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Review of “Impeachment: The Constitutional Problems,” By Raoul Berger

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BOOK REVIEWS

IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS. By Raoul Berger.¹ Cambridge: Harvard University Press, 1973. Pp. xii, 345. \$14.95.

In 1970, apparently motivated by President Richard Nixon's desire to retaliate for the rejection of two of his nominees to the Supreme Court,² then-House Minority Leader and now-Vice President Gerald Ford mounted an abortive drive to impeach Justice William Douglas. Ford introduced the drive with the announcement that "an impeachable offense is whatever a majority of the House of Representatives considers it to be."³ Ford's sweeping assertion of power impelled legal historian Raoul Berger⁴ to make an intensive study of the subject.⁵ The result, *Impeachment: The Constitutional Problems*, was published in February 1973, the same month the Senate established the Watergate Committee.⁶ This coincidence precludes a charge that Berger wrote his book with Watergate in mind, which is just as well, for President Nixon, himself now the object of an impeachment investigation, will find scant comfort in its pages.

I

Berger lays the premise for his work in the introduction:

The constitutional grant of power to impeach raises important questions Resort to the historical sources and close analysis of the several textual provisions may throw fresh light on the problems. To grasp the place of impeachment in the constitutional scheme, and its potential role for the future, we need better to understand the use to which it

1. Charles Warren Senior Fellow in American Legal History, Harvard Law School.

2. So Berger alleges. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 94 (1973) [hereinafter cited as *IMPEACHMENT*].

3. *Id.* at 53 n.1.

4. Berger is also the author of the widely admired *CONGRESS V. THE SUPREME COURT* (1969).

5. Berger quotes or refers to Ford's statement four times. *IMPEACHMENT* 53, 86, 94, 103.

6. S. Res. 60, 93d Cong., 1st Sess. (1973).

was put in the past. For it was with the historical past in mind that the Founders wrought.⁷

Proceeding from this premise, Berger surveys in chapter I the historical development and use of impeachment by the English Parliament, concluding with two observations: Parliament could punish an act as treason even though no statute previously had defined the act as treasonable; and "an indictable treason was not the prerequisite of impeachment."⁸ These points are significant because they help support Berger's later conclusion that impeachable offenses are not limited to crimes. Since parliamentary impeachments frequently were for treason, one might be led to argue that impeachment lay historically only for the commission of a crime. Berger blunts the force of that argument by demonstrating that many impeachments were for acts first declared to be treasonable in the course of the proceedings in which the accuseds were convicted.

Chapter II, the longest, attempts an examination of all the issues that arise, more or less, from the constitutional phrase "high crimes and misdemeanors."⁹ This common thread is too weak to tie the issues together in a comprehensible pattern, and the chapter suffers from the resulting dispersion of aim and effort. Nevertheless, two of Berger's most important conclusions emerge with clarity. The first is that both English history¹⁰ and Senate precedent¹¹ make plain that an indictable crime is not a prerequisite to impeachment.¹² The second is that, although an indictable crime is unnecessary, the phrase "high crimes and misdemeanors" has a "limited, technical" meaning,¹³ importing more than "petty misconduct."¹⁴ The "great offenses"¹⁵ historically encompassed within this "limited, technical" meaning are, according to Berger, "reducible to intelligible categories:" misapplication of funds; abuse of official power; neglect of duty; encroachment

7. IMPEACHMENT 5-6. He repeats the premise at page 54.

8. *Id.* at 52.

9. U.S. CONST. art. II, § 4.

10. IMPEACHMENT 59-73.

11. *Id.* at 56, 58 & n.16.

12. "In sum, 'high crimes and misdemeanors' appear to be words of art confined to impeachments, without roots in the ordinary criminal law and which . . . had no relation to whether an indictment would lie in the particular circumstances." *Id.* at 62.

13. *Id.* at 87, 106-07.

14. *Id.* at 90.

