

On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings

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The ordinary strictures of judging obviously do not apply to Richard Posner, at least when it comes to productivity. In addition to his administrative duties as chief judge of the Seventh Circuit Court of Appeals, he is no doubt the most efficient and prolific opinion writer currently on the federal bench—indeed, perhaps in history. By one count, he has written over 1,500 opinions since becoming a judge in 1981, an astonishing average of one and a half opinions per week (with no time for vacations).

Equally, if not more, impressively, Judge Posner also manages to publish an important book just about every year, on fascinating topics ranging from *Aging and Old Age* (1995) to *Sex and Reason* (1992). He also teaches as a senior lecturer at the University of Chicago, and he somehow found time to serve as the mediator in the Microsoft antitrust trial.

Posner's most recent book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (Harvard University Press), drew the usual acclaim. The *New York Times* called it one of the ten best books of 1999, and it was a finalist for the *Los Angeles Times* Book Award. *An Affair of State* has also created a controversy, however, suggesting that Posner had gone beyond another of the usual limitations on judges—this one ethical rather than temporal.

In *An Affair of State*, Judge Posner dissects the Clinton impeachment investigation and trial in great detail, offering his repeated opinions that President Clinton committed “varied felonious obstructions of justice” and that he clearly “perjured himself in the Paula Jones deposition.” Opening the book almost at random, one would find comments such as this:

Even if, as I do not for a moment believe, none of President Clinton's lies under oath amounted to perjury in the strict technical sense, they were false and misleading statements designed to derail legal proceedings, and so they were additional acts of obstruction of justice—as well as additional overt acts of a conspiracy to obstruct justice involving Clinton, Lewinsky, Currie, and possibly Jordan and others as well, such as Blumenthal. An imaginative prosecutor could no doubt add counts of wire fraud, criminal contempt, the making of false statements to the government, and aiding and abetting a crime.

The ethical question, as first pointed out by Ronald Dworkin in the *New York Review of Books*, is whether Posner's commentary violates Canon 3A(6) of the Code of Judicial Conduct for United States Judges, which prohibits public comments on “pending or impending” cases.

Posner defended himself, in the pages of both *New York Review of Books* and the *New York Times*, by observing that the impeachment process itself had been concluded, and was therefore no longer pending, well before his book was published. Concerning the problem of impending proceedings, as in the possibility of a future criminal prosecution, he declared that “impending” means imminent, and that almost “no issue of policy has a smaller probability of someday becoming a legal case than that President Clinton will someday be prosecuted for the offenses of which the Senate acquitted him.”

It turns out, however, that Judge

Posner is wrong on both counts. *An Affair of State* violates each provision of Canon 3A(6) by commenting on both pending and impending proceedings.

Consider first the question of a future prosecution of Clinton (or others). While the Code of Judicial Conduct does not define “impending,” it obviously means something more than cases that are currently on trial or in court. In our treatise, *Judicial Conduct and Ethics*, my coauthors and I define an impending proceeding as “one that can be identified . . . as a dispute between recognizable parties over identifiable facts and circumstances,” whether or not it has already been filed in court. The Independent Counsel's continuing criminal investigation of President Clinton and his associates certainly seems to fit that description.

The potential prosecution of President Clinton for perjury or obstruction of justice was discussed throughout the impeachment debate and after. Judge Posner's current assertion that it is “almost certainly not going to happen” might gladden hearts in the White House, but it would come as surprising news to the Office of Independent Counsel. In fact, it has been widely reported that Robert Ray, Kenneth Starr's successor, is still “actively investigating whether to indict President Clinton after he leaves office.” True, Mr. Ray might yet decide not to charge Clinton, but the test for “impendingness,” so to speak, has to be evaluated as of the time of the judge's comments, not in retrospect after all of the litigation decisions have been made.

