

RICHARD A. POSNER

**AN
AFFAIR OF STATE**

**THE
INVESTIGATION,
IMPEACHMENT,
AND TRIAL OF
PRESIDENT CLINTON**



A
New York Times
Book Review
Editors' Choice for
Best Book of
1999

AN

AFFAIR
OF STATE

THE INVESTIGATION,
IMPEACHMENT,
AND TRIAL OF
PRESIDENT CLINTON

Richard A. Posner

Harvard University Press
Cambridge, Massachusetts
London, England

Copyright © 1999 by the President and Fellows of Harvard College
All rights reserved
Printed in the United States of America

Fifth printing, 2000

First Harvard University Press paperback edition, 2000

Library of Congress Cataloging-in-Publication Data

Posner, Richard A.

An affair of state: the investigation, impeachment and trial
of President Clinton/Richard A. Posner.

p. cm.

Includes bibliographical references and index.

ISBN 0-674-00080-3 (cloth)

ISBN 0-674-00391-8 (pbk.)

1. Clinton, Bill, 1946— —Impeachment. 2. Trials (Impeachment)—
United States. 3. Impeachments—United States. I. Title.

KF5076.C57P67 1999

342.73'062—dc21 99-24307

AN
AFFAIR
OF STATE

Dramatis Personae

Monica Lewinsky	White House intern, then employee; Clinton girlfriend and witness in his Senate trial
William Clinton	President of the United States
Kenneth Starr	Independent Counsel, investigating the President
Betty Currie	The President's personal secretary
Evelyn Lieberman	Deputy White House Chief of Staff
Paula Jones	Plaintiff in a sexual harassment suit against Clinton
Susan Webber Wright	District judge in the Jones case
Bill Richardson	U.S. Ambassador to the United Nations
Vernon Jordan	Washington lawyer; Clinton friend and witness in his Senate trial
Ronald Perelman	Chairman of the executive committee of Revlon, Inc.
Sidney Blumenthal	Assistant to the President; witness in Clinton's Senate trial
Webster Hubbell	Former Associate Attorney General
Linda Tripp	Pentagon employee; confidante of Lewinsky
Kathleen Willey	Volunteer worker in the White House
Lucianne Goldberg	Conservative literary agent; friend of Linda Tripp

Gennifer Flowers	Former girlfriend of Clinton
Vince Foster	Former Deputy White House Counsel; a suicide
Richard Mellon Scaife	Clinton opponent
Robert Fiske	Starr's predecessor as Independent Counsel
James Carville	Political consultant; Clinton defender
Robert Bennett	Clinton's lead lawyer in the Jones case
David Kendall	Clinton's lead lawyer in the Starr investigation
Henry Hyde	Chairman of the House Judiciary Committee; chief prosecutor of Clinton in the Senate trial
Tom DeLay	House Republican whip
Charles Ruff	White House Counsel; the President's lead lawyer in the impeachment and trial

Chronology

May 8, 1991	Paula Jones encounters Governor Clinton in a hotel room in Arkansas
November 3, 1992	Clinton is elected President
May 6, 1994	Jones sues Clinton for sexual harassment, asking for \$700,000 in damages
August 9, 1994	Kenneth Starr is appointed Independent Counsel to investigate Whitewater real estate deal
July 1995	Monica Lewinsky becomes a White House intern
November 15, 1995	Clinton begins a sexual relationship with Lewinsky
April 5, 1996	Lewinsky is transferred to the Pentagon
November 5, 1996	Clinton is reelected President
March 29, 1997	Clinton's last sexual encounter with Lewinsky
May 27, 1997	The Supreme Court rules that the Jones suit can go forward
November 1997	Lewinsky enlists Vernon Jordan's aid in her New York job search
December 5, 1997	Lewinsky's name appears on the witness list in the Jones case
December 28, 1997	Betty Currie picks up gifts from Lewinsky, hides them under her bed
January 7, 1998	Lewinsky signs an affidavit in the Jones case

