

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.



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In the 1850s, the slavery debate damaged one American institution after another: the political parties, the churches, the courts. The result was civil war. A century and a half later, when one American institution after another stumbled during the fourteenth-month Clinton-Lewinsky soap opera, the result was banal, not tragic.

It has been two years since President Bill Clinton assured the nation that "I did not have sexual relations with that woman." Barely one year ago, the Senate voted to acquit the impeached and disgraced president. With each new round in the 2000 campaign, with each new book published about the episode, fewer and fewer people seem willing to defend Bill Clinton's despicable behavior. Just after the Senate trial, the widely circulated charges that Clinton had raped a woman in the 1970s elicited a stony, uncomfortable, but acquiescent silence. Even the ever-loyal Vice President Al Gore admits that the man whom he declared "the greatest president" on Impeachment Day engaged in "inexcusable" conduct. And the long-suffering First Lady, after attributing the President's wantonness to being abused as a child -- both his

mother and his grandmother fought for his affections! -- has moved out of the White House and into a New York Senate race.

The debits have piled up on the Republican side of the ledger as well. Newt Gingrich, Ken Starr, and Bob Livingstone have vanished along with the Republicans' healthy majority in the House. Clinton-haters now grumble about the key-stone-cops pratfalls of the Independent Counsel's Office, the House Managers, and the Senate Majority leadership. Meanwhile, a majority of Americans continue to fault Republican overzealousness and prosecutorial misconduct for the whole ordeal. And while Bill Clinton globetrots madly in his frantic quest to burnish his legacy, and Monica Lewinsky shills for Jenny Craig weight-loss programs, Linda Tripp awaits trial in a Maryland courtroom for what Clinton defenders in a different context would deem a trivial, rarely prosecuted, technical violation of the law. In short, just as no heroes emerged during the whole sordid scandal itself, it is hard to imagine that historians will be able to find many white knights or silver-linings in retrospect, either.

In his rigorous, unsparing, razor-sharp analysis, *Affair of State*, Richard A. Posner details the deluge of deceit, distortion, sloppiness, and silliness that resulted in the only impeachment of an elected president in American history. Posner takes on the major players and central institutions in the melodrama one by one -- and finds most of them wanting. Posner is a pragmatist as well as a moralist. He can reject the formalistic, fanatic, and disproportional zeal of Clinton's persecutors as well as the Clintonites' relativistic, solipsistic, situational ethics. Posner's purview is narrow, his perspective is limited. He began writing the book in October 1998 and finished it on February 16, 1999, just four days after the Senate trial concluded. Federal judge that he is -- in fact, he is Chief Judge of the U.S. Court of Appeals for the Seventh Circuit -- Posner confined his analysis to the available evidentiary record. Nevertheless, he succeeds in offering some first rate social commentary. Posner also helps solve two of the central mysteries of the time: how did a clearly guilty president survive and how did this tawdry and tangled episode succeed in polarizing so many into such united and hostile camps?

In eight painstaking chapters and an introduction, Posner sifts through the evidence regarding "the President's Conduct," "the Prosecution and Defense," the impeachment imbroglio, and the broader questions the scandal raised about morality, leadership, and cultural division in America today. Judge Posner finds President Clinton guilty of the very real crimes of perjury and obstruction of justice (ignoring perjury in Clinton's answers to the questions put to him by the House Judiciary Committee and certain other peripheral offenses). The judge concludes with a "conservative estimate" that Clinton's crimes would have earned a normal defendant a federal "prison sentence of thirty to thirty-seven months" (p. 55). More broadly, Posner attacks "the number, publicness, transparency, solemnity, and gratuitousness of President Clinton's lies" (p. 151). The magnitude of the deceit combined with the trivial-

ity of the motive sets Clinton apart from other presidents who may have prevaricated in the line of duty. The "everybody does it" defense does not hold. When Abraham Lincoln or Franklin Roosevelt lied under wartime conditions there was, at least "some social cost but more social benefit;" Clinton's cascade of concoctions "were all social cost and no social benefit" (p. 151).

Furthermore, Judge Posner's indictment charges that Clinton did not act alone. Posner bristles when he discusses the White House's "slander machine" and its systematic attempts to "blacken the reputations of the President's adversaries in his desperate, no holds-barred struggle to retain his office" (p. 75). He suggests that Hillary Clinton was "an accomplice in her husband's scheme of deception" (p. 139) and that most of the president's defenders knew he was lying from the start but "doubtless believed ... that Clinton's denials would never be proved false" (p. 139). He finds it unfortunate if understandable that "Clinton's lawyers had no inhibitions about making statements in the trial that, as intelligent people, they could not have believed, notably that the President had been truthful in his grand jury testimony" (p. 245). The White House Counsel Charles Ruff impresses Posner as a "better actor" than the president's personal lawyer David Kendall, and thus able to at least give "a convincing impersonation of a person who believes what he is saying" (p. 246). Nevertheless, "the technical acrobatics of the President's lawyers, though helpful in throwing sand in the eyes of his attackers and providing 'running room' ... for his supporters, hurt his reputation and may have tipped the balance in favor of impeachment" (p. 246).

