

2000

The Perils of Presidential Impeachment

Michael J. Gerhardt

Repository Citation

Gerhardt, Michael J., "The Perils of Presidential Impeachment" (2000). *Faculty Publications*. 1110.
<https://scholarship.law.wm.edu/facpubs/1110>

Copyright c 2000 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

The Perils of Presidential Impeachment

Michael J. Gerhardt†

An Affair of State: The Investigation, Impeachment, and Trial of President Clinton. Richard A. Posner. Harvard University Press, 1999. Pp vii, 266.

For a long time, I have suspected that there is more than one Richard Posner. There is the extremely prolific scholar, Richard Posner, who has written over thirty books¹ and more than a hundred articles in such fields as torts, constitutional law, criminal law and procedure, federal jurisdiction, moral and political philosophy, antitrust, economics, property, and contracts. There is also Richard Posner the judicial biographer and the man who founded an antitrust counseling firm. There is Richard Posner the judge who has been on the federal court of appeals for almost two decades, is reputed to be one of the most prolific and fastest judges in the nation, and has risen to the chief judgeship of his circuit. And there is the Richard Posner who writes about the intersection of law and such varied areas as sex, aging, literature, and AIDS.

In his new book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*, virtually all of these dimensions of Richard Posner are present. It is a wonderfully elegant and provocative book and is sure to be among the most distinguished in the anticipated long line of commentaries on President Clinton's impeachment ordeal.² In characteristic fashion, Posner pulls no punches,

† Professor of Law, The College of William and Mary. I want to thank Susan Low Bloch, John Duffy, Deborah Gerhardt, Neal Kudmar Katyal, Neil Kinkopf, and Alan Meese for their helpful comments on earlier drafts.

¹ I am most grateful for the graciousness and generosity of Judge Posner's chambers, which gave me a list of his many publications. The numbers of books and articles cited in this Review are based on this list.

² Judge Posner began the book in October 1998 and finished it four days after the close of the impeachment trial (p 4). Other recent books that analyze the President's impeachment proceedings include Bill Kovach and Tom Rosenstiel, *Warp Speed: America in the Age of Mixed Media* (Century Foundation 1999); Elizabeth Drew, *The Corruption of American Politics: What Went Wrong and Why* (Birch Lane 1999); and Bob Woodward, *Shadow: Five Presidents and the Legacy of Watergate* (Simon & Schuster 1999). See also Laurence H. Tribe, 1 *American Constitutional Law* 152–202 (Foundation 3d ed 2000). For a forthcoming book with substantial discussion of this subject, see Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Chicago 2d ed 2000).

concluding that the impeachment and trial of Bill Clinton 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” (p 5). In telling this story, Posner examines almost every conceivable evidentiary, procedural, moral, criminal law, social, cultural, and constitutional issue raised in the proceedings.

The book’s great strength is its extraordinarily rich, multidimensional perspective on the Clinton impeachment proceedings. This perspective reveals some aspects of the impeachment process that have been inadequately captured or overlooked in other commentaries, such as the difficulties posed by the vagueness of the constitutional standard of impeachment for principled decisionmaking in an impeachment trial. Moreover, the analysis features an insightful depiction of the Clinton impeachment proceedings as cause and effect of modern American culture wars (pp 199–216), and a new dimension of Richard Posner as military strategist, who draws an intriguing analogy between the Clinton impeachment proceedings and war, based on the work of the great military historian and tactician Carl von Clausewitz (pp 248–61).

The purpose of this Review is to assess both Richard Posner’s basic judgment that various institutions failed to meet the challenges posed by Clinton’s legal and impeachment troubles, and the analysis by which he reached that judgment. This Review suggests that Posner’s dismal assessments of institutional performances throughout President Clinton’s impeachment ordeal lack sufficient support. There are significant portions of the records of the Clinton and past impeachment proceedings that Posner fails to consider in formulating his judgments. These failures also undercut his claim that his preferred means of resolving impeachment issues—pragmatism or the balancing of the “probable consequences” (p 183) of actual or likely decisions—is superior to “soft subjects” (such as history and law), which are “permeable to political disagreements” and which differ from the hard sciences in which “agreement on the methods for resolving disagreement enables consensus to be forged despite the differing political agendas of the practitioners” (p 240). Posner fails to establish convincingly that his analysis of the President’s acquittal is any more immune to abuse than other approaches.

³ See Carl von Clausewitz, *On War* (Princeton 1976) (Michael Howard and Peter Paret, eds and trans).

I. JUDGE POSNER'S LESSONS

The central theme of *An Affair of State* is the failure of various institutions to rise to the challenges posed by President Clinton's legal and impeachment troubles. The failed institutions include Congress, the Supreme Court, the legal system as well as the legal profession, the presidency, and the academic community. A secondary theme is that these institutions should be assessed based on the likely consequences and the actual ramifications of the decisions they did make.⁴

One source of the problem, according to Posner, is "post-electoral politics," in which political combat transpires through "revelation, investigation, and prosecution" instead of electoral competition (pp 115–16).⁵ He blames post-electoral politics for generally providing "a climate favorable to political impeachment," as well as for particular events in the impeachment proceedings, such as the outing of adulterous Republicans and the attempts to "'pay back' the Democrats for forcing Nixon from office" (p 116).

Posner also criticizes Congress for not following procedures that appear fair. For example, the House did not adopt rules before receiving the Starr Report (p 93), and the Senate never imposed a gag rule or articulated rules regarding a burden of proof or evidence (pp 120–24, 126, 128). These omissions "underscor[ed] the failure of the impeachment proceeding to meet minimal standards of legal justice" (p 94).

The Supreme Court's major error was "its failure to engage with the Realpolitik considerations" implicated in the case, including "how the independent counsel law had worked in the past" or "how it might work in the future," particularly in a case in which the President was a party (p 223) and the explosive subject was sex (pp 215, 225–30). The majority opinions in *Morrison v Olson*⁶ and *Clinton v Jones*⁷ were excessively "legalistic" (p 223). Instead, the Court should have narrowly interpreted precedent and considered alternatives such as staying Jones's proceedings until Clinton's term expired, or allowing Clinton to be deposed only if absolutely necessary (p 229). As a solution, Posner recommends appointing justices with more political experience (p 229).

⁴ See, for example, p 174 ("The lack of a definite standard of Presidential impeachability makes it natural to focus on the consequences of impeaching and convicting. Let us try to compare the likely bad consequences with the likely [good] consequences of alternative courses of action.").

