2000

The Ordinary, the Exceptional, the Corrupt, and the Moral: What Did the Impeachment of Bill Clinton Mean for America and Americans? Book Review Of: An Affair of State: The Investigation, Impeachment, and Trial of President Clinton. by Richard A. Posner

Stephen B. Presser

THE ORDINARY, THE EXCEPTIONAL, THE CORRUPT, AND THE MORAL: WHAT DID THE IMPEACHMENT OF BILL CLINTON MEAN FOR AMERICA AND AMERICANS?

AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON. By Richard A. Posner[1] Harvard University Press. 1999. Pp. 266. $24.95

Stephen B. Presser[2]

Richard Posner is one of my heroes. I mean, the guy has written 23 books, he's Chief Judge on the prestigious 7th Circuit U.S. Court of Appeals, he was one of the most famous law professors at the University of Chicago, and if he didn't invent it, he certainly did more to popularize law and economics than any man alive. Perhaps it does not go too far to say that most late twentieth century legal scholarship is really a dialogue with Posner, who has taken on virtually every trendy theory in the legal academy, and found it wanting.[3] He is the foremost exponent of practical reason in our time, and, for most practical purposes, might be viewed as a latter-day Oliver Wendell Holmes, Jr.[4] He is a surprisingly self-effacing man in person, and, if you point out all of his glorious accomplishments, and how much you hold him in awe, he will explain that you are mistaken, that he is really nothing special, as his wife has told him.[5] Mrs. Posner not with-

1. Chief Judge, United States Court of Appeals for the Seventh Circuit, and Senior Lecturer, University of Chicago Law School.

2. Raoul Berger Professor of Legal History, Northwestern University School of Law, and Adjunct Professor of Management and Strategy, Kellogg Graduate School of Business, Northwestern University.

3. See generally Richard Posner, *Overcoming Law* (Harvard U. Press, 1995), and Richard Posner, *Problematics of Moral and Legal Theory* (Belknap Press of Harvard U. Press, 1999).

4. Even to the point of editing a splendid collection of Holmes's writing: Richard Posner, ed., *The Essential Holmes* (U. of Chicago Press, 1992).

5. You'll have to trust me on this, but he did say it to me when the two of us appeared on the radio program Extension 720, WGN Radio, September 29, 1999, to discuss

standing, I do find Posner extraordinary. Trying to understand how one person could produce so much, and so much of it of a high caliber, the best I've been able to do is free associate on the movies. Perhaps you can remember one of the final scenes in *Close Encounters of the Third Kind*, when the aliens emerge out of the giant flying saucer. There is one tall, bald alien in the center of them, who is obviously their leader, and who radiates serenity, bemusement, and intelligence. Could something similar be the origin of Posner?

In any event, the task at hand is to review the latest from the judge's laptop, by way of the Harvard University Press, his new book on the impeachment of President Clinton. The judge's prior qualities are very much in evidence here. The learning is prodigious—Posner's analysis is informed by drawing on Clausewitz's *On War,* (pp. 13, 148, 250) Shakespeare, (pp. 143, 254) Tolstoy, (p. 264), George Orwell on Salvador Dali, (p. 214) and the notion of "confirmation bias" from cognitive psychology, (p. 216) just to pick a few suggestive examples. The perspective is, as always, Olympian in detachment, and the judge has *bon*, or perhaps I should say *mauvais, mots* to hurl at virtually everyone involved in the impeachment imbroglio. The double-entendre in the title, *An Affair of State,* furnishes the judge more than a little bit of sport, and it is sometimes difficult to tell how seriously we are to take this tome. In the beginning of the book is a list of "Dramatis Personae," (p. vii) many of whom are barely referred to in the text which follows, and the metaphor of drama is seldom pursued, leaving us to wonder whether Judge Posner believes he is reviewing a comedy, a tragedy, or perhaps a problem play. The judge pauses to explain the meaning of such things as "phone sex" (a form of mutual masturbation, he informs us, citing to the spicy work, *VOX*, which the President and his nubile paramour, Ms. Lewinsky, shared, (pp. 18, 263)) while, some pages later, he excoriates Kenneth Starr for including so much salacious detail about a cigar in his famed Report. (p. 82)

The Judge seems critical of those who condemn fooling around, and Posner is pleased that the "Affair of State" made Americans much more realistic and open about sex. He appears to applaud the fact that America, if it hasn't yet become France, has at least moved closer to the kind of mature attitude Posner himself manifested in his Rosenthal Lectures delivered at

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Posner's book.