The fact that Posner is a Reagan appointee to the bench does not prevent him from ripping into Clinton's enemies as well. The president's attackers were not just overzealous but self-defeating. "Errors of tact, taste, and public relations committed by the Independent Counsel's office and the members and staff of the House Judiciary Com-

mittee may have been decisive in the President's acquittal," Posner believes (p. 246). Kenneth Starr's report was too prurient and too disdainful of the president's privacy; the Republicans in general were too hasty and too partisan. Posner's analysis of the thirteen House Managers illustrates that if Kenneth Starr will be condemned in history for being too focused; the managers will be remembered for being too scattered: "They were too numerous, too alike, mistakenly emphasized the obstruction of justice article of impeachment, took too much time, and conducted an inept examination of Monica Lewinsky" (p. 127).

Posner recognizes Clinton's impeachment as part of a disturbing pattern that Benjamin Ginsberg and Martin Sheffer called "postelectoral politics" in their 1990 book, *Politics by Other Means: the Declining Importance of Elections in America*. Ginsberg and Sheffer identified the modern politician's torture chamber, RIP -- "revelation, investigation, and prosecution" -- as a new substitute for electoral competition.[1] Electoral competition is alive and well thank you very much, but these "institutional weapons of political combat" remain potent.[2]

Along with so many Americans, Posner remains torn about the impeachment question. On the one hand, Clinton "committed repeated and various felonious obstructions of justice over a period of almost a year, which he garnished with gaudy public and private lies, vicious slanders, tactical blunders, gross errors of judgment, hypocritical displays of contrition, affronts to conventional morality and parental authority, and desecrations of revered national symbols." Not only that but "all this occurred against a background of persistent and troubling questions concerning the ethical tone of the Clinton Administration and Clinton's personal and political ethics" (p. 173). And yet, "Clinton acted under considerable provocation -- perhaps provocation so considerable that few people in comparable circumstances would not succumb -- in stepping over the line that sepa-

rates the concealment of embarrassing private conduct from obstruction of legal justice" (p. 174).

The cloud surrounding the case against Clinton becomes even murkier considering the fog around the impeachment question itself. It is a pleasure to watch a trained and rigorous mind cut through the cant and the demagoguery, the bipartisan distortions of history and the law. At the end, Posner admits that there is no clear-cut definition for impeachable conduct. As a result, almost any impeachment is bound to be more political than legal, to focus on possible consequences of the punishment rather than the actual offenses.

Nevertheless, the confusion surrounding impeachment did not justify turning the Senate trial into "a travesty of legal justice" (p. 127). The "most serious procedural failure was the failure to impose a gag rule" (p. 128). In this trial-by-soundbite, all the Senatorial egos enjoying their moment in the media glare made a mockery of the fiction that they were unbiased or open-minded jurors. With "impeachment-happy" (p. 111) Republicans imposing a stiff, overly rigorous, Kantian formalism on one of the most complex areas of human relations, with Democrats defending "the indefensible ... with sophistries and obfuscations," the trial was a farce (p. 113).

And yet, this messy, ugly, distorted process produced a pretty reasonable result -- a hazy punishment to fit an opaque crime. Posner believes the ideal punishment would have been impeachment, followed by "a full and frank" presidential "confession that he had lied and broken the law." This combination would have "been a shaming penalty at once constitutional and efficacious," rendering censure, removal, or criminal prosecution "superfluous." No one should underestimate the powerful sting of impeachment -- no matter how many House Democrats cried "witch-hunt," the "stricken look on the Clintons' faces when they appeared in the Rose Garden on December 19, 1998 immediately after the President was impeached, is evidence that ... impeachment is an ef-

fective, powerful, and legitimate form of shaming penalty" (p. 195). True, the president never 'fessed up to his crimes, and he and his more deluded supporters could define the Senate acquittal as a kind of vindication. Still, no one can erase the black mark on his record -- which, anyway you slice it, stemmed from his appalling personal behavior.