January 13, 1998	Lewinsky accepts a job offer (later rescinded) from Revlon
January 16, 1998	Kenneth Starr is appointed to investigate the Lewinsky matter
January 17, 1998	Clinton is deposed in the Jones case
January 18, 1998	Clinton meets with Betty Currie to discuss his deposition
January 21, 1998	The <i>Washington Post</i> reveals the Clinton-Lewinsky affair and investigation
April 1, 1998	The district court dismisses the Jones suit
July 28, 1998	Lewinsky agrees to cooperate with the Independent Counsel
August 17, 1998	Clinton testifies before the grand jury via closed-circuit television, then addresses nation
September 9, 1998	The Starr Report is submitted to Congress
September 21, 1998	Clinton's grand jury testimony is broadcast
October 8, 1998	The House of Representatives votes to conduct an impeachment inquiry
November 3, 1998	Mid-term congressional elections; Democrats do better than expected
November 9–10, 1998	Hearings are held before the House Judiciary Committee
November 19, 1998	Jones suit is settled for \$850,000
November 27, 1998	Clinton answers eighty-one questions propounded to him by the House Judiciary Committee
December 1, 8–10, 1998	Further hearings are held before the Judiciary Committee
December 11–12, 1998	The Judiciary Committee approves four articles of impeachment
December 19, 1998	The House of Representatives approves two of the articles; President Clinton is impeached

January 7, 1999	The trial of President Clinton by the Senate begins
February 6, 1999	Videotaped witness testimony is presented to the Senate
February 12, 1999	The trial ends; the President is acquitted

Contents

Dramatis Personae	<i>vii</i>
Chronology	<i>ix</i>
Introduction	1
1. The President's Conduct	16
2. Prosecution and Defense	59
3. The History, Scope, and Form of Impeachment	95
4. Morality, Private and Public	133
5. Should President Clinton Have Been Impeached, and If Impeached Convicted?	170
6. The <i>Kulturkampf</i>	199
7. Lessons for the Future	217
8. The Balance Sheet	262
Acknowledgments	267
Index	269

Introduction

The year-long political, legal, constitutional, and cultural struggle that began on January 21, 1998, when the world learned that Independent Counsel Kenneth Starr was investigating charges that President Clinton had committed perjury and other crimes of obstruction of justice (primarily subornation of perjury and witness tampering) in an effort to conceal a sexual affair with a young White House worker named Monica Lewinsky, is the most riveting chapter of recent American history. The investigation culminated on December 19, 1998, in the impeachment of President Clinton by the House of Representatives for perjury before a grand jury and for obstruction of justice.¹ It was only the second impeachment of a U.S. President. The first was the impeachment of Andrew Johnson 130 years earlier, although in 1974 Richard Nixon would have been impeached and convicted had he not resigned after the House Judiciary Committee recommended his impeachment to the full House. On January 7, 1999, the Senate trial of President Clinton began.² Truncated and anticlimactic—indeed, a parody of legal jus-

¹The vote to impeach him for perjury before the grand jury was 228 to 206, with one member of the House not voting. The vote to impeach him for obstruction of justice was 221 to 212, with two members not voting.

²Although the trial nominally lasted more than a month, there was only one real day of trial—February 6, when the prosecution and defense presented the relevant portions of the videotaped depositions of the three witnesses (Monica Lewinsky, Vernon Jordan, and Sidney Blumenthal) whom the Senate had authorized the House managers (i.e., prosecutors) to call. (The transcript of the February 6 session is published at 145 Cong. Rec. S1290 [Feb. 6, 1999].) There is a semantic problem here. The term “trial” is used in the impeachment context to refer to the entire proceeding in the Senate, embracing both pretrial proceedings (preliminary motions and pretrial discovery) and the evidentiary hearing, which corresponds to a conventional trial.

tice—the trial ended on February 12 with the President’s acquittal.³ With this, the end of the main legal phase of the struggle that began on January 21 of last year, the record of events analyzed in this book was complete, though the aftershocks (such as Juanita Broaddrick’s rape charge and Lewinsky’s television interview and book) continue.

Three features of what at first seemed a political crisis of the first magnitude, but that now seems better described as a political drama or even a comedy (for other than the participants), hold a particular interest for me. The first is its intersection with issues, particularly of law and morality, that have long engaged my academic interest and attention.⁴ The second is its sheer multifaceted complexity—factual, legal, political, and moral—which cries out for the sort of synoptic, compendious treatment that I have attempted in several previous books on cross-disciplinary subjects, such as sex and aging.⁵ Not everyone was paying careful attention to the Clinton impeachment drama who should have been, and as a result there is a danger that the history of it will pass rapidly into myth.⁶ The third feature that intrigues me is related to the second: the drama has so many “angles,” and such an undercurrent of emotionality, that maintaining balance and perspective is an enormous challenge to one’s powers of judicious reflection.