15. *E.g., id.* at 101.

on or contempts of Parliament's prerogatives; and corruption.¹⁶ Berger's supporting argument is in three steps: (1) these categories were settled by English precedent before the Constitution was framed; (2) the framers of the Constitution were aware of the English precedents; and (3) the framers intended to adopt the English precedents.¹⁷ Another reviewer has queried the second step, and has noted that the third begs rather than resolves the question of the meaning of "high crimes and misdemeanors."¹⁸

Berger goes on to argue in chapter II that the "limited, technical" meaning of "high crimes and misdemeanors" is applicable only to the impeachment of Presidents, not to the impeachment of judges; that is, that judges can be impeached for misconduct that would not authorize the impeachment of Presidents.¹⁹ This interpretation raises two problems. The first, which Berger acknowledges, is that of "giving the [identical] words both a narrow and a broad construction."²⁰ The difficulty of this feat previously had led Berger to the opposite conclusion.²¹ He justifies his change of mind on two grounds: the removal by impeachment of a President "must generate shock waves that can rock the very foundations of government,"²² a consideration absent in the case of a judge, even a Justice of the Supreme Court;²³ and Presidents can be removed by voters at the next general election, whereas federal judges have life tenure.²⁴ Ultimately, of course, both of these justifications must find support in some actual or presumed intention of the framers, but Berger provides no evidence of it. It is one thing to construe constitutional language in a way that appears to be inconsistent with original intent; it surely must be more difficult to justify giving the same constitutional provision two inconsistent meanings. Yet Berger condemns the Supreme Court for doing the former (in the context of jury trial guarantees),²⁵ but engages in the latter himself.

The second problem springing from Berger's distinction between

16. *Id.* at 70-71.

17. *Id.* at 54-55; *cf. id.* at 106-07. With respect to the second step, see especially *id.* at 87 n.160.

18. Bates, Book Review, 25 *STAN. L. REV.* 908, 911-15 (1973).

19. *IMPEACHMENT* 91-93.

20. *Id.* at 91.

21. *Id.* at 91 n.181.

22. *Id.* at 91.

23. *Id.* at 92.

24. *Id.*

25. *Id.* at 203-04.

Presidents and judges for purposes of removal for "high crimes and misdemeanors" is that he fails to draw the distinction himself when he analyzes the impeachment precedents in the Senate. Berger earlier has asserted that "a succession of 'guilty' verdicts [in the Senate] has tacitly 'settled' that impeachment lies for nonindictable offenses."²⁶ But all of these impeachments were of judges. If Berger applied his logic consistently, his only relevant precedent on the question of what conduct constitutes a "high crime and misdemeanor" for the impeachment and removal of a President would be that of Andrew Johnson. And it is impossible to read Johnson's acquittal in the Senate as support for the assertion that an indictable crime is not a requisite. Berger's effort to give two distinct meanings to "high crimes and misdemeanors" therefore fails, both as constitutional construction and as interpretation of precedent.

More persuasive is his handling of this matter in chapters IV and V. Berger argues that the "good behavior" provision of article III implies, first, that impeachment is not the sole method of removing judges,²⁷ and, second, that misconduct which would not constitute a "high crime and misdemeanor" nevertheless might justify removal of a judge.²⁸ The removal procedure he envisions is one administered by judges rather than by the Senate.²⁹ He argues that Congress, under the necessary and proper clause,³⁰ can enact legislation facilitating such removal.³¹ Chapter V continues to rely upon the difference between the "good behavior" standard of article III and the "high crimes and misdemeanors" standard of article II in its discussion of insanity, disability, and senility. Berger concludes that a President cannot be impeached, but that a judge can be removed by other judges, for any one of them.

Chapter II also considers whether impeachment is a "criminal pro-

26. *Id.* at 56.

27. *Id.* at 135-59.

28. *E.g., id.* at 123-25; *see id.* at 159-65, 179-80.

29. *Id.* at 175. An arguably similar procedure has in fact been implemented. *See Chandler v. Judicial Council*, 382 U.S. 1003 (1966), *motion for leave to file petition for writ of prohibition and/or mandamus denied*, 398 U.S. 74 (1970).

