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Book Reviews: Impeachment: The Constitutional Problems

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BOOK REVIEWS

IMPEACHMENT: THE CONSITUTIONAL PROBLEMS. By Raoul Berger,† Cambridge, Massachusetts: Harvard University Press. 1973. Pp. xii, 345. $14.95. Reviewed by Honorable Hall Hammond.††

Virtue, it is said, is its own reward. The virtues of scholarly research in depth and of sound and penetrating analysis of the problems that the processes of impeachment present, shine from every page of Raoul Berger's book. These virtues have led to the traditional reward of high praise from his peers to a colleague who has distinguished himself in the academic, legal, and governmental communities. To cite but a few briefly, Professor Philip Kurland (with whose view Berger differs from time to time) said: "This is a serious, scholarly effort .... Berger's book has much to tell us. And we shall be grateful to him for his scholarship and his capacity to express himself so lucidly on a subject that will always be shrouded in some darkness."[1]

Professor Arthur Schlesinger, Jr., says that Berger's "writings are distinguished by vigorous and exhaustive research, by thoughtful and ingenious argument, by pungent summation and by an independence of mind constrained only by a fundamental commitment to the American Constitution."[2] J. Willard Hurst of the University of Wisconsin Law School says "Raoul Berger conveys the excitement of high policy, while he advances challenging new theses and does it all with sure, deft craftmanship which makes even the footnotes good reading."[3]

I agree with these gentlemen and I am pleased that Berger has received a well earned academic due and gratitude for his contribution to those who must recall, either from the theoretical or the practical point of view that there exists the mechanism of impeachment. And I have the further happy thought that this "serious, scholarly" book which entirely fortuitously came to fruition during the time of Watergate and Vice President Agnew's involvement with the Federal Grand Jury in Baltimore, will sell so many timely copies at a not inconsiderable price that the author's reward will not be limited to his virtue but will be substantially increased by coin of the realm, devalued and inflated though it be.

The Founding Fathers when they adopted the Constitution of the United States were of course familiar with the common law, the history of impeachment in England and with the fact that one of the longest

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1. Kurland, Book Review, N.Y. Times, Aug. 5, 1973, at 3 (Book Review).
2. Schlesinger, Book Review, The Washington Post, June 10, 1973, at 1-2 (Book World).
3. Hurst, Book Review, The Washington Post, May 9, 1973, at F2, col. 2 (Style).

and most famous of English impeachments, that of Warren Hastings, was under way in the summer of 1787 when the Constitutional Convention gathered in Philadelphia.[4] Berger notes they were aware that impeachment developed in the fourteenth century as a weapon of Parliament to fight the King in the battle for supremacy and that impeachment reached its most effective utilization in the seventeenth century. The King himself could not be reached but the House of Commons could indict high officers of the King for a variety of offenses and hale them before the House of Lords for a trial that was essentially criminal in nature. Thus, Parliament which could not control the King directly could do so indirectly. The Founding Fathers, knowing history and human nature, had no intention of permitting potential abuses of presidential power to be beyond corrective reach. Their real preoccupation in this area was the President and only at the last and somewhat casually did they make "all civil officers of the United States"[5] subject to removal by impeachment.

Berger declares that:

> The path by which the Framers arrived at this language is traceable in the records of the Convention. Initially, impeachment was to be based upon "malpractice or neglect of duty." In the Committee of Detail this became "treason, bribery or corruption," and was then reduced by the Committee of Eleven to "treason or bribery." [sic] When George Mason suggested on the floor of the Convention the addition of "maladministration," Madison remarked that it was "so vague," [as to make the tenure of a President at the pleasure of the Congress] whereupon Mason substituted "high crimes and misdemeanors," which was adopted without demur.

The phrase "high crimes and misdemeanors" Berger demonstrates, is a term of art with ascertainable limits; it means *high crimes* and *high misdemeanors* and *high* misdemeanors are not limited to criminal or indictable offenses but include (or really mean) political crimes against the state and public interest. Political crimes cannot be precisely defined but rather are to be explained by examples and categorized as they are by Berger. As to *high* midemeanors, one senses Mr. Justice Stewart's dilemma when he contemplated hard core pornography—he could not define it but he knew it when he saw it.

The "excitement of high policy" and the "challenging new theses"[6] which Hurst said Berger conveyed and advanced is well illustrated in his chapter discussing judicial review of an impeaching ouster by the Senate.

Berger enthusiastically and somewhat ingeniously argues that the

4. The impeachment proceedings commenced in May, 1787 and lasted for seven years.
5. U.S. CONST. art. II, § 4 provides: "The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."
6. Hurst, *supra* note 3.

Supreme Court can ultimately decide whether the charged misconduct constitutes an impeachable offense,[7] although he acknowledges that "[f]rom Story onward it has been thought that in the domain of impeachment the Senate has the last word; that even the issue whether the charged misconduct constitutes an impeachable offense is unreviewable, because the trial of impeachments is confided to the Senate alone."[8]

In challenging this long and widely held view, Berger would seem to have adopted the position that "I may be wrong but I am not in doubt" (as an engaging business and political leader in Maryland was wont to say some years ago). Indeed in his prefatory acknowlegements Berger states: "If I have persisted in 'error' it was not for want of searching criticism but because one must have the fortitude to adhere to hard-won conclusions which are not shaken by criticism, however high its source."[9]

Despite his "hard-won" conviction I am not persuaded that his conclusions are sound or that his arguments would prevail if a case arose in which they could be made. Berger relies mainly on *Powell v. McCormack*[10] in which the Supreme Court held that exclusion from the House was limited by the Constitution to the requirements of age, citizenship, and residence and that, although the Constitution made the House the judge of the qualifications of its members, it could not exclude Adam Clayton Powell for serious misconduct. From this holding he argues: "The Senate may convict for 'treason'; by Article III, § 3, 'treason' is defined as levying war against the United States or giving aid and comfort to its enemies. Suppose the Senate convicts the President of treason on the ground that he attempted to subvert the Constitution . . . ."[11] Plainly this would amount to adding a new ground for impeachment which the Supreme Court could and should invalidate.

