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HOW SERIOUS IS THE THREAT OF IMPEACHMENT? AND TO WHOM?

*Harold Baer, Jr.**

THE FEDERAL IMPEACHMENT PROCESS—A CONSTITUTIONAL AND HISTORICAL ANALYSIS. By *Michael J. Gerhardt*. Princeton, N.J.: Princeton University Press. 1996. Pp. 233. \$29.95.

U.S. CONSTITUTION¹

ARTICLE I

Section.2. . . . The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.²

Section.3. . . . The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.³

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 the Law.⁴

* * *

ARTICLE II

Section. 2. . . . [The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.⁵

* * *

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and

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1. I have set out in detail the Articles and Sections of the U.S. Constitution that bear directly on impeachment.

2. U.S. CONST. art. I, § 2, cl. 5.

3. U.S. CONST. art. I, § 3, cl. 6.

4. U.S. CONST. art. I, § 3, cl. 7.

5. U.S. CONST. art. II, § 2, cl. 1.

Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.⁶

While a slender volume, *The Federal Impeachment Process*⁷ offers the reader a variety of different insights on this topic, beginning with the debates at the Constitutional Convention and running to the modern-day practice of impeachment trials by committee rather than by the full senate. *Impeachment* is valuable reading, not just for those of us interested in American history, or those of us who are public officers of the United States, but for every American who wants to understand his or her morning newspaper better. Not only does it lift the veil of darkness surrounding the impeachment process, it provides a focus for the perceptions of all those who are concerned over the recent spate of impeachment threats.⁸

As Professor Gerhardt⁹ notes at the outset, impeachment was not a major consideration at the Constitutional Convention. The most prominent ratification document discussing the federal impeachment process — and, of course, a series of other issues — was *The Federalist Papers* (p. 12). *The Federalist Papers* provided an overview of the model replicated by the convention — and the model, it turns out, follows the impeachment procedures adopted by the most populous states. The model has an unmistakable theme often overlooked by some in Congress today, to say nothing of President Clinton: that impeachment is an appropriate remedy only where a public officer has committed a criminal act while in office. Furthermore, the view of the Framers was that removal from office and disqualification from holding future public office was to be the only punishment. This is quite different from the pattern in England at the time, where not only were private citizens subject to impeachment, but criminal penalties could and would be imposed and by a bare majority of the House of Lords. Clearly the Framers sought a uniquely American variation of the impeachment process (pp. 4-5).

Professor Gerhardt has a writing style that enables the reader to feel that he is sitting at a desk just behind the delegates, absorbing the debate. He describes in some detail each of the various plans that were put forth at the convention.

6. U.S. CONST. art. II, § 4.

7. Hereinafter *Impeachment*.

8. Those threats may have escalated with a decision of mine involving an unlawful search of an automobile here in New York and the suppression of some 80 pounds of heroin and cocaine. See *U.S. v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996). But it quickly escalated to include such respected members of the federal judiciary as Martha Craig Daughtrey of the Sixth Circuit Court of Appeals, and Judge Thelton Henderson of the Northern District of California, who preliminarily enjoined California's affirmative action voter initiative among others.

9. Professor of Constitutional Law, Marshall-Wythe School of Law; lecturer in Government, College of William and Mary.

While the plans differed in several ways, the wrongdoing that would constitute an impeachable offense was probably the most diverse and included, at one time or another, malpractice, neglect of duty, malversation and corruption before reaching, by an eight-to-three vote, the language, "bribery and other high crimes and misdemeanors." The author fails to note how treason crept into the final language. He does note, however that it was not until August 1789 that a report was published advocating that the House of Representatives should have the sole power to impeach. Interestingly, even at that late date, the report went on to provide that the trial that followed impeachment by the House would occur before the Supreme Court. As it turned out, "[t]he delegates ultimately agreed that the Senate posed the fewest problems of the various proposed trial courts. When the full convention voted on the Senate as the trial body for impeachments, only Pennsylvania and Virginia dissented from the proposal to make the Senate the 'sole' court for impeachment trials" (p. 7). Perhaps most importantly for academics and certainly for history buffs, we learn from *Impeachment* who was on each side of these significant issues and why.

WHO SHOULD BE IMPEACHED

One could not help but draw some parallels between the debates at the Constitutional Convention as to the officeholders to be included in the impeachment orbit and the modern-day independent counsel statute. In that statute, some seventy souls were finally, and often after a painstaking review of hundreds of officeholders, included amongst those men and women from the Executive Branch subject to investigation by the special prosecutor. The Framers, on the other hand, chose to paint with a broader brush: they simply used the words "all civil Officers"¹⁰ — a phrase that has wrought