Judicious—not judicial. The framers of the Constitution carefully excluded the judiciary (all but the Chief Justice, who presides at the Senate trial of an impeached President) from the adjudication of impeachments. We other judges are confined to the observer role. And the ethical

³The vote to convict was 45 to 55 on the perjury article, and 50 to 50 on the obstruction of justice article. A two-thirds (67–33) vote was required for conviction. A motion to censure the President was rejected on procedural grounds.

⁴See my books *The Problems of Jurisprudence* (1990), *Overcoming Law* (1995), and *The Problematics of Moral and Legal Theory* (1999).

⁵See my books *Sex and Reason* (1992) and *Aging and Old Age* (1995).

⁶Before it was over, serious confusion was evident in the minds of members of the public. Illustrative is a letter to the editors of the *New York Times* shortly before the Senate trial ended attacking the *Times*’s “outdated proposal for a censure-plus-admission endgame. The charge of perjury seems to have fallen apart for lack of evidence, and while the House ayatollahs are trying to keep the obstruction charge alive, I have not seen any specific instances in which Mr. Clinton obstructed justice in a legal sense. So what would you have President Clinton admit to? Sex with Monica S. Lewinsky and lying about it? He has on numerous occasions admitted to that.” *New York Times*, Feb. 3, 1999, p. A22. We shall see that the charge of perjury is solid, that the President in several instances obstructed justice in a legal sense, and that he has never admitted lying about his relationship with Lewinsky.

rules of the federal judiciary forbid public comment on pending cases, including, I assume, an impeachment—but I do not discuss any pending cases. One cannot, however, write about the Clinton impeachment and related matters without touching on politically sensitive issues, and in particular without criticizing President Clinton’s conduct and that of members of Congress. This might be thought a decisive objection to a federal judge’s writing about this subject even if the judge writes *qua* academic rather than *qua* judge. The principle that underlies the hypothetical objection, a principle I support as well as recognize as binding upon me, is that judges are not to be politically active. But criticism of the President’s conduct, and that of other political actors in the drama, crosses party lines, indeed is nearly universal. I have striven to avoid any hint of partisanship in my analysis, and I hope that to the extent I have succeeded this will neutralize the objection.

Apart from its sheer narrative intricacy, Clinton’s ordeal presents a number of distinct but interrelated issues that have to be sorted out and related to facts that are contested and incompletely known,⁷ and so in need of being weighed and sifted. There are issues of law, including criminal and constitutional law, the law of evidence, and the substantive and procedural principles that should guide impeachment and impeachment trials. There are issues of jurisprudence, concerning the appropriate roles of historical scholarship and pragmatic reasoning in answering questions of law and policy, the difference between popular and legal justice, and (a related point) the meaning and appropriateness of characterizing impeachment proceedings as “legal.” There are issues of morality, both private and public, and of political theory, political history, political science, and the specialized branch of history and political science known as Presidential studies. There are issues that evoke the theory of conflict, or strategy, and numerous perplexing issues of political and cultural sociology, including the peculiar sociology of the “moralistic Right” and of the “academic Left.” (These are crude, even offensive, categorizations, but I shall defend them.)

I am unapologetic not only about my decision to write about the struggle to impeach and remove Clinton, despite its partisan overtones

⁷I have not tried to go beyond the public record of the facts. I am not a journalist or a detective or even an *habitué* of the World Wide Web. I have not conducted interviews, or rested conclusions on any of the rumors that continue to swirl around the controversy, although, while trying to avoid speculation, I have not hesitated to draw the kind of inferences that judges and jurors are permitted to draw from a public record.