⁵ Posner is quoting Benjamin Ginsberg and Martin Shefter, *Politics by Other Means: The Declining Importance of Elections in America* 26 (Basic Books 1990).

⁶ 487 US 654 (1988).

⁷ 520 US 681 (1997).

Clinton also deserves blame for violating the executive and exemplary moral duties of his office (pp 133–69). The former are his executive and administrative duties, which can only be executed successfully by someone with credibility (pp 148, 152). The latter include his duties to serve as a role model, to preserve the dignity of his office, and to avoid scandal (p 153). Clinton's extramarital sexual activities and attempts to cover up these activities "may have succeeded . . . unwittingly in destroying the mystique of the Presidency once and for all" (p 167). In fact, Posner argues that Clinton's violation of the exemplary duties of his office constitutes "the most powerful case for impeachment and conviction" (pp 157–58).⁸

The legal profession also failed to perform admirably throughout the President's legal proceedings. First, leaders of the bar, law school deans, and prominent law professors failed "in general to emphasize the importance of the rule of law in general and of telling the truth in depositions and in testimony before a grand jury, in particular, and to point out that Clinton is a member of the Arkansas bar and that the conduct in which he engaged would ordinarily result in disbarment" (p 240). Moreover, academicians' advocacy in the Clinton proceedings revealed the failure of their respective disciplines to posit consensus-building solutions to moral dilemmas (pp 230–40). This failure is symptomatic of a "soft" field (such as history or law) in contrast to a "hard" field (such as physics) in which theorists reason to "divergent conclusions from shared premises" (p 240).

Judge Posner is also particularly harsh on the President's personal lawyers, who grounded their defense in the Senate trial on "quibbling, hair-splitting equivocation, brazen denial of the obvious, truncated quotation and quotation out of context, and mischaracterization of the law" (p 242). The Independent Counsel and the House Judiciary Committee's members and staff were not much better; they committed "errors of tact, taste, and public relations" (p 246) in leaking material that was primarily designed to embarrass the President (if not to harass him into leaving office) and engaging in "hardball" tactics by effectively threatening Monica Lewinsky and her mother with prison (p 76).

Judge Posner concludes that not all of the fallout from the President's legal and impeachment troubles was negative. Despite these numerous failures, for example, the public is somewhat more informed about law, ethics, and politics, at least for the short term (p 14). Because the impeachment drama "reveal[ed] that a higher percentage of

⁸ Judge Posner also finds President Clinton guilty of various breaches of private morality (p 148).

politicians have skeletons in their closet" (p 263) than previously believed, elections might become more focused on substantive issues rather than on scandal (p 263). Additionally, the impeachment "demonstrated the resilience of the American government. For despite everything, government ticked along in its usual way through thirteen months of so-called crisis" (p 263).

II. JUDGING THE SUPREME COURT

It makes sense to begin with an analysis of Judge Posner's critique of the Supreme Court, for that is the institution that set everything in motion. Posner overestimates the Supreme Court's responsibility and underestimates the fault of District Court Judge Susan Webber Wright and President Clinton for the fallout from *Morrison* and *Jones*. His critique of the Court rests on an unfounded link between limitations in the experiences of the justices and flaws in the Court's opinions. Lastly, he never explains how his preferred resolutions of *Morrison* and *Jones* can be squared with relevant precedent.

A. Grading the Court

Posner identifies *Morrison* and *Jones* as forces that propelled the impeachment proceedings and associated events, but he neglects to assess fully the contributions of intervening characters, namely, President Clinton and District Judge Wright. Judge Posner does not mention that in the seven months between Clinton's civil deposition in the *Jones* case and his grand jury appearance, the President reputedly had been warned more than once to come clean.⁹ Consequently, it is only fair that he be held responsible for most of the fallout from his failure to heed this counsel.¹⁰ Nor would it have been unreasonable for the Court to have assumed that a President would testify truthfully in a legal proceeding. Moreover, the Supreme Court based its ruling in *Jones* on the expectation that the District Judge would manage discovery to avoid undue interference with the President's duties.¹¹ Yet, as Judge Posner recognizes, the District Judge failed to do so.¹²

⁹ See, for example, Bill Nichols and Susan Page, *Advisers Used the Media to Push for Admission*, USA Today 1A (Aug 17, 1998); Jim Wolf, *Hatch Warns Clinton on Testimony; Defiance Is Termed Reason to Impeach*, Washington Post A4 (July 13, 1998).

¹⁰ Posner suggests that the President's choice to lie at that time rather than refuse to answer questions "was probably his single biggest mistake in the whole mess" (p 161 n 56).

¹¹ *Jones*, 520 US at 702, 707.

¹² At the very least, Judge Wright could have, as Judge Posner suggests (p 228), dismissed the case without discovery once she had decided that Paula Jones had not suffered a sufficiently serious injury to support a cause of action for sexual harassment. She also could have disallowed questioning of the President about Monica Lewinsky (p 210); or she could have encouraged or

B. Judge Posner's Critique of the Justices

Posner suggests the Justices' political inexperience (p 228) helps to explain the Court's holding in *Jones*, but none of the Justices would be where they are had they not been unusually politically astute. Moreover, Rehnquist, Scalia, Thomas, and Breyer have previously held significant political positions in the federal government,¹³ while Souter (as a New Hampshire attorney general) and O'Connor (as majority leader of the Arizona state senate) were not political neophytes.

Even if the Justices were politically unsophisticated, Posner's recommended solution, that the next Justice appointed have substantial political experience (p 229), would not produce a different outcome. *Jones* was a unanimous holding, and only Scalia dissented in *Morrison*.¹⁴ Assuming that the hypothetical justice disagreed with these majorities, he or she probably would not be able to garner enough votes to change any relevant outcomes.¹⁵

In addition, Judge Posner's criticism of Chief Justice Rehnquist is unduly harsh. He chides the Chief Justice for presiding over the impeachment trial in the same yellow-striped robes that he wears on the bench. The robes "drew a good deal of comment, all duly noting their comic opera origins" (p 168).¹⁶ In Judge Posner's opinion, "the appearance [Rehnquist] presented makes it difficult to believe that the American people any longer expect their officials to be more dignified, aloof, and impressive than themselves" (p 168). There is no evidence to indicate that the Chief Justice's attire had the effect suggested by Judge Posner or that most people appreciated its inspiration or irony. In fact, these inferences do not comport with the actual trial scene. Anyone who watched or followed the trial in its entirety could not help but notice the extraordinary respect that the Senate gave to the Chief Justice. A dramatic example of this respect was that no sena-

ordered Jones's lawyers to ask more direct questions of the President (p 48).