Northwestern University, subsequently published as the book *Sex and Reason* (1992). But there is often a disturbing dissonance about the judge's conclusions regarding the impeachment proceedings. For example, while he states that "it is clear beyond a reasonable doubt, on the basis of the public record as it exists today, that President Clinton obstructed justice, in violation of federal criminal law, by (1) perjuring himself repeatedly in his deposition in the Paula Jones case, in his testimony before the grand jury, and in his responses to the questions put to him by the House Judiciary Committee; (2) tampering with witness Lewinsky by encouraging her to file a false affidavit in lieu of having to be deposed, and to secrete the gifts that she had received from him; and (3) suborning perjury by suggesting to Lewinsky that she include in her affidavit a false explanation for the reason that she had been transferred from the White House to the Pentagon,"[6] (p. 54, footnote omitted) and while he concludes that the President's criminal conduct, were he anyone else but the President, would have merited a federal sentence of imprisonment from 30 to 37 months, (p. 55) the Chief Judge is curiously of two minds about the impeachment itself.

Thus, in a crucial passage, which is also blurbed on the back dust jacket of the book, Posner lays out what he claims to be two feasible, and inconsistent, "narratives" of the circumstances that led to the "Affair of State," and then reaches an impossible conclusion:

> [I]n one, [of the two possible "narratives"] a reckless, lawless immoral President commits a series of crimes in order to conceal a tawdry and shameful affair, crimes compounded by a campaign of public lying and slanders. A prosecutor could easily draw up a thirty-count indictment against the President. In the other narrative, the confluence of a stupid law (the independent counsel law), a marginal lawsuit begotten and nursed by political partisanship, a naive and imprudent judicial decision by the Supreme Court in that suit, and the irresistible human impulse to conceal one's sexual improprieties, allows a trivial sexual escapade (what Clinton and Lewinsky

6. And that's not all, apparently. Posner adds that the President, "may also have tampered with potential witness Currie, conspired to bribe Lewinsky with a job that would secure her favorable testimony, and suborned perjury by Lewinsky by suggesting that she include in her Paula Jones affidavit the 'delivering documents' cover story; but these offenses cannot be proved with the degree of confidence required for a criminal conviction." (p. 54). Nevertheless, according to Posner, "An imaginative prosecutor could doubtless add counts of wire fraud, criminal contempt, the making of false statements to the government, and aiding and abetting a crime." (p. 54)

> called "fooling around" or "messing around") to balloon into a grotesque and gratuitous constitutional drama. The problem is that both narratives are correct. (p. 92, footnote omitted)

But what if everyone but Posner believes that both narratives are not correct? I for, one, think the first narrative is true, while the second is wishful thinking. Here we have what may well be a demonstration of Posner's Olympian even-handedness and serenity masking a preference for particular values. Perhaps one can concede that the Independent Counsel law was "stupid" or at least agree with the suddenly conventional wisdom that Justice Scalia was right in his sole dissent to *Morrison v. Olsen*.[7] Even so, I remain unconvinced that Paula Jones' lawsuit was "marginal" or that the Supreme Court was "naïve and imprudent" when it decided the suit could proceed while President Clinton remained in office. I am not at all sure that the "human impulse to conceal one's sexual improprieties," if one exists, is "irresistible," nor, when the married leader of the free world is repeatedly "fellated" (to use Judge Posner's marvelous past participle (p. 48)) in the Oval Office by a subordinate half his age, and eventually on the government payroll, would I describe it as a "trivial sexual escapade," "fooling," or "messing" around.