and its origins in a sexual relationship widely regarded as tawdry, but also about attempting to write a scholarly book so soon after the event. After? During, really; I began writing in October 1998, when the crisis was very much *in medias res* and the end could not be foreseen, and I finished on February 16, 1999, four days after the Senate trial ended.⁸ To write so close to the event is to write without the perspective that temporal distance enables, without a complete picture of the facts, and without being able to do more than guess at the long-term consequences. Thus it is to write without the possibility of being definitive. But it is also to write with better prospects of achieving freshness and immediacy than if I waited until history had applied its varnish. There is such a thing as distinguished contemporaneous history (oxymoronic as the term sounds), though I don't expect to be compared with Tacitus or Thucydides, or even Suetonius. To write close to the event is also to write with a *relative* freedom from hindsight bias,⁹ though the qualification is important. This book is not a diary, and the judgments in it are informed by knowledge of how the story ends,¹⁰ although not by knowledge of how it will come eventually to be judged by history.

Hindsight bias is a serious problem in historiography. Once a historical episode is declared "closed" (so far as any historical episode can be so described), there is a tendency to see the events that led up to, constituted, and resolved it as inevitable, if not indeed as the product of design. Outcome exerts an irresistible hydraulic pressure on interpretation. Blunders that had happy results for the blunderer are redescribed as brilliant tactical moves, while moves that were intelligent *ex*

⁸That was the day before I sent my final draft to the publisher. I have made only minor changes since.

⁹On which see, for example, Baruch Fischhoff, "Hindsight \neq Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty," 1 *Journal of Experimental Psychology: Human Perception and Performance* 288 (1975).

¹⁰If it *has* ended—a matter of definition. President Clinton and other participants in the ordeal remain in some jeopardy of being prosecuted for crimes; Clinton may be disciplined by the district judge in the Paula Jones case (the judge on April 12, 1999, found Clinton in civil contempt of court for lying in his deposition, *Jones v. Clinton*, 1999 WL 202909 [W.D. Ark.], but has not yet determined how much he must pay as a sanction for the contempt) and by the Arkansas bar; and if the political element in the story is emphasized, the story may not end until the elections of 2000. That is why I said earlier only that the "main legal phase" of the ordeal ended on February 12 with the President's acquittal by the Senate. Incidentally, although the independent counsel law expires by its own terms on June 30, 1999, it permits an independent counsel to complete any pending investigation. 28 U.S.C. § 599.

ante—were the best that could be devised on the basis of the information available at the time—are redescribed as avoidable blunders. The tendencies that hindsight bias foments were famously denounced by Tolstoy in *War and Peace*. For him, the basic law of history was the law of unintended consequences.¹¹ I think there's a lot to Tolstoy's theory of history and that the Clinton-Lewinsky investigation and the ensuing ordeal of the Presidency provide supporting evidence, but that while this is easy to see at present it may become obscured with the passage of time. But no doubt many of the judgments made in this book will some day have to be revised. And a case study, when the case is as multifaceted as this one is, is bound to lack the depth that monographic treatment of each facet would enable. But this particular case study can also be viewed as an empirical test of claims concerning law and philosophy that I have advanced in previous books.¹² Among these are claims for the superiority of pragmatic to formalistic, philosophical, and historical approaches to issues of law and public policy and against the utility of constitutional theory and moral theory in dealing with such issues. A case study is a study (analysis) as well as a case (description). I have tried to do justice to both halves.

The story of Clinton's ordeal is exhilarating as drama but sobering as a commentary on powerful and prestigious American institutions. The story that I shall be telling is a story of the failure of the judiciary, the political establishment, the Congress, the legal profession, and the academic community to cope with a novel challenge. It is also a story of personal failure by Clinton and others. But the institutional failures are the more interesting. We shall see that institutions that look strong may actually be brittle and therefore break when hit from an unexpected angle. This happened with American universities when they were faced with an unanticipated revolt of students in the late 1960s and early 1970s. President Clinton's extraordinary behavior—an explosive mixture of lust and mendacity—sprang an equal surprise on an overlapping set of institutions (universities being implicated in both upheavals), and they couldn't cope either. But because the nation was prosperous and

¹¹Interestingly, there is evidence that hindsight bias can be reduced or even eliminated by pointing out the role of chance in human affairs and hence the unpredictable character of many events, David Wasserman, Richard O. Lempert, and Reid Hastie, "Hindsight and Causality," 17 *Personality and Social Psychology Bulletin* 30 (1991)—the very features that Tolstoy emphasized.