¹³ Both Rehnquist and Scalia headed the prestigious Office of Legal Counsel in the Justice Department (a confirmable position), Thomas served as assistant secretary for civil rights at the Department of Education and as chair of the Equal Employment Opportunity Commission (both confirmable offices), and Breyer served as chief counsel to the Senate Judiciary Committee.

¹⁴ 487 US at 697.

¹⁵ Breyer, who is known for his collegiality and persuasive skills, did not get a single justice to join his separate concurrence in *Jones*, 520 US at 710.

¹⁶ Judge Posner explains that the robes were "inspired by the costume worn by the Lord Chancellor in a production that Rehnquist had seen of Gilbert and Sullivan's operetta *Iolanthe*" (p 168).

tor ever challenged nor did the Senate overturn a single ruling made by Chief Justice Rehnquist during the trial.¹⁷

C. The Relevance of Precedent

Though Posner chides the Court for paying too much attention to history and precedent (p 225), a justice cannot casually ignore precedent, and precedent largely compelled the outcome in *Jones*. As Justice Stevens noted, the Court in *United States v Nixon*¹⁸ and Chief Justice Marshall in *United States v Burr*¹⁹ held that “the President is subject to judicial process in appropriate circumstances.”²⁰ Justice Stevens noted further that sitting presidents, including Monroe, Nixon, Ford, and Clinton, have provided court-ordered testimony and evidence so frequently that it has become commonplace.²¹ If there is no normative principle supporting a president’s use of his office as a shield to block legal process in a case challenging his actions as president, then it is hard to see why there should be one in a case challenging unofficial conduct. The fact that the subject matter of *Jones* involved sex does not constitute a justifiable basis for distinguishing it from these other precedents or for adopting a special constitutional rule. It is primarily relevant as a basis for a trial judge to maintain tight control over discovery.

III. JUDGING THE PRESIDENCY

No analysis of Clinton’s impeachment could be complete without evaluating the impact of Clinton’s misconduct on the presidency. Posner provides an extensive analysis of Clinton’s various breaches of private and public morality, but his discussion of how Clinton’s im-

¹⁷ Such deference sharply contrasts with the experience of Chief Justice Chase, who had several rulings disputed and at least two overturned by the Senate in Johnson’s impeachment trial. See John Niven, *Salmon P. Chase: A Biography* 422 (Oxford 1995) (describing how the Senate overrode Chase’s procedural rule on how Senators could overturn his evidentiary rulings); Gene Smith, *High Crimes & Misdemeanors: The Impeachment and Trial of Andrew Johnson* 263 (William Morrow 1977) (describing how the Senate overturned Chase’s ruling that the defense could call a Cabinet minister to testify).

¹⁸ 418 US 683 (1974) (holding that President Nixon must comply with subpoena duces tecum and produce tapes).

¹⁹ 25 F Cases 30 (C C D Va 1807) (holding that President Jefferson must comply with subpoena duces tecum and produce a letter).

²⁰ *Jones*, 520 US at 703–04.

²¹ Id at 704–05. Stevens here refers to President Monroe responding to written interrogatories, citing Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U Ill L F 1, 5–6; President Nixon producing tapes as ordered by the Court in *United States v Nixon*, 418 US 683 (1974); President Ford being deposed for *United States v Fromme*, 405 F Supp 578 (E D Cal 1975); and President Clinton testifying, on videotape, for *United States v McDougal*, 934 F Supp 296 (E D Ark 1996).

peachment will affect the presidency is unnecessarily brief, and he too hastily concludes that presidents and judges should be subject to different standards.

A. Clinton's Acquittal as Strengthening the Presidency

One significant issue posed by Clinton's impeachment proceedings is whether his acquittal will weaken or strengthen the presidency. After assessing the different possible effects of Clinton's acquittal on the presidency, Judge Posner concludes, "It is sheer speculation that Clinton's impeachment and its sequelae will bring about a dangerous weakening of the presidency" (p 179). Indeed, the impeachment is likely to *strengthen the presidency*.

One way to assess the impact on the presidency is to examine how the institution that conducted the proceedings—Congress—will likely view their significance. It is typical for members of Congress to try to legitimize the outcome of an impeachment trial by reconciling it with the outcomes of past proceedings. This reconciliation is likely to work to the advantage of the presidency.

For example, precedent suggests that Congress will recognize a presidential zone of privacy, so that a president's private life is largely immune to scrutiny in the federal impeachment process. Richard Nixon beyond doubt would have been impeached and removed for his abuses of uniquely presidential trusts, which had a public dimension, but not his income tax fraud, which was purely private.²² Similarly, most senators who voted to acquit President Clinton explained that they did not perceive his misconduct as having a sufficiently public dimension or injury to warrant his removal from office.²³ The former decision, coupled with Clinton's acquittal, likely signals that there is a

²² See Impeachment Inquiry: William Jefferson Clinton, President of the United States, Presentation on Behalf of the President, before the House Committee on the Judiciary, 105th Cong, 2d Sess 125, 131–32, 153 (GPO 1998) (statements of Robert Drinan (D-MA) and Wayne Owens (D-UT), members of the House Judiciary Committee during Nixon's impeachment proceedings, noting that President Nixon's tax evasion was not impeachable because it was personal rather than official misconduct).

²³ Of the thirty-eight senators who published statements on their reasons for voting not guilty on both articles, more than half—twenty-six—explained that they did not regard the misconduct alleged in either article of impeachment approved by the House as an impeachable offense. See the statements of Senators Akaka, 145 Cong Rec S 1576–78 (Feb 12, 1999); Biden, id at 1476–81; Boxer, id at 1511–12; Breaux, id at 1500–01; Bryan, id at 1608–10; Cleland, id at 1524; Collins, id at 1568–69; Dorgan, id at 1618–20; Durbin, id at 1530–32; Graham, id at 1560–61; Hollings, id at 1627–28; Jeffords, id at 1594–97; Johnson, id at 1474; Kennedy, id at 1566–68; Kerry, id at 1620–22; Kohl, id at 1547–48; Leahy, id at 1587–88; Levin, id at 1543–46; Lieberman, id at 1600–05; Lincoln, id at 1625–26; Mikulski, id at 1498–99; Moynihan, id at 1559–60; Reid, id at 1574–75; Sarbanes, id at 1502–04; Snowe, id at 1546–47, 1669–71; and Wellstone, id at 1597–98.

zone of a president's private life that will be treated as largely off limits in the federal impeachment process.