To take the last point first. Posner assures us that "Clinton's affair with Monica Lewinsky, [was] an affair intrinsically (that is, as long as it was secret) devoid of any significance to anyone except Lewinsky[.]" (p. 13) But, even if the President was as stunningly boorish as Posner exquisitely proves that he was, wasn't the affair intrinsically significant to *him*, as well as Lewinsky, to say nothing of its significance (even if undiscovered) for the President's relationship to his wife and daughter and for the President's own purportedly expressed belief that his conversations (up to and including the "phone sex" presumably) were monitored by foreign governments, raising the possibility of blackmail and international intrigue? Posner is able to draw a distinction between public and private conduct and to argue that if the majority of Americans weren't troubled by the President's peccadilloes, neither should we be. But a number of us testified before the House of Representatives Judiciary Committee's

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7. It's been touched by the Greenhouse effect. See Linda Greenhouse, *Blank Check: Ethics in Government: The Price of Good Intentions*, New York Times, Sec. 4, p. 1 (Feb. 1, 1998) ("After 10 years of mouldering on law library shelves, the Scalia dissent in Morrison v. Olson is being cited and passed around in liberal circles like samizdat.").

Subcommittee on the Constitution that the Framers, at least, had a more holistic conception of integrity and virtue and would not have drawn a sharp distinction between private acts and public requirements. For them, virtue was paramount in the office of President, and a President who twisted the law to serve his own ends, as Posner admits this President did, would not have been seen as fit to continue in office. George Washington, who took the oath seriously, would have wanted Bill Clinton, to whom an oath meant nothing, turned out of office.[8]

Nor do I find Posner's other assertions—that the Paula Jones' suit was "marginal" or that the Supreme Court was wrong to allow it to go forward particularly persuasive.[9] Posner repeatedly describes Ms. Jones's lawsuit as one for "sexual harassment"—and one that was a "long shot" at best. (pp. 7, 13, 28, 91, 146, 218) It is true that the suit was eventually dismissed by Judge Susan Weber Wright (p. 141) (a Bush appointee (p. 141), but a Clinton law student, by the way,[10] which Posner does not tell us), but it seems likely that Judge Wright's dismissal of the lawsuit would have been reversed by the Eighth Circuit (as other of her decisions regarding the lawsuit were). Judge Wright's fining the President almost a hundred thousand dollars for contempt suggests that she at least took the lawsuit seriously, and, it should be stressed, the lawsuit is properly seen not as about garden variety "sexual harassment," but rather about abuse of power by the President when he was Governor. Posner never explores the factual allegations of the Jones lawsuit, nor, it appears, has he studied the pleadings, because the suit was one for a federal claim of abridging federal civil rights under cover of law and for a state claim of intentional infliction of mental distress and defamation.[11] Posner is convinced that Ms. Jones suf-

8. The hearings took place on November 9, 1998, before the House Judiciary Committee Subcommittee on the Constitution. For the point about George Washington see Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 Geo. Wash. L. Rev. 666 (1999). For similar arguments, see Gary L. McDowell, *"High Crimes and Misdemeanors": Recovering the Intentions of the Founders*, 67 Geo. Wash. L. Rev. 626 (1999); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 Geo. Wash. L. Rev. 650 (1999); and Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 Geo. Wash. L. Rev. 735 (1999).

9. I should disclose that I was among the lawyers and academics who signed an amicus brief on behalf of Mrs. Jones's position before the Supreme Court. We were right then, and we're still right.

10. See, e.g., Joan I. Duffy, *Clinton Hit with $90,686 Contempt Fine in Jones Case*, The Commercial Appeal (Memphis, TN) A1 (July 30, 1999), available at 1999 WL 22119838.

