposure*.

Toobin's book is wanting in several key respects, however -- each of which points up a corresponding superficiality in the underlying story he tells.

First, Toobin fails to consider one key dimension of the Clinton impeachment -- its betrayal, on both sides, of the seriousness of any invocation of the Constitution's impeachment process, particularly against an elected President. Most of the best histories of Watergate assess the nature of impeachment, the meaning of "high crimes and misdemeanors," and the significance of impeachment in constitutional government.[1] Toobin refers to these matters only in passing, thus reflecting and reinforcing the ways in which the Clinton impeachment scanted such vital questions. (Readers will search in vain for any discussion in *A Vast Conspiracy* of the afternoon in December 1998 when many leading constitutional scholars historians were called before the House Judiciary Committee, only to be spurned.)

The pivotal flaw in Toobin's book, however, is in his thesis. His riveting account of the coincidences, accidents of timing, and ramshackle connections among various members of the pro-impeachment forces impeaches (if I may use that word) most uses at the time of the phrase "vast conspiracy." It was more an ad hoc, jury-rigged series of opportunistic alliances than a conspiracy.

A word of clarification is required, however. By "vast conspiracy" Toobin invokes not the "vast right-wing conspiracy" against Clinton postulated by Hillary Rodham Clinton, but rather what Toobin repeatedly speaks of as "the legal system's takeover of the political system." Toobin seems to believe that law and politics are and should be distinct realms, hermetically sealed off one from the other; beginning in the 1950s, he contends, the use of litigation to achieve such great social and political goods as desegregation and voting rights led in turn to the legal system's takeover of the po-

litical system -- with the Clinton impeachment as the final damning evidence of this terrible wrong turning.

Oddly, however, Toobin's account repeatedly suggests that the reverse has been true -- that the bitterness of social and political conflict pervading the political system has seeped into and taken over the legal system, not vice versa. Toobin's own account so convincingly supports the mirror image of his chosen interpretative perspective that he leaves this reader, at least, unclear why he has adopted his stated viewpoint. Perhaps Toobin has adopted the fashionable posture of 1990s critiques of encroachments of law into realms for which it is supposedly unsuited.

Moreover, Toobin's linking of the trainwreck of the Clinton impeachment to the legal system's postulated takeover of the political system begs the gigantic question of how the great goods achieved through legal means, such as desegregation, could have been achieved other than through constitutional litigation. Yet again, here as in other aspects of his analysis, Toobin's choice to focus his analysis on the events of 1998-1999 denies him and his readers the broader historical perspective that would have elevated this book above an inflated magazine article.

By contrast, *An Affair of State* claims to be a carefully-prepared and rigorously-argued analysis of the Clinton-Lewinsky affair from a responsible jurisprudential perspective. This study is a notable change of pace for its author, Chief Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, perhaps the most prolific writer ever to work in the field of jurisprudence and legal philosophy. Judge Posner's introduction startles the reader with his characterizations of the Clinton impeachment as "exhilarating" and "riveting," but a closer reading of his book suggests why he is so entranced by the tawdry spectacle and why, furthermore, he has ventured into the realm of what some might dismiss as "instant history" (he tells us that he fin-

ished writing the book four days after the Senate voted not to convict President Clinton). Judge Posner's purpose in *An Affair of State* is to use the Clinton episode as a case study to test (and vindicate) his approach to jurisprudence and legal thought, which some would describe by the older label "law and economics" but which he refers to as "legal pragmatism."

I leave it to other reviewers to assess Judge Posner's purely legal analyses; a cogent response by Professor Ronald Dworkin of New York University School of Law suggests that Judge Posner's examination of the crime of perjury, and his assessment of the conduct and work of Kenneth Starr are both severely flawed.[2] So, too, does Toobin's book. Indeed, a juxtaposition of the two studies is instructive. For example, Posner sees nothing wrong with anything that Starr and his minions did, whereas Toobin presents a damning indictment of the Starr prosecutions; one reason may be that Posner never has had prosecutorial experience, whereas Toobin (a former member of Iran-contra prosecutor Laurence Walsh's staff) is an experienced federal prosecutor.

What is of interest for constitutional scholars, political scientists, and historians is the specific target of *An Affair of State*. Posner's various works of legal scholarship often choose a competing school of legal thought for contemptuous dismissal. Here Posner takes aim at historians and constitutional theorists.

For legal and constitutional historians, Posner's book is of interest mainly as a challenge. Posner disputes the ability of historians -- or of legal scholars whose chosen perspective is that of moral philosophy, or that of law and literature, or that of just about any other field besides his chosen form of legal pragmatism -- to render useful or enlightening advice on any major legal or constitutional issue.

To be sure, historians and constitutional theorists on both sides of the debate over Clinton's impeachment were guilty of rhetorical excesses -- in

particular, those scholars who in other settings vigorously had dismissed "original intent" or "original meaning" or "original understanding" jurisprudence," yet abruptly turned around and made originalist arguments against the impeachment effort. So, too, legal scholars who insisted on rigorous, even rigid originalism in other fields blithely dismissed any constraints of any identifiable original intent on the impeachment process. Some scholars attempted to voice and explain middle-ground positions that avoided either excess, but unfortunately they were drowned out by the polarizing effect of the choice to impeach or not to impeach.

However, the faults and flaws of the scholarly controversy over the impeachment process do not warrant Posner's dismissal of the scholars – nor his overheated rhetoric about the professoriat. Posner's contempt for those who think otherwise falls curiously flat when we watch his attempts to use legal pragmatism to resolve the constitutional questions of the Clinton impeachment. Posner essentially concludes that, although Clinton might have committed impeachable offenses (a conclusion that he reaches by bootstrapping arguments about the President's moral authority into a claim that personal immorality damages the institution of the Presidency), a cold pragmatic analysis of what would be gained versus what would be lost by impeaching the President tips the scale against impeachment. It is difficult to see how this approach to deciding whether to impeach a President is an improvement over the carefully reasoned approach developed in the Watergate crisis of 1973-1974 – one crystallized by John Labovitz's observation that impeachment is a lawyer's solution to a statesman's problem, and that presidential impeachment is necessarily a blend of constitutional, legal, and political inquiries.[3]

In sum, the last battle of the Clinton impeachment is, in the words of Jonathan Swift, "the battle of the books." Few of these books come before the reader with as many claims to authoritativeness

as those now under review. The failure of these books to elucidate or illuminate the nature, sources, and longterm significance of a constitutional train wreck suggests, yet again, the dangers of writing contemporary history.

Notes

[1]. See generally Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (New York: Knopf, 1990; new ed., New York: W.W. Norton, 1992); J. Anthony Lukas, *Nightmare* (New York: Viking, 1975; reprint ed., Athens: Ohio University Press, 1999).

[2]. Ronald Dworkin, "Philosophy and Monica Lewinsky," *The New York Review of Books*, March 9, 2000.

[3] See generally John R. Labovitz, *Presidential Impeachment* (New Haven: Yale University Press, 1979).

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