Congress will also likely recognize that any impeachment inquiry into a popular president or an inquiry without strong public support must be kept very short. When faced with an investigation that might not uncover serious misconduct (insofar as the public is concerned) for some time, future congresses might think twice before engaging in a prolonged investigation of a president's misconduct, for fear that it might alienate the public. Consequently, it is possible that impeachment will be effective only for the kinds of misconduct that can galvanize the public to set aside its approval of a president's performance to support resignation or formal removal. A future Congress might support removal only if it has direct evidence of very serious wrongdoing and unambiguous consensus (in Congress and among the public) on the gravity of such wrongdoing.²⁴

Finally, independent of whatever reconciliation Congress may reach, Clinton's acquittal will likely be construed as casting doubt upon the House's judgment to impeach the President. This may help wash away any deleterious effects the impeachment might have had on the presidency.²⁵ The most notorious acquittals in the nineteenth

²⁴ Whereas President Clinton's acquittal might make it more difficult for Congress to use impeachment against a popular president, it does underscore the greater vulnerability to impeachment and removal of those officials who lack a president's resources (such as recourse to the bully pulpit) or popularity. While Judge Posner does not discuss the plight of such officials, it is hardly inconceivable that an unpopular president such as Andrew Johnson might meet a different fate in an age in which the media constantly applies pressure to investigate a president's misconduct (or actions that have made him unpopular) and in which daily polls can dramatize a loss of popularity and increase in support for removal. In these circumstances, removal or resignation might be extremely likely. To date, the only instance like this occurred during the final days of Richard Nixon's presidency, when the public, for the first and only time during the Watergate investigation, expressed support for the President's ouster based on information revealed in the Watergate tapes. See Stanley I. Kutler, *The Wars of Watergate* 531–32 (Knopf 1990). Though not discussed by Judge Posner, the dynamic is likely to be even more problematic for a federal judge, including a Supreme Court justice, whose hearings are not likely to get anything near the widespread media coverage that President Clinton's proceedings received, nor the outpouring of public support (or the public's opposition to the prolongation of hearings). In the absence of these factors, a federal judge or other low-profile official simply lacks the resources available to a president (particularly a popular one) in defending against political retaliation in the form of an impeachment.

²⁵ Also, once out of office, President Johnson never stopped trying to achieve vindication—something he thought he had done near the end of his life when the Tennessee state legislature named him as one of its two U.S. senators. It is equally likely that as long as he remains president Bill Clinton will not stop trying to rewrite his legacy. While it is doubtful that the Republican-led Congress would ever let him achieve the vindication that he craves, it is certain that Clinton is intensely interested in doing whatever he can to ensure that the opening line of his obituary does not mention that he was the second president ever to have been impeached. Some believe, for instance, that Clinton's intense activity in foreign affairs subsequent to acquittal is motivated in part by a personal rather than a purely institutional or partisan desire to leave a positive legacy.

century, namely those of President Johnson and Justice Chase, have each had the effect of dissuading subsequent congresses from initiating impeachments based on similar misconduct. The Clinton acquittal could be construed by subsequent congresses as rejecting the House's judgment on the impeachability of the President's misconduct.

First, the vote to impeach the President was (as it had been in Chase's and Johnson's cases) largely cast along party lines (p 111), and there is a widespread perception that the proceedings generally were conducted and resolved largely on partisan grounds.²⁶ Moreover, most people (including most members of Congress) largely agree about the underlying facts in President Clinton's case; they disagree primarily over the legal significance of those facts. Subsequent congresses can reasonably conclude that if such misconduct did not merit a conviction in President Clinton's case, it would be unfair or inconsistent to allow similar misbehavior to support a conviction.

B. The Standards for Impeaching Presidents and Judges

Perhaps the most divisive constitutional issue in the Clinton impeachment proceedings was whether there are different constitutional standards for impeaching presidents and judges. This issue arose because one federal judge (Harry Claiborne) had been impeached and removed from office for having engaged in private misconduct unrelated to his office (tax evasion), while two others had been impeached and removed from office for having committed offenses like those with which the President was charged (Walter Nixon for making false statements to a grand jury and Alcee Hastings for perjury and bribery).²⁷ If the standards were the same for impeaching presidents and judges, the case for President Clinton's removal would have been stronger.

Posner provides three reasons why judges and presidents should be subject to different impeachment standards (pp 103–04). The first, that a presidential impeachment is more likely to destabilize the executive branch than a judicial impeachment would the judicial branch (p 103), is hard to reconcile with some of his other conclusions. Posner

²⁶ See *Poll Update ABC Poll: 71% Say Impeach Vote Based on Partisan Politics*, 10 Am Pol Network 9 (Feb 16, 1999); *ABC Nightline Poll, 1999 WL 6416273* (Feb 8, 1999) (indicating that 74 percent of Americans expected senators not to vote their consciences but rather to vote on the basis of partisan politics).

²⁷ Inexplicably, Judge Posner mistakes these facts. He states that "[o]ne judge, Walter Nixon, was impeached and convicted, in 1989, for perjury before a grand jury" (p 103 n 23). In fact, the House impeached and the Senate convicted Nixon for making false statements to a grand jury, which is not the same thing as perjury. It lacks the element of materiality, a prerequisite for proving perjury.

repeatedly observes that the President's impeachment proceedings did not come anywhere close to paralyzing the executive branch (pp 175, 263–64). For most of their duration the impeachment proceedings did not even deflect the President from doing his job (p 149), and, to the extent they did so, the ensuing paralysis was no different than (and might have been largely attributable to) the paralysis that inevitably results from the combination of a Republican Congress and a lame duck Democratic president (p 175).²⁸

The second argument given by Posner is that partisan politics are more likely to play a larger role in the impeachment of an elected official, such as a president, than in the impeachment of a judge (p 104). This argument ignores, however, the radically different resources available to presidents and judges for combating impeachment. Clinton's impeachment proceedings dramatically illustrate how presidents can rally political parties, interest groups, academics, and, perhaps most important, the American people. As Posner notes, presidents can even exact special advantages for themselves, such as having their lawyers present while questioned before a grand jury, in the comfort of the White House (p 152). Such power argues against a president's need for a higher impeachment threshold. Indeed, federal judges who lack such resources might need an impeachment threshold at least as high as a president's to protect their otherwise fragile tenure.²⁹

Moreover, judges, though unelected, can be victims of politically charged reprisals. Consider the case of Judge Harold Baer. After Judge Baer granted a motion to suppress based on his finding that federal agents had conducted an illegal search,³⁰ Bob Dole, then the Republican candidate for president, threatened Baer with impeachment³¹ while President Clinton, who had appointed Baer, indicated that he was considering whether to ask Baer to resign.³² Though several Second Circuit judges denounced the threatened impeachment as

²⁸ Moreover, Judge Posner stresses that most work in the government is done by subordinates rather than the President (p 175).