11. *Clinton v. Jones*, 520 U.S. 681, 686 (1997) ("Respondent seeks actual damages

fered no real harm, (pp. 91, 149) but she claimed that she did, she had voluminous evidence which raised the possibility that Mr. Clinton's conduct toward her was replicated in his conduct toward many other women,[12] and there were reports that the reason the President initially refused to settle the Jones case was his fear that many of those other women would similarly bring suit against him. Can it really be true that Judge Posner believes that the conduct of a Governor who (1) exposes himself to a state employee, (2) urges her to kiss his revealed member, and (3) has a burly state trooper (purportedly familiar with his boss's proclivities) guarding the door and implicitly underscoring the Governor's direction (implied threat?) to remain silent about what happened is inconsequential?

Could it be that Judge Posner's own feelings about the danger of our becoming overexcited about sexual matters is driving his analysis? Is he really "reasonable" where sex is concerned? At one point Posner tells us that ". . . seriously believing Christians (also seriously believing Jews and Muslims) are more likely than other people to be outraged by sexual misconduct." (p. 66) The implication appears to be that only the extremely religious tend to get upset about sex, and the corollary is that realistic pragmatists like him do not, but has his anti-prudishness made him forget about some of the most important jurisprudential notions, or what our Country is supposed to be all about?

Judge Posner is admirably clear about where he stands. "[N]ormative moral theory, and cognate forms of legal and political theory, have little to contribute to the public life of the nation," he tells us, in language that the framers would have found shocking.[13] (p. 12) Referring to a couple of recent titanic national struggles, Posner explains that "American participation in

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of $75,000 and punitive damages of $100,000. Her complaint contains four counts. The first charges that petitioner, acting under color of state law, deprived her of rights protected by the Constitution, in violation of Rev. Stat. § 1979, 42 U.S.C. § 1983. The second charges that petitioner and [former Arkansas state police officer Danny] Ferguson engaged in a conspiracy to violate her federal rights, also actionable under federal law. See Rev. Stat. § 1980, 42 U.S.C. § 1985. The third is a state common-law claim for intentional infliction of emotional distress, grounded primarily on the incident at the hotel. The fourth count, also based on state law, is for defamation, embracing both the comments allegedly made to the press by Ferguson and the statements of petitioner's agents.)

12. Even Judge Posner repeats the "rumor" that the President regularly has sex with subordinates. (p. 138)

13. For the case to the contrary, that is, for the argument that the framers believed, and we should as well, that there could be no law without morality, and no morality without religion, see Stephen B. Presser, *Recapturing the Constitution: Race, Religion, and Abortion Reconsidered* 42-49 (Regnery Publishing, Inc., 1994).

World War II and the Cold War was motivated (primarily anyway) by national interest rather than by considerations of morality. Nor is morality central to our politics and attitudes. Freedom and wealth are." (p. 155) Somehow I think Washington, Jefferson, Madison, and even Hamilton would have thought that we were about something more. No doubt Posner's single-minded focus on "freedom and wealth" are part of what gives his writing such clarity and power, but his critics have always wondered whether life wasn't about more than just free individuals pursuing wealth maximization.[14]

The American experiment in nationhood was surely concerned with the preservation of freedom, and the protection of the rights of property, but these means were supposed to be in the service of promoting virtue,[15] and advancing morality and religion, even though, like Posner, most American legal academics appear (I am tempted to say, "blissfully") unaware of this simple truth. The goal of virtue in our leaders is not one to which Posner subscribes. (p. 165) "Americans," he tells us, "have reached a level of political sophistication at which they can take in stride the knowledge that the nation's political and intellectual leaders are their peers, and not their paragons. The nation does not depend on the superior virtue of one man." (p. 266) Posner thus appears to believe in the gradual evolutionary unfolding of sophistication in the American people's exercise of sovereignty, but I don't believe we've ever surpassed the "political sophistication" of Hamilton, Madison, and Jay writing in *The Federalist,*[16] and they were convinced that popular sovereignty could only flourish in America if the President possessed the kind of virtue and integrity that meant that he could be trusted with great power.[17]