30. U.S. CONST. art. I, § 8, cl. 18.

31. IMPEACHMENT 132-33, 174. It would not be the first time legislative power was justified by resort to an article III provision. Compare the power to legislate with respect to maritime concerns, *e.g.*, G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 406 (8th ed. 1970).

ceeding." The question arises because of apparently inconsistent language in the Constitution. On the one hand, article I, section 3, provides:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law.

On the other hand, article II, section 2, provides that "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Similarly, article III, section 2, states that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" Neither the double jeopardy clause of the fifth amendment nor the jury trial guarantee of the sixth amendment contains any language indicating whether it was meant to bear on impeachment. After carefully comparing the language and historical meaning of these various provisions, Berger persuasively concludes that impeachment is not a "criminal proceeding" subject to the jury trial and double jeopardy protections.³²

Berger closes chapter II with a discussion of the political nature of impeachment trials.³³ The remarkable thing about this discussion, in view of Berger's obvious bias for historical learning, is its failure to consider the relevance of changes in the Constitution. Methods of electing Presidents³⁴ and Senators³⁵ have been changed, and a method for removing a disabled President has been added.³⁶ Since Berger does not mention them, these alterations presumably are irrelevant. Also missing is any mention of the question whether Senators, who constitute the "jury" in an impeachment trial, must be impartial in the sense of not having prejudged the merits.³⁷ But this omission may be understandable, as Berger wrote before Watergate became the subject of a senatorial investigation.³⁸

Chapter VI argues that the "high crimes and misdemeanors" and

32. IMPEACHMENT 78-85.

33. *Id.* at 94-102.

34. U.S. CONST. amend. XII.

35. U.S. CONST. amend. XVII.

36. U.S. CONST. amend. XXV.

37. Except in the context of the impeachment trial of President Johnson. IMPEACHMENT 266.

38. See Collings, Book Review, 62 CALIF. L. REV. 294 (1974).

“good behavior” standards both permit removal from office for nonofficial as well as official acts.³⁹ Chapter VII reviews the one precedent which seems to hold that legislators are not subject to impeachment, and urges that it be overruled.⁴⁰ Chapters VIII and IX are detailed examinations of the impeachment trials of Justice Samuel Chase and President Andrew Johnson, respectively.

II

Chapter III advances the thesis that judicial review is available to determine whether the conduct for which a President or judge was impeached and convicted constitutes a “high crime and misdemeanor.” Berger 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.”⁴¹ But he argues that *Powell v. McCormack*⁴² undercut this position. *Powell* held (1) that judicial review of Congressman Powell’s exclusion was not precluded by the “political question” doctrine, and (2) that the House of Representatives was without power to exclude, as distinguished from expel, a member for misconduct.⁴³ The House had argued that article I, section 5, which provides that “each house shall be the judge of the . . . qualifications of its own members,” was a “textually demonstrable commitment” of its action to a coordinate branch of the federal government, and, therefore, that the validity of Powell’s exclusion was unreviewable⁴⁴ under the political question doctrine of *Baker v. Carr*.⁴⁵ But the Supreme Court held that the “qualifications” the House was

39. Berger submits this proposition in the face of some impressive statements to the contrary, e.g., IMPEACHMENT 207, which he labels “dicta,” *id.* at 208-11, and with a recognition that no decided cases support it, *id.* at 213.

40. *Id.* at 223. The case was the attempted removal by impeachment of Senator William Blount in 1797. “By a vote of 14 to 11 the Senate dismissed the charges on the ground that it ‘ought not to hold jurisdiction.’” *Id.* at 214.

41. *Id.* at 103 (footnotes omitted). This thesis also is examined at length in Bates, *supra* note 18, at 919-25. My focus on the question is different than his, as is my conclusion.

42. 395 U.S. 486 (1969).

43. *Id.* at 510-11, 547-49.

44. *Id.* at 513-14.