²⁹ Also, the fact that the electoral process serves as a check against executive abuse of power is not a strong argument for treating presidents differently from judges. The problem with the argument is that there is no electoral check against a second-term president's misconduct. It is telling that the impeachment efforts undertaken against Presidents Nixon and Clinton arose in their second terms when neither was subject any longer to being held accountable in an election. Under such circumstances, it is pointless to consider the electoral process as a check against abuse of power. Its primary relevance then has to do with the extent to which the public might have ratified the President's misconduct in an intervening election.

³⁰ *United States v Bayless*, 913 F Supp 232 (S D NY 1996).

³¹ Don van Natta, Jr., *Judges Defend a Colleague from Attacks*, NY Times B1 (Mar 29, 1996).

³² Alison Mitchell, *Clinton Pressing Judge to Relent*, NY Times A1 (Mar 22, 1996).

a violation of his constitutionally protected independence,³³ Baer reversed himself,³⁴ giving rise to the suspicion that the external pressures affected his decisionmaking.

Posner's third argument for holding judges and presidents to different standards is that judges, but not presidents, have a duty to symbolize and personify the law (p 104). Such a difference of duty, however, does not signify that the meaning of "high Crimes and Misdemeanors"³⁵ depends on whether a judge or president is being impeached, as Posner claims (p 104). Instead, the constitutional standard of impeachment could be the same, with the difference in duty shaping the circumstances and context in which the uniform standard is applied.³⁶

There are other arguments that cut against applying different standards for presidential and judicial impeachments that Judge Posner does not address. One is that the assertion is counter-historical. It conflicts with the Founders' obvious intention to adopt the phrase "during good Behavior" to distinguish judicial tenure (life) from the tenure of elected officials (such as the President) rather than to establish the particular terms of judicial removal.³⁷ The argument that the Constitution establishes different standards for impeaching presidents and judges is a relatively new one in the annals of impeachment history.³⁸ For instance, President Johnson never made such a claim, though his impeachment had been preceded by four judicial impeachments, including Associate Justice Samuel Chase's.

Another argument why the Constitution should be interpreted as enacting a uniform standard derives from historical practices. The constitutional language, "high Crimes and Misdemeanors"³⁹ is vague, indi-

³³ *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, 215 NY L J 4 (Mar 29, 1996).

³⁴ *United States v Bayless*, 921 F Supp 211 (S D NY 1996).

³⁵ US Const Art II, § 4.

³⁶ Similarly, the fact that the consequences that might ensue from an attempt to impeach a president might be different from those that might result from the removal of a judge is not an adequate basis for employing different constitutional standards for impeaching presidents and judges. Rather, the consequences of an impeachment of an official could be factors to be taken into account in the course of applying the common operative standard.

³⁷ See Gerhardt, *The Federal Impeachment Process* at 83–84 (cited in note 2).

³⁸ See Published Impeachment Statement of Senator Paul Sarbanes, 145 Cong Rec S 1502–04 (Feb 12, 1999). Senator Sarbanes declared that

Judges must be held to a higher standard of conduct than other officials. As noted by the House Judiciary Committee in 1970, Congress has recognized that Federal judges must be held to a different standard of conduct than other civil officers because of the nature of their position and the tenure of their office.

Id at 1503 (quoting House Judiciary Committee majority report accompanying recommended articles of impeachment against Walter Nixon in 1989) (citation omitted in original).

³⁹ US Const Art II, § 4.

cating that the Founding Fathers wanted the body charged with applying this law, namely Congress, to interpret this phrase. And Congress has never formally pronounced that judges and presidents are subject to different impeachment standards. Of the seventeen senators who expressed an opinion on this issue during Clinton's proceedings, eleven (ten Republicans and one Democrat) asserted that the standard is uniform.⁴⁰

C. Prosecuting a Sitting President

Yet another issue that arose in the Clinton impeachment proceedings involved whether a sitting president could be criminally indicted or prosecuted (pp 105–09).⁴¹ On this question, Judge Posner evaluates possible consequences and concludes that the likely practical effects weigh in favor of barring a sitting president from being criminally indicted or prosecuted (p 106). The problem with his conclusion is that the main reason for immunizing a sitting president from indictment or prosecution is the same as the best argument for having a higher threshold for impeaching presidents than for judges—that the proceeding would unduly paralyze the executive branch. Judge Posner already gave a convincing response to this prospect—it is unlikely that such an indictment or prosecution would be more debilitating than a presidential impeachment trial, which did not paralyze the government.

Judge Posner's other reason for concluding that a sitting president should not be allowed to be criminally indicted or prosecuted is the practical effect of a president's ability to pardon himself. If the president may pardon himself, then it becomes practically impossible to ensure that a criminal indictment or prosecution of a president can be accomplished (pp 107–09). The problem with this argument is that Judge Posner fails to explore the significance of impeachment as a check on a president pardoning himself. Abuse of power was the most common example of an impeachable offense given in the constitutional and ratifying conventions, and it is hard to imagine a better ex-

⁴⁰ Senators who clearly supported different standards for impeaching presidents and judges include Biden, 145 Cong Rec S 1477 (Feb 12, 1999); Kerry, id at 1620; Kohl, id at 1547; Robb, id at 1510; and Sarbanes, id at 1503. Senators who clearly supported a uniform standard include Allard, id at 1561; Bond, id at 1509; Brownback, id at 1608; Fitzgerald, id at 1520; Frist, id at 1528; Gorton, id at 1463–64; Grams, id at 1500; Kyl, id at 1533; Mack, id at 1513; and McConnell, id at 1564.