Even if the United States stumbled toward some reasonable outcome, Posner sees this debacle as part of a broader social failure -- as did so many others at the time. He attacks the Supreme Court and other lawyers for excessive legal formalism -- both in upholding the independent counsel law and in allowing the Paula Jones case to proceed: "a descent from the plane of abstract rules on which judges are happiest might have saved the Supreme Court from committing errors harmful both to the nation and to the Court's reputation" (p. 228). Posner is outraged that jurists and law professors fed the confusion between popular justice and legal justice by accepting the White House notion that the struggle was between Starr and Clinton, rather than a question of whether the President broke the law. In general, Posner sighs: "Although a high level of professional skill was displayed on both sides of the struggle from time to time, the investigation, impeachment, and trial of President Clinton was not the legal profession's finest hour" (p. 246).

Inevitably, Posner scores some hits against the many pundits, especially the public intellectuals, who -- in the words of Posner's colleague Jean Bethke Elshtain -- become "more and more public and less and less intellectual" the more air time they clock (p. 232). The performance of many commentators from the "soft" disciplines -- including many historians -- suggests that their academic training had little impact on their conclusions. Their fancy degrees were merely admission tickets they used so they could address "the same" issues in roughly the same way the "public" did (p. 240). An advertisement signed by dozens of histo-

rians in the *New York Times* struck Posner as vague, unsubstantiated, hyperbolic, unsystematic, misleading and inaccurate. "No historian who had bothered to examine the history of impeachment in the United States could have written or signed the statement," Posner seethes (p. 235). Posner is particularly stinging in his denunciation of Abner Mikva, a jurist who had no qualms about calling his old colleague Kenneth Starr "sick" and a "bottom feeder" (p. 71); of Sean Wilentz, a historian who took his mastery of the past as a license to offer dire Chicken Little predictions of the future; and of Ronald Dworkin a law professor who often chides the public for failing to inject "moral principle[s] into our public policy ... [yet] had nothing to say about the decided lack of moral principle demonstrated by President Clinton" (p. 239).

Looking at this dumbfoundingly superficial and partisan debate unlocks one of the key mysteries to the entire affair: how did President Clinton survive? Clinton survived because the debate over his personal sins escalated into a "Kulturkampf" (p. 199). People did not simply disagree -- many became polarized into two intensely antagonistic camps. Once in those camps, there was little room to acknowledge the enemy --pro-Clintonites felt compelled to demonize Starr and lionize Clinton; their opponents simply reversed polarities with equal fanaticism.

What was bad for the American people was great for Bill Clinton. Rallying against a common foe, Clinton achieved a cult-figure status on the left that had long eluded him. His new alliances with liberals, with intellectuals, with unionists, with feminists, helped Clinton survive --as did the President's refusal to be defeated. Even Richard Nixon had to cry uncle eventually. Here and elsewhere, Posner quotes Clausewitz on war to good effect.

Surprisingly, one of the few professions to avoid Posner's critical arrows are working journalists themselves. Despite the barrage they sustained, Posner finds that reporters stuck to the

story -- and were far more frequently right than wrong. Remember, the most dramatic example of supposed journalistic irresponsibility in the winter, spring and early summer of 1998 was the infamous soiled blue dress -- the one compelling piece of evidence that Clinton in the end could not explain away.

Posner's close and immediate analysis of this episode is fascinating. His first two chapters are particularly interesting examples for the historian -- as an illustration of how we never approach the problem. He unashamedly lacks any kind of historical perspective. As a result, of course, his analysis is also severely limited. It is striking to a historian nevertheless. Posner offers no context, no past, few speculations about broad phenomena. As a result the book becomes an intriguing example of how a judge thinks through the evidence -- often context, past patterns, and the like are actively barred from the record.

This "just the facts, ma'am" approach should force historians to reexamine our own assumptions. The Clinton-Lewinsky scandal has left historians with much important work to do, not only in accounting for many of our colleagues' failures but in explaining the antecedents, dynamics, and consequences of the whole episode. Posner's approach suggests that, sometimes, the history of Swiss watchmaking may be illuminating, but sometimes we just need to tell the time. Yes, historians have an important role to play in public debates. But we need to be wary of simply invoking our authority or our facility with historical examples to make dishonest connections and demagogic debating points. Posner's book, thus, is an invaluable aid both in tackling the difficult questions this episode raised and in prodding us to be more rigorous, more honest, more self-critical, and a lot less self-righteous and polemical.

Notes

[1]. The book was recently republished as Benjamin Ginsberg and Martin Shefter, *Politics by Other Means: Politicians, Prosecutors and the*

Press from Watergate to Whitewater, rev. ed., (New York: W.W. Norton & Company, 1990, 1999). For "RIP," see p. 39.

[2]. Ibid., p. 16.

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