There is another curious inconsistency in Posner's views about what we ought to expect of the President, and to what extent we have a right to inquire into his private life, or to compel him to submit to the Courts in a civil suit. A President, Posner seems to suggest, is really just another regular guy, no different

14. For the most pungent criticism of Posner on this point see Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974).

15. See Presser, *Recapturing the Constitution* (cited in note 13), and sources there cited.

16. See, e.g., Hamilton, Madison, & Jay, *The Federalist Papers* 75-76 (Isaac Kramnick ed., 1987), making the point that Clinton Rossiter believed that *The Federalist* was the "one great American contribution to the world's literature on politics," and quoting other commentators to the same effect.

17. See Presser, 67 Geo. Wash. L. Rev. (cited in note 8).

from the rest of us. Thus, Posner's summation of what can now be gainsaid about both the President and his detractors from this "Affair of State," is that "We have learned that powerful, intelligent, articulate, well-educated, and successful people who would like us to submit to their leadership whether political or intellectual are, much of the time, fools, knaves, cowards, and blunderers, just like the rest of us." They are "ordinary people, with all the ordinary vices . . . ." (p. 265) In particular, Posner writes that after L'Affaire Lewinsky, it is now "difficult to take Presidents seriously, as superior people, for the same reason that an even greater novel, *The Remembrance of Things Past*, made it impossible by dint of its riveting detail to take aristocrats seriously as superior people." (p. 266) Proust may not be a particularly good authority for Posner here; Evelyn Waugh for one, believed that Proust never really got close to the real aristocrats in France, and was actually writing about second-raters.[18] But if Posner is right about Presidents, at least, isn't it bizarre for him repeatedly to suggest that a pragmatist (of which Posner claims to be one) should have been able to work out a way for Clinton to be above the law during his incumbency?

"I don't think it is monarchical," writes Posner "to suggest that a President should be entitled to a uniquely generous exercise of prosecutorial discretion in his favor—so generous, indeed, as to excuse him from being prosecuted for criminal behavior committed before or during his term of office that could not reasonably be described as monstrous. Would not the disgrace of being labeled a criminal by a censure resolution be punishment enough for such a lofty figure? The fall from grace is greater, the higher the altitude from which the fall begins." (p. 194) Which is it, then, an "ordinary person," who presumably should be subject to the law, like everyone else, or "a lofty figure," for whom special rules should be applied? More troubling still, Posner's "lofty figure" is supposed to be capable of shame, and the shame is supposed to be punishment, but, as Posner himself understands, Bill Clinton is uniquely incapable of shame.

Or again, perhaps projecting the Posnerian world-view on the American people, the Judge states that Americans are not Kantian in their regard for the rule of law, but rather they are "prepared to allow that a President may be a little above the law,

18. I've combed my bookshelves for a citation here, so far without success. I think I read it once in a book review by Gore Vidal in the New York Review of Books. Thank God we can take a bit of license in book reviews.

that felonies can be excused when they seem the harmless consequence of human weaknesses that should never have been a subject of legal proceedings, that prosecutorial excess can mitigate a defendant's guilt, and that pragmatic considerations should bear heavily on the decision whether to force a President from office." (p. 230) But what if being "a little above the law" is like being a little pregnant? The pragmatic Posner skates a bit too close, for my taste, to dispensing with justice and the rule of law altogether. To be entirely fair to Posner, he does recognize that some chastisement of the President was called for. "[T]he American public, he notes, "wants *some* punishment for [Clinton's] actions," it wants, he continues, "a balance between the kind of legal rigorism advocated by the Republican critics of the President and the alarmingly free-wheeling 'equitable' or even populist concept of justice advocated by the most extreme of his defenders." (p. 230) Endorsing what he claims the public wants, Posner claims that "[w]e might call that balance 'pragmatism.'" (p. 230) It seems to me, though, that this "balance," purportedly desired by the American people, but clearly preferred by Posner, might just as easily be called "Holmesian legal realism," or "total discretion," or even "tyranny." Is it so clear that there is an acceptable middle ground here? Perhaps it is only a matter of faith or historical tradition, and rigorous argument cannot yield scientific or even pragmatic truth, but perhaps sometimes extremism in the defense of the rule of law is no vice, and moderation in allowing some to be above the law is no virtue.