Of course, it is not to be reasonably imagined that the House would indict for treason if the offense was a *high* misdemeanor, as attempting to subvert the Constitution would be, and the Senate would convict if it did. Assuming, however, that what Berger hypothesizes did occur there are, as I see it, compelling indications that the Supreme Court has no right to review and would not attempt to do so. There is the stark language of the Constitution: "The House of Representatives . . . shall have the sole Power of Impeachment"[12] and "[t]he Senate shall have the sole Power to try all Impeachments."[13] That the Supreme Court was to have no part in the impeachment proceeding is fortified by the

7. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 103–07 (1973) (citations omitted) [hereinafter cited as BERGER].
8. *Id.* at 103 (citations omitted).
9. *Id.* at vii.
10. 395 U.S. 486 (1969).
11. BERGER 106.
12. U.S. CONST. art. I, § 2.
13. *Id.* § 3.

realization that the Framers originally entrusted the trial of impeachments to the Supreme Court but then made the Senate the tribunal for trials.[14] One reason for the change said Gouverneur Morris was:

> that the Supreme Court was to try the President [upon indictment] after the trial of the impeachment [unlike the English practice under which the Lords tried both issues]. . . . So too, Roger Sherman "regarded the Supreme Court as improper to try the President because the judges would be appointed by him" and inferentially would therefore be partial to him. These views were expanded by Hamilton in *The Federalist*;[15] [in Hamilton's view] the Senate would be "unawed" by the fact that the House lodged charges, [but] it was doubtful whether the Supreme Court would be "endowed with so evident a portion of fortitude" to execute "so difficult a task."[16]

Unlike the Framers, Berger's main concern with impeachment is not its application to the presidency but to the judiciary. He makes a good, and to me, a convincing case that impeachment is not the exclusive means for the removal of federal judges. Judges hold office during "good behavior."[17] When the Framers limited judicial tenure to "good behavior;" they did not intend that a judge who misbehaved and so violated the condition of his tenure should continue his office. "There are no dead words in the Constitution"[18] and every word must be given effect. At common law judicial tenure during good behavior was terminated by misbehavior, which was "every voluntary act done by an officer contrary to that which belongs to his office . . . ."[19] Lord Coke specified three causes for forfeiture of office: "abusing, not using and refusing."[20] Impeachable offenses and high crimes and misdemeanors are not the only forms of misbehavior which render a judge unfit to continue in office; therefore, federal judges whose offenses do not amount to a high crime or high misdemeanor should be tried and removed by their fellow judges (in deference to the rule of separation of powers).

Berger thinks that the Congress should not waste its time in considering and deciding whether to oust dreary little judges for squalid misconduct and Congress has indicated it will not do so. He discusses Professor Kurland's view that there would not be many, if any, dreary little judges guilty of squalid misconduct if federal judicial appointments could really be made on merit alone rather than as "prime

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14. However, during the impeachment trial the Chief Justice presides over the Senate.
15. THE FEDERALIST No. 65 (A. Hamilton).
16. BERGER 112-13 (citations omitted).
17. U.S. CONST. art. III, § 1.
18. BERGER 132.
19. *Id.* at 127 n.28.
20. *Id.* at 160.

patronage plums to be awarded by Senators in acknowledgement of party or personal loyalty"[21] and agrees with Kurland that it is unrealistic to expect any improvement in the process of appointment of federal judges in the foreseeable future.

Berger's fortitude as to hard-won conclusions is manifest in his chapter on the impeachment of Justice Chase. He strongly rejects the long accepted opinion that "the acquittal of Justice Samuel Chase represents the triumph of justice over heated political partisanship."[22] He pictures Chase as an "implacably prejudiced judge"[23] who should have been removed "as a standing reminder"[24] to other judges similarly bent. If he had made his argument before an appellate court on which I sat, my vote would have been against his view and in favor of long accepted opinion. (I have often been charged as too friendly to stare decisis.)

The chapter on the impeachment of President Andrew Johnson is Berger at his very best, and this is high praise. It would be hard to differ with his analysis that the impeachment of Johnson was "a gross abuse of the impeachment process, an attempt to punish the President for differing with and obstructing the policy of Congress."[25] In essence Johnson was impeached because he declined to execute a law, the Tenure of Office Act, that in his view and that of the cabinet—and later in the opinion of the Supreme Court—was unconstitutional. Must a president execute a duly enacted law that he considers unconstitutional? Berger says ordinarily he must but (here he shows that his fortitude as to hard-won conclusions is not ineluctable for he acknowledges a change from his earlier position) he now agrees with Chief Justice Salmon P. Chase that this general rule does not apply where the law "directly attacks and impairs the executive power"[26] confided to the President by the Constitution.

I end on a more pedestrian level. The Bibliography, the General Index, and the Index of Cases meet the same very high standards of all that goes before in the book.

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21. *Id.* at 165.
22. *Id.* at 224.
23. *Id.*
24. *Id.*
25. *Id.* at 295.
26. *Id.*