45. 369 U.S. 186 (1962).

authorized to "judge" were limited to the standing qualifications listed in the Constitution, namely, age, residence, and citizenship.⁴⁶

Berger's argument overlooks the key factor in *Powell*: the House, by "excluding" Powell, had attempted to circumvent the specific constitutional restriction that a member may be "expelled" only "with the concurrence of two thirds."⁴⁷ The Speaker of the House had ruled that a simple majority was enough to exclude (again, as distinguished from expel) Powell, and some early procedural matters leading to Powell's exclusion were approved by votes of less than two-thirds.⁴⁸ Had the Court permitted Powell's exclusion to stand, it would have sanctioned the circumvention of a specific constitutional restriction by a play on words.

Berger is correct in his basic conclusion that *Powell* made inroads on the "textually demonstrable commitment" element of the political question doctrine. But the question is whether the inroads were as extensive as Berger believes. Read narrowly, all *Powell* stands for is that the commitment of a question to a coordinate branch of the federal government does not necessarily preclude judicial review if the Constitution itself sets standards for the resolution of that question. This reading of *Powell* would dispose of the hypothetical horror that upsets Berger the most: the possibility of convicting a President or judge of treason on the ground that he had attempted to subvert the Constitution.⁴⁹ The Constitution itself defines treason,⁵⁰ and the Court in such a case could look to that definition for standards, as it looked to the definition of "qualifications" in *Powell*. This reading of *Powell* also has the advantage, which Berger's does not, of being consistent with the few available indications of the Supreme Court's attitude. Only once has an impeached and convicted officer challenged the validity of his removal. Judge Halsted Ritter sued for his salary in the Court of Claims after his removal by impeachment. In

46. U.S. CONST. art. I, § 2, cl. 2.

47. U.S. CONST. art. I, § 5.

48. The House committee established to investigate Powell's peccadillos recommended that he be seated and fined. 395 U.S. at 492. The report was amended to substitute exclusion for seating and fining by a vote of 248 to 176, less than two-thirds. *Id.* at 492-93. That this was the key factor in the Court's decision is demonstrated by the fact that the Court devoted one entire section (part IV) of its opinion to a discussion of "Exclusion or Expulsion." *Id.* at 506-12.

49. IMPEACHMENT 105-06.

50. U.S. CONST. art. III, § 3.

dismissing the suit, that court quoted an earlier Supreme Court dictum:

In the case of *State of Mississippi v. Johnson* [71 U.S. (4 Wall.) 475, 501 (1867)], the Chief Justice said with reference to a hypothetical case where the House of Representatives had impeached the President and an injunction was sought to restrain the Senate from sitting as a court of impeachment—"Would the strange spectacle be offered to the public world of the attempt by this court to arrest proceedings in that court?" implying that the Supreme Court would take no such action even though it was claimed that the Senate was acting unconstitutionally.⁵¹

The Supreme Court denied certiorari. Berger does not discuss *Ritter v. United States*; indeed, he cites it only once in a footnote.⁵² He neither cites nor discusses the *Mississippi v. Johnson* dictum.⁵³

Article I, section 3, provides, "The Senate shall have the sole Power to try all Impeachments." Berger's second proposition in support of his judicial review thesis is: "We need only read the power to 'try' as a grant of jurisdiction to try a case in the first instance, leaving untouched an appeal to the Supreme Court from action in excess of jurisdiction" ⁵⁴ Nowhere in the course of this argument does Berger advert to the language of article I, section 2: "The House of Representatives . . . shall have the sole Power of Impeachment." But if use of the word "sole" in section 3 does not preclude review of a judgment of conviction, then by a parity of reasoning its use in section 2 would not preclude review of the articles of impeachment, to determine—to use the closest analogy I can think of—whether they state a cause of action. And that possibility collides head on with the dictum of Chief Justice Chase in *Mississippi v. Johnson*.