In the end, the pragmatic Posner is able to conclude that Clinton should not have been made to pay with his job because the Supreme Court erred in allowing Paula Jones to pursue what he regards as an essentially frivolous claim, a claim spearheaded by the President's political enemies. Posner is only able to make that argument because of his belief that the President's peccadilloes were private in nature, without a public dimension. (pp. 148-49) But even Posner himself concedes that he may go too far here. Posner observes that the President's private conduct (in engaging in perjury, obstruction of justice and the slandering of his opponents) was inexcusable, but still one could be a "private monster but a public saint." (p. 173) And thus private conduct should not be allowed to drive a person the American people believe is an effective public official from office. And yet, Posner makes the best argument for obliterating this idea: "But if I am wrong about this [notion that one can separate public

from private character], then the inference from private to public conduct cannot reasonably be confined to cases in which the private conduct is a particularly heinous crime." (p. 173) As he suspects, Posner *is* wrong about this, and thus a President who can, with impunity, lie before a judge, a grand jury, and the American people about having sexual relations with "that woman, Ms. Lewinsky," is uniquely capable of ignoring other legal mandates.

Posner repeatedly blames the Supreme Court for failure to understand that it should not have allowed the Paul Jones lawsuit to proceed, and blames the Independent Counsel Law, (and the Court's upholding of that law) for the President's troubles, and by implication for the wrenching "Affair of State," through which the nation suffered. A Supreme Court bench composed of Justice Posners would not have made that mistake and the President would not have been put in an excruciating position. For after all, "Clinton acted under considerable provocation—perhaps provocation so considerable that few people in comparable circumstances would not succumb—in stepping over the line that separates the concealment of embarrassing private conduct from obstruction of legal justice." (p. 174) If the Supreme Court had decided the Paula Jones case the other way, Posner assures us, "there would have been no occasion for President Clinton to obstruct justice while he was President." (p. 218) But this is a *post hoc propter hoc* fallacy of a kind of which I would have thought Judge Posner, pragmatist or no pragmatist, incapable. The Judge focuses on Paula Jones, and forgets that the Clinton administration has managed to generate more scandals per square inch than any other Presidency since that of U.S. Grant. After all, the Independent Counsel Act may well have been a mistake, but it was the Whitewater investigation, Travelgate, the Rose Law Firm Billing Records, etc. etc. that put Ken Starr in business, not Paula Jones. Lewinsky, who was called as a deposition witness in the Jones case," only became part of his investigation when it looked as if Vernon Jordan may have attempted to buy Lewinsky's silence (presumably aiding the President) in the same manner he may have operated as a go-between for Webster Hubbell.[19] Had Paula Jones never existed, instead of believing that the President would have never obstructed justice,

19. For the details here see the Starr Report, H.R. Doc. No. 105-310 (Referral from Independent Counsel Kenneth Starr in Conformity With the Requirements of Title 28, United States Code, Section 595(c)).

one might just as easily believe the President would have invented another excuse to do it.

Posner bends over backwards to be even-handed (if I may be forgiven an egregious and twisted mixed metaphor), and it looks to me like he snaps. Take, for instance, his confident assurance that "[o]ne just *knows* that if the shoe were on the other foot—if everything were the same except that the President was a Republican—the Republicans would have denounced the investigation in the same terms that the Democrats used. And with perfect sincerity." (p. 91, emphasis Posner's) But one just *doesn't* know that. (Emphasis mine) When Republicans are trapped in scandal, they may denounce investigations, but it's not in the same terms, they don't fight on shamelessly, and instead, guilt-ridden, they resign, as did Nixon, Gingrich, and Livingston. Republicans don't stage defiant pep rallies at the White House after their man is impeached; they slink back home. There are differences between the parties. The Republicans, particularly the House Managers, though they may have been poor tacticians,[20] were fighting for a solid cause grounded in morality and the rule of law, perhaps even against their long-term political interest, while the Democrats, knowing they had no legal case, outrageously pressed claims they knew to be without merit, and played every devious political card in the deck. As Posner puts it, "[The President's lawyer David] Kendall gave no impression of believing what he was saying. [His colleague, Charles] Ruff, the better actor, gave a convincing impersonation of a person who believes what he is saying. The lawyers made the Senate Chamber an echo chamber of the President's untruths." (p. 246)