One reason for restraining judicial speech about impending prosecutions is that the outspoken opinion of a respected federal judge might influence the

prosecutor's decision about whether or not to proceed. True, everyone in the country recognizes that Bill Clinton lied in the Jones deposition, but those lies would not be criminal unless they met the legal test of "materiality." A prosecutor pondering an indictment would have to worry about whether he could satisfy that requirement beyond a reasonable doubt, which remains an open question. It should hardly need saying that a sitting federal judge should not be in the business of advising prosecutors, even indirectly, about such matters.

Judge Posner, however, devoted several pages in *An Affair of State* (and several more paragraphs in a subsequent reply to Dworkin) to an explanation of precisely how the necessary case for materiality could be made: "All that must be shown is that the lie had the potential to impede the interrogator's investigation," he explains, followed by a precise description of the way that Clinton's falsehoods could be said to have done just that. Indeed, not only is it certain that Clinton's "lies were material" says Posner, but, "[i]n addition, a lie that intentionally derails or delays a legal proceeding, sending the other participants on a wild-goose chase, is a form of obstruction of justice even if it is not material to any issue in the case." Thus, his comments directly addressed one of the most important issues still outstanding—and still under active consideration—in the Clinton scandal. That is precisely the situation that the Code of Judicial Conduct was intended to prevent.

Moreover, a proceeding to revoke President Clinton's law license was actually pending at the very time that *An Affair of State* was published, having been referred to the Arkansas Committee on Professional Conduct by Judge Susan Webber Wright in April of 1999. Since publication, the Committee has announced that it would indeed seek the disbarment of Mr. Clinton and has filed a formal complaint alleging that his conduct in the Jones case was "prejudicial to the administration of justice." The next step is a hearing before a trial judge in Little Rock, whose ruling will be reviewed by the Arkansas Supreme Court. Posner's book has already been invoked in the public debate. In urging

disbarment of the president, the *Providence Journal Bulletin* relied upon a seemingly tailor-made quote from *An Affair of State*: "Clinton engaged in a pattern of criminal behavior and obsessive public lying, the tendency of which was to disparage, undermine and even subvert the judicial system of the United States."

Finally, it is instructive to consider Posner's own words on the subject of public commentary. In *An Affair of State* he calls Abner Mikva "irresponsible" for publicly attacking the integrity of Kenneth Starr, since Mikva was then "mantled with the prestige of a former chief judge of a federal court of appeals." What should we make, then, of the conduct of the sitting chief judge of the Seventh Circuit?

It is tempting to lobby for a "Posner exception" to the no-comment rule. He is, after all, one of our leading public intellectuals and he does, after all, enrich the national discourse by writing invariably interesting books on imaginatively diverse subjects. If any judge should have leeway to pursue his thoughts in print, it is certainly Richard Posner.

Nonetheless, even great minds are not immune to errors of judgment. The conclusion seems inescapable that *An Affair of State* impermissibly comments on both pending and impending proceedings. For that reason, Ronald Dworkin condemned the book as injudicious and ethically questionable.

Technically, Posner could face reprimand by the Seventh Circuit Judicial Council, but it is unlikely that things will ever go that far. The sides have long been drawn on the Clinton scandal, and *An Affair of State*, though detailed, deliberate, and exhaustive, plows no new ground. Posner's explicit purpose in writing was to limn the impeachment process, not to urge prosecution of the president. In that light, this contretemps is a doubtful candidate for any sort of disciplinary action. But that does not mean it should be quickly forgotten.

In defending himself, Posner claimed to speak on behalf of the judiciary, asserting that acceptance of Dworkin's criticism would discourage other judges from writing about public affairs. One hopes that Judge Posner's colleagues would disagree with that interpretation

of the Code of Judicial Conduct—and be willing to tell him so, even if only in private. There is a sharp distinction between public affairs and impending cases, which most judges are more than willing to accept. In other situations, it might be dangerous indeed for a sitting federal judge to proclaim the guilt of an as yet unindicted person. Richard Posner's formidable intellect notwithstanding, *An Affair of State* sets a poor example for the necessary neutrality of the federal judiciary.



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