¹²See the references in note 4 above.

at peace throughout the ordeal, and has a resilience greater than that of any of its institutional components, it was able to weather the storm with what appears to be (although it is too soon to tell, really) minimal damage to the social fabric. Those who consider the stock market an accurate barometer of the nation's social health will say with zero damage.

This book is not a narrative of the ordeal, but Chapter 1 is a narrative, essential to what follows, of the President's conduct in and arising from his affair with Lewinsky. To the extent that the facts are contested, I have indicated both what I think the most probable version is and what its legal significance would be in an ordinary criminal proceeding (for example, if Clinton were the president of a university rather than of the United States). What if any crimes were committed? Are they the types of crime that, given the circumstances—but abstracting not only from Clinton's position as President of the United States but also from the investigative methods of the Independent Counsel—prosecutors prosecute and juries convict for?

Those methods are not discussed in Chapter 1, but are the focus of Chapter 2, where I review how the Independent Counsel and his allies (including Paula Jones's lawyers and backers), and the President's lawyers and other defenders, developed and as it were marketed their respective versions of the facts. The critical questions here are whether the Independent Counsel committed legal or ethical violations in conducting what amounted to a "sting" operation against the President of the United States, whether the defenders misbehaved as well, and whether any of the misbehavior, prosecutorial or defensive, even if as bad as depicted by the opposing side, has any bearing on whether Clinton would have been prosecuted successfully for criminal conduct were he not President.

The first two chapters should dispel several persistent misunderstandings about the legal significance of Clinton's conduct, such as that no ordinary person would be prosecuted or if prosecuted convicted for what he did, that his only provable misconduct was giving misleading answers to questions about his relationship with Lewinsky, and that a determination of criminal liability requires balancing the defendant's misconduct against any misconduct on the part of the prosecutor. The reader should emerge from these chapters with a clear idea of the legal liabilities of a non-President who committed the acts that the President committed in the aftermath of his affair with Monica Lewinsky. So far

as the public record discloses,¹³ these acts were indeed crimes, though not as many as the Independent Counsel and the House of Representatives believed if attention is confined to those acts that could be proved criminal beyond a reasonable doubt. It is also possible to regard the Independent Counsel's investigation, though basically ethical so far as appears at this writing,¹⁴ as overkill, given the intrinsic triviality not only of the President's extramarital escapades but also of the Paula Jones litigation, the original scene of the President's criminal violations. Her case was weak, and in any event the courts should not have proceeded with it until the end of Clinton's term of office.

For the hypothetical non-President, the arena for determining guilt and admeasuring punishment would be a federal criminal prosecution for having committed perjury and related crimes of obstructing justice in a federal civil litigation and before a federal grand jury. For President Clinton, once the Independent Counsel decided not to prosecute him criminally before giving the House of Representatives a shot at impeaching him—it is an unsettled question whether a President *can* be prosecuted while in office¹⁵—the arena was an impeachment proceeding. The impeachment of a federal officer is authorized only for “high Crimes and Misdemeanors,” a term the Constitution does not define. The principal issues bearing on the impeachment of President Clinton are whether commission of a crime is either a necessary or a sufficient condition for the impeachment and conviction of a President;¹⁶ whether

¹³This is an important qualification. Should the President ever be prosecuted in the ordinary way for the criminal conduct discussed in this book, the judgment of guilty or not guilty will be based on the specific charges brought and on the specific witnesses called and documents admitted in the trial, and not on the record on which the impeachment and Senate trial, and all the legal assessments in this book, are based. Nothing in the book should be taken to prejudge any future criminal or civil proceedings arising out of the matters discussed in it.

¹⁴This is a particularly important qualification, because the Independent Counsel's investigation of the President is itself, at this writing, under investigation by the Department of Justice for possible ethical and legal misconduct.

¹⁵See Chapter 3, where I also discuss the fascinating question of whether the President, if prosecuted, can pardon himself (perhaps even in advance of being prosecuted).

¹⁶The “impeachment” of a President is, technically, the determination by the House of Representatives that the President should be tried by the Senate for violation of the articles of impeachment voted by the House. Only if the Senate convicts the President is he removed from office. “Articles of impeachment” issued by the House thus correspond to an indictment in a criminal case, and the House to the grand jury, though we