And so, in the end, I still don't buy into Posner's even-handedness and pragmatism. Perhaps the difference between us is that he's a Circuit Judge, above the fray, a happy and lucky man, in full command of stunning descriptive powers. I read Posner, and I feel a bit like Solieri listening to Mozart. I wish I could deliver such lethal blows to my fellow academics as Posner effortlessly tosses at Clintonphiles Alan Dershowitz, (p. 216) Ronald Dworkin, (p. 238) Bruce Ackerman, (p. 129) or Sean

20. That's what Posner says, anyway; and, in particular, he thinks the House Managers blew it because they were not politically correct enough. Posner believes that it was a mistake for the House Managers to parade before the Senate a large number of Christian White Males, and that they would have done better to be more like the White House, which fielded a team of lawyers including persons who were physically challenged, female, Jewish and Black. (p. 253)

Wilentz (pp. 235-36). I wish I could have, within a year after the event, assimilated thousands of pages of raw data, and produced a highly readable account, which has the virtue of giving each side its due, clearly staking out a position in the middle (albeit an untenable one, I think), and grounding it all in a legal philosophy that, if problematic, is at least brilliantly limned, and of which Holmes would have been envious.

I wish I were as Olympian, but then again, maybe I don't. Posner is fair enough in his treatment so that the virtue and even the nobility of the impeachment effort can still be discerned, even if it is not highlighted. And Posner's even-handedness is particularly useful when employed to do things like rescuing Judge Starr from the obloquy to which the Clintonistas subjected him. (p. 69) Still, for Posner, "[a]bout all that can be said is that moral rigorist would be inclined to think that the President committed impeachable offenses, while a pragmatist would lean, though perhaps only slightly, the other way." (p. 187) But more, much more can be said. I don't pretend to objectivity here. I was called as an impeachment witness before the House Judiciary Subcommittee on the Constitution by the Republicans, I think they were right,[21] and I think Henry Hyde, to whom Posner gives rather short shrift,[22] was superb to invoke my testimony as authority in his speech opening the floor debate on impeachment. Said Hyde, quoting Presser, "Impeachable offenses are those which demonstrate a fundamental betrayal of public trust. They suggest the federal official has deliberately failed in his duty to uphold the Constitution and laws he was sworn to enforce."[23] No hint of Posnerian pragmatism there, just pure Kantian morality and the Rule of Law. It's good enough for Hyde, and it's good enough for me. It was right to impeach the President, and he should have been convicted and removed. *Fiat justica, ruat coelum.*

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21. In what follows I wallow in the reviewer's prerogative of implying that the author should have paid more attention to the reviewers' work. I also fault Posner for not giving any consideration to the testimony offered by my fellow witnesses Gary McDowell, John McGinnis, and Jonathan Turley, all three of whose efforts suggest Posner is a bit too quick to characterize the academic testimony offered as shallow. (p. 218) See generally the pieces cited in note 8.

22. See, e.g., p. 208, where Posner accuses Hyde of hypocrisy in defending Oliver North's obstruction of justice and attacking Clinton's. Posner gives the impression of believing that Hyde is an insufficiently pragmatic Puritan and an unthinking zealot. I disagree. I think Hyde showed considerable courage in battling against insurmountable political odds, particularly in the Senate, where the deck was clearly stacked against him.

23. Henry Hyde, speech before the full House, December 18, 1998.