⁴¹ If so, then a president could possibly be vulnerable to impeachment on the basis of incapacitation because of imprisonment or distraction from the need to defend himself. If not, then one of two disturbing prospects could arise—the specter of either a lawbreaking president staying in office awaiting later punishment or a Congress bent on expediting removal to facilitate the president standing trial sooner rather than later.

ample of such abuse than a president using his pardon power to avoid criminal accountability for his misconduct. Indeed, it is an example that several Framers and ratifiers used to illustrate the scope of the impeachment power.⁴²

IV. JUDGING CONGRESS

As the institution primarily responsible for competently and fairly adjudicating President Clinton's impeachment, Congress failed miserably, in Judge Posner's estimation. Posner criticizes Congress for its partisan approach and its failure to adopt judicial procedures. Although a completely non-partisan impeachment might be unattainable, Posner identifies structural changes that have made modern impeachments more vulnerable to partisan influences than the Founding Fathers might have intended (p 118). For example, senators are now directly elected by the voters of their respective states, and citizens need no longer satisfy property requirements to vote (p 118). Mass media, which immediately disseminates information throughout the country, also has moved the country towards a more direct, populist democracy (p 118).

The first problem with Posner's analysis of Congress's performance in the Clinton impeachment proceedings is that he dismisses all too quickly the significance of the Founders' deliberate selection of politicians, not judges, as the impeachment authorities, in part because impeachment, as Posner concedes, involves balancing political interests.⁴³ Moreover, the vagueness of the impeachment standard invites the infusion of politics into an impeachment trial,⁴⁴ for a vague standard confers greater discretion to the adjudicator.

⁴² See, for example, Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 550 (Yale 1966) (statement of Colonel Mason); Jonathan Elliot, ed, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 498 (Taylor & Maury 2d ed 1854) (statement of James Madison during the Virginia ratifying convention). See also *An Impartial Citizen V*, in John P. Kaminski and Gaspare J. Saladino, eds, 8 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia* 428, 429–30 (State Historical Soc of Wis 1988), which declared that

[S]hould the President pardon in common cases *before* conviction, or *afterwards* forgive notorious villains, or persons who should be unfit objects of mercy, this would be such a misfeasance of his office, as would subject himself to be personally impeached. He is as responsible for transactions in one part of his office as another.

⁴³ Gerhardt, *The Federal Impeachment Process* at xi (cited in note 2).

⁴⁴ The fact that bipartisanship was not achieved in President Clinton's trial was not surprising. It had one significant variable that the seven cases in which the Senate has convicted and removed officials did not—a popularly elected president (who was still popular during his impeachment). It also lacked most variables present in those cases, including a clearly severe injury to the constitutional order, a clear link between the offense alleged to that injury and an official's formal duties, and a showing that the linkage among the injury, alleged offense, and duties was so

The Constitution diffuses the harms of partisanship by mandating a supermajority requirement for conviction by the Senate. Convincing more than two-thirds of the Senate to remove an official (particularly a president) requires a showing of misconduct that is so bad and so clearly linked to the public responsibilities of the impeached official (even the exemplary moral duties of the official) that the normal pull of partisanship is overcome. That the Constitution demands such a showing is not a new insight.⁴⁵

Moreover, Posner's criticisms of the procedures employed in Clinton's trial, including his judgment of the trial as "a travesty of legal justice" (p 127), are problematic. Posner argues that Congress erred by failing to adopt a standard of proof, rules of evidence, or a gag rule (pp 120–128). As a self-described pragmatist, Posner surprisingly overlooks practical difficulties in implementing uniform procedural rules. While a gag rule might be enforceable, senators probably would not be comfortable enforcing other recommended rules, such as one that mandates a particular burden of proof. Each chamber has long followed a tradition that respects each member's ability to decide various procedural issues, such as the proper burden of proof, for him or herself.⁴⁶

Nor, as Posner contends, were the members of Congress involved with Clinton's impeachment out of their depth. To begin with, most participated in the three judicial impeachment proceedings in the 1980s.⁴⁷ A significant minority participated in Congress' investigations of Richard Nixon's misconduct.⁴⁸ Their decisions were calculated risks

close that the official was left unable to perform his duties. Those are a lot of missing variables, enough to explain an acquittal, without having to conclude that the system is broken.

⁴⁵ The Founding Fathers were well aware of the potential for impeachments to become political. See, for example, Federalist 65 (Hamilton), in Isaac Kramnick, ed, *The Federalist Papers* 380, 380–81 (Penguin 1987). Hence, the supermajority requirement exists in part to prevent partisanship from being the sole or primary reason for removing a high-ranking official. The odds are that to get a supermajority to convict there must be some members of the official's party who cross over. In the absence of such a crossover, the odds favor acquittal.

⁴⁶ In fact, the Clinton impeachment proceedings essentially reaffirmed the practical implications of *Nixon v United States*, 506 US 224 (1993), which held that constitutional challenges to impeachment trial procedures are nonjusticiable. Consequently, it is left to the nonreviewable discretion of the House and the Senate to devise their respective impeachment procedures as they each see fit. See Gerhardt, *The Federal Impeachment Process* at 118–46 (cited in note 2).

⁴⁷ Of the representatives who participated in the House impeachment proceedings in the 1980s, over one-hundred forty participated in President Clinton's House proceedings and at least seventeen in his impeachment trial. At least fifty-one senators who participated in President Clinton's trial participated in the impeachment trials of Alcee Hastings and Walter Nixon.

⁴⁸ Sixty-seven representatives who voted on President Clinton's impeachment served in the House during its investigation of President Nixon's misconduct, and seven members of the House Judiciary Committee that approved impeachment articles against President Nixon participated in either the House or Senate impeachment proceedings against President Clinton. Eleven senators who participated in the Senate's investigation of President Nixon's misconduct

that in fact might have paid off for those primarily interested in tarnishing the President's legacy or facilitating the election of a Republican as President in 2000 (by nurturing or encouraging Clinton fatigue).

Moreover, there is no empirical support for Posner's claim that House members lack the requisite training or resources to undertake independent fact-finding in an impeachment inquiry. The fact that in thirteen of the sixteen impeachment hearings conducted by the House its members did undertake some independent fact-finding (even in five of the eight matters referred to the House by external authorities) indicates that they do have the requisite training and resources to undertake some fact-finding.⁴⁹ Indeed, such undertakings have proven essential for cultivating public confidence in the House's judgments to impeach as non-partisan.