Nor is Berger specific concerning the details of how the impeached and removed officer obtains direct review in the Supreme Court, as he appears to consider possible. Obviously, such litigation is not within the Court's original jurisdiction,⁵⁵ and to suppose that the Court has "appellate jurisdiction" over Congress is bizarre.⁵⁶ Clearly, then,

51. *Ritter v. United States*, 84 Ct. Cl. 293, 300 (1936), *cert. denied*, 300 U.S. 668 (1937).

52. IMPEACHMENT 103 n.4.

53. He cites the case on an unrelated point in the course of discussing the impeachment trial of President Johnson. *Id.* at 286-87.

54. *Id.* at 111.

55. U.S. CONST. art. III, § 2.

56. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

the officer would have to begin his challenge in a district court and proceed from there by way of appeal. But supposing this is a possibility, what is to prevent Congress from enacting legislation which prohibits any federal court from exercising jurisdiction, original or appellate, to review any question raised in the course of an impeachment? This would renew the debate concerning the meaning and scope of *Ex parte McCordle*,⁵⁷ which dismissed for lack of jurisdiction an appeal under consideration when Congress repealed the statute under which the appeal had been taken. Berger does not address the question.

Berger's third proposition in support of his thesis uncharacteristically lapses into hyperbole and bombast; for example:

Although impeachment was chiefly designed to check Executive abuses and oppressions, there was no thought of delivering either the President or the Judiciary to the unbounded discretion of Congress "Limits" on Congress determined by Congress itself would be no limits at all.⁵⁸

This argument, if it can be called that,⁵⁹ conveniently assumes that any power not subject to judicial review is "unbounded discretion." Forgotten is Chief Justice Harlan Stone's caustic remark, "Courts are not the only agency of government that must be assumed to have capacity to govern."⁶⁰

"Finally," Berger argues, "if it be assumed that the 'sole power to try' conferred insulation from review, it must yield to the subsequent Fifth Amendment If the Constitution does in fact place limits upon the power of impeachment, action beyond those limits is without 'due process of law' in its primal sense" ⁶¹ This is just sophisticated question-begging. To begin with, it is quite clear that every congressional act in excess of constitutional authority is not a deprivation of due process in any sense, "primal" or otherwise.⁶² Moreover,

57. 74 U.S. (7 Wall.) 506 (1869). For the debate, see *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). See also G. GUNTHER & N. DOWLING, *supra* note 31, at 51-57.

58. IMPEACHMENT 117-18.

59. "The suggestion that [congressional spending power] must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused." Later-Chief Justice Stone in *United States v. Butler*, 297 U.S. 1, 87 (1936) (dissenting opinion).

60. *Id.*

61. IMPEACHMENT 120.

62. See, e.g., *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

to assume that judicial review is available to rectify the alleged deprivation begs the question because that is the very point at issue.

If chapter III is viewed merely as a prediction that the Supreme Court will hold judgments of impeachment reviewable, it may be correct. But to the extent it purports to base that prediction on a reasoned extrapolation from authoritative sources, it is dubious. And to the extent it attempts to justify judicial review, it is totally unconvincing. Too much contrary authority is ignored, and too many hard questions are bypassed to make it cogent.

CONCLUSION

I probably have made Berger appear more dogmatic than he is. For the most part, Berger is tentative and self-effacing: "The conclusion that 'high crimes and misdemeanors' was adopted as a 'technical' limiting phrase leaves perplexing problems; and it is to be hoped that my reflections will stimulate further study and investigation."⁶³ Certainly the result of his labor is a timely, interesting, and valuable contribution to a previously ignored subject. Perhaps no higher praise can be given than to observe that all future debate about impeachment will use Berger's book as a starting point.

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THE CASE FOR BLACK REPARATIONS. By Boris I. Bittker.¹ New York: Vintage Books, 1973. Pp. 191. \$1.95 (paper).

One leaves the reading of this short, scholarly work with revived hunger for a society capable of acting upon Boris Bittker's generous legal and moral perceptions of why and how we should provide contemporary black American citizens with reparations for the evils they have suffered at the hands of the white majority. But one senses that this hunger will go unrequited, much like, in Lincoln's phrase, "the

63. IMPEACHMENT 93.

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