V. JUDGING ACADEMICIANS

Posner's critique of public intellectuals who come from "soft subjects" or fields (such as law, history, and philosophy) that lack consensus-building methodologies (pp 230–40) is problematic for several reasons.

First, the critique is disproportionately skewed against liberals. Granted, there is ample empirical data demonstrating the liberal bias of academicians, particularly law professors,⁵⁰ a numerical advantage that enabled liberals to dominate academic debates on impeachment. More than four hundred law professors and four hundred historians submitted letters urging the House Judiciary Committee to forego its

participated in the Clinton trial. At least two members of Congress who participated in the Clinton proceedings (Zoe Lofgren in the House and Fred Thompson in the Senate) served as staffers in Congress's investigations of President Nixon's misconduct.

⁴⁹ The only three instances in which the House refused to undertake any fact-finding in an impeachment inquiry were the proceedings for Harry Claiborne, Andrew Johnson, and Bill Clinton. Claiborne encouraged the House to forego fact-finding in the (ultimately futile) hope that a full Senate trial would vindicate him, while the House's failures to undertake some independent fact-finding in the other two cases—both involving presidents—came back to haunt the House (by making it look intemperate) in the ensuing Senate impeachment trials.

⁵⁰ See Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 Chi Kent L. Rev 765, 780 n 54 (1998) (indicating that only 10 percent of law professors identify themselves as conservative); James Lindgren, *Measuring Diversity*, Speech to the National Association of Scholars (Jan 5, 1997) (reporting that more than 80 percent of law professors are registered Democrats); Seymour Martin Lipset, *The Sources of Political Correctness on American Campuses*, in Howard Dickman, ed., *The Imperiled Academy* 71, 79 (Transaction 1993) (referring to the results of a 1989 survey by the Carnegie Corporation, finding that at research universities, 67 percent of professors identify themselves as liberal while only 17 percent identify themselves as conservative); Richard Pipes, *Property and Freedom* 272 (Knopf 1999) (reporting that in the humanities and social sciences, less than 4 percent of faculty identify themselves as conservative).

impeachment inquiry against Clinton;⁵¹ the conservative counterpart was a letter signed by ninety-six academics and former government officials, suggesting that the Starr Report could support a case for removing Clinton.⁵²

Yet the obvious prominence of liberal voices in the impeachment debate does not explain Posner's selection of academics to single out by name. He provides severe and detailed criticism of numerous liberal academics, including Schlesinger, Nagel, Sandel, Mikva, Dworkin, Sovern, Rakove, and Wilentz (pp 208–09, 231–37), but he fails to identify any particular error committed by a conservative legal scholar. As Michael Klarman and Neal Devins have shown, however, the impeachment debate brought out the worst in both liberal and conservative law professors.⁵³ Moreover, there was a striking absence of any moderate voices in the impeachment debate—demonstrated at least in part by the fact that the author of this Review was the only joint witness in a hearing at which eighteen other legal scholars testified as experts about whether the President's misconduct was impeachable.

Another illustration of Judge Posner's unbalanced critique of academic impeachment commentary is that the institution of which he is least critical is the media, whose coverage he commends as largely exemplary (pp 246–48).⁵⁴ Yet one recent empirical study of the media's coverage of the proceedings indicates it had a pro-prosecution bias.⁵⁵ Moreover, this bias probably overwhelmed the effects of the liberal academy's bias. For it appears as if the media's bias turned off most of the public relatively early in the proceedings.⁵⁶ Consequently, it is doubtful that liberal commentary even had much effect on public opinion regarding the proceedings. The odds are that for the most part it fell on deaf ears.

⁵¹ See Background and History of Impeachment, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong, 2d Sess 334–39, 374–83 (GPO 1998) (historian and law professor letters, respectively).

⁵² See *Don't Let the President Lie with Impunity*, Wall St J A22 (Dec 10, 1998).

⁵³ Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 Va L Rev 631 (1999); Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U Pa L Rev 165 (2000).

⁵⁴ According to Judge Posner, the media's

one big mistake . . . was to describe Lewinsky as a twenty-one-year-old intern, which created the impression that Clinton had taken advantage of a girl. Lewinsky was twenty-two when the affair began and only nominally an intern, since she had been hired as a regular employee, though the paperwork for the appointment had not been completed. And she was a savvy, sexually experienced young woman, not a vulnerable naïf.

(p 248).

⁵⁵ See Kovach and Rosenstiel, *Warp Speed* at 63–64, 77–78, 104 (cited in note 2).

⁵⁶ *Id* at 63, 77–78.

Another problem with Posner's critique of public intellectuals is his failure to adopt a standard for evaluating the quality of academic commentary on public events. He summarily concludes that academics cannot guide our country with disinterested analysis (p 12), without considering whether the norms of public intellectuals could evolve to minimize, if not eliminate, partisan propaganda masquerading as intellectual reasoning. For example, public intellectuals could adopt something like the code that governs judicial ethics.⁵⁷ Such a standard would require academics to disclose any potential conflict of interest, such as close ties to any of the parties involved in the story or event,⁵⁸ so that the public can better interpret their commentary. Similarly, academic commentators should specify their domains of expertise. Posner justifiably chastises those who assumed a mantle of authority as law professors in signing an anti-impeachment letter,⁵⁹ without being expert in impeachment law or the facts of Clinton's case (p 242).

VI. JUDGING POSNER

One possibly serious consequence missed by Judge Posner is the impact of his commentary on his judicial status. Judge Posner appropriately considers whether his judicial obligations preclude his commenting on any of Clinton's legal or impeachment troubles, but he quickly dismisses the likelihood of any impropriety. He acknowledges the judicial canon "forbid[ding] public comment on any pending cases" (p 3),⁶⁰ but hastens to add, "I do not comment on any pending cases" (p 3).

It is, however, possible that the Judge construes the canon restricting commentary on pending cases too narrowly; presumably, he has construed it as restricting him from commenting only on a case pending before his court or himself. It could also reasonably be con-

⁵⁷ The idea that law professors are like judges in certain respects is not new. For a classic statement of the similarity between judges and law professors, see Alexander Bickel, *The Least Dangerous Branch* 25-26 (Yale 2d ed 1986) ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."). For further analysis of the standard that should govern lawyers commenting on public events, see Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator*, 69 S Cal L Rev 1303 (1996); Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator II*, 37 Santa Clara L Rev 913 (1997).

⁵⁸ This includes, inter alia, disclosing one's basic political or ideological biases or inclinations. See, for example, Louis M. Seidman and Mark V. Tushnet, *Remnants of Belief* (Oxford 1996) (including a "bibliographic essay" that identifies the books and articles that particularly influenced the authors).

⁵⁹ See Background and History of Impeachment at 374-83 (cited in note 51) (law professor letter).

⁶⁰ The canon in question is Canon 3 of the ABA's Model Code of Judicial Conduct. See *ABA Model Code of Judicial Conduct* (1997).

strued as restricting his commenting on cases pending in other courts.⁶¹ In fact, he recognizes that several matters on which he comments extensively are pending in other legal fora. For example, he acknowledges the Justice Department's ongoing investigation into whether the Independent Counsel violated any ethical or legal obligations (p 7 n 14); and he recognizes that the President has not yet been but could still be prosecuted for various criminal infractions (pp 7 n 14, 162, 166). Moreover, Judge Posner acknowledges that the President could be disbarred for having committed certain crimes (p 55) and that Clinton "could be disciplined by the district judge or by the Arkansas bar" (p 4 n 10).⁶²

It is easy to imagine that Judge Posner's comments might influence some of these pending matters. For example, it is possible that any federal court before which the Independent Counsel ever tries to defend the legality of his office's tactics could cite Judge Posner's conclusion that any wrongs done by the Independent Counsel were "inconsequential" (p 74). It is also possible that if the President ever were to face disbarment, someone might introduce the Judge's book into the record as reflecting one prominent federal judge's views on the President's fitness to remain a member of the bar. I can further imagine that his book—including its suggestion that it would be better for the nation if the President were not prosecuted for his criminal acts to preclude having the prosecution become a major issue in the next presidential election (p 194)—will make the rounds of the independent counsel's office, which has not yet firmly decided to forego prosecuting the President or the First Lady. Nor has Starr's office published its final report, which, for all we know, could draw heavily (at least for inspiration or moral support) from Posner's expansive speculation on the array of criminal acts that he believes the President committed "clear[ly] beyond a reasonable doubt" (p 54). How much easier to convict the President in a report than in a real courtroom with a real judge and jury, especially when a leading federal judge has given his blessing to such an assessment.

I hasten to add that though Judge Posner's expansive commentaries are hard to reconcile with his technical responsibilities as a judge, any conflicts are by no means impeachable. If the Clinton impeachment proceedings demonstrated nothing else, they showed that

⁶¹ See, for example, *In re Broadbelt*, 146 NJ 501, 683 A2d 543 (1996) (holding unanimously that a municipal court judge had violated Canon 3 by providing television commentary on pending cases in other courts, including courts outside New Jersey).

⁶² Posner also speculates that Judge Wright "could have imposed monetary sanctions on Clinton under Rule 37 of the Federal Rules of Civil Procedure, which creates sanctions for bad faith in pretrial discovery" (p 55).

removal is not an appropriate remedy for every indiscretion, mistaken judgment, or arguable breach of trust. Other fora exist for addressing such errors, including public opinion, the judgment of history, and civil or criminal proceedings. Posner's indiscretions merit at most some public criticism (and perhaps the scorn of some colleagues), but they do not come remotely close to constituting the serious abuse of power or constitutional injury that justifies removal.

Ironically, Judge Posner explains that he wrote his book in the midst of the President's trial to avoid "hindsight bias" (p 4).⁶³ However, the Judge could have written his manuscript during the trial but published the book a few years later when the entire affair had subsided or concluded. This would have avoided hindsight bias and any virtually contemporaneous negative impact his commentary may have on himself as a symbol of law.

CONCLUSION

Judge Posner's newest book has all of the strengths of his other work—it is impressively multidisciplinary, lucidly written, and illuminates a topic one would have thought had already been overanalyzed. His recognition of the challenges posed by the vagueness of the constitutional standard of impeachment is exemplary. He recognizes that this vagueness compels members of Congress to balance many factors, including an official's formal duties, the gravity of an offense, the injury that the misconduct has caused the constitutional order, the link between an official's misconduct and duties, the degree to which the misconduct has disabled an official from doing his or her job, and other possible avenues for redress. He further recognizes public opinion is a factor, both to the extent it has to be considered in calculating other factors and in its own right.

Yet, the fallout Judge Posner perceives as arising from Bill Clinton's impeachment is not so dire as he suggests. The members of the Supreme Court cannot fairly be held accountable for all of the fallout from *Morrison* and *Jones*, because there were other significant intervening forces, including Judge Wright's lax control of discovery and the President's surprising failures to testify truthfully under oath in civil and criminal proceedings. Congress was also well within its rights, taking calculated risks for which its members remain politically

⁶³ Hindsight bias is a "serious problem in historiography" (p 4) in which a historian analyzing an event that has been "declared 'closed'" (p 4) imposes on it a design or framework that it did not have at the time of its occurrence. Ironically, "hindsight bias" is a risk that judges routinely undertake. It is commonly thought that one important measure of the legitimacy of a judge's ruling is that it has not been made in the heat of the moment but rather from a dispassionate perspective that is removed in time and space from the controversy being reviewed.

accountable. Moreover, the presidency is probably stronger, because subsequent congresses will likely recognize a zone of private misconduct for which presidents will not be held accountable in the impeachment process. In addition, Posner does not posit a standard by which to measure the quality of academic commentary on Clinton's impeachment and legal troubles. Nor, for that matter, does Posner assess more fully (as his methodology requires) the problems that his expansive commentaries on unsettled legal and political matters pose for his own status as a symbol of the law's neutrality. His comments are at odds with the expectation that as a symbol of the law's neutrality he will refrain from trying to influence ongoing legal proceedings or become involved in an ongoing political fray.

Ironically, the President's acquittal points to a lesson that is as important to future presidents as it is for Judge Posner. The President's acquittal is a strong reminder that impeachment is not a mechanism for redressing every indiscretion or mistake of judgment made by an impeachable official. Impeachable officials (even one as extraordinarily talented as Richard Posner) sometimes make mistakes that subject them to public criticism and perhaps a rebuke from some of their colleagues or successors. That's a form of justice, though it is not the kind of justice that Richard Posner dispenses. But it is a form of justice that is real and enduring. Just ask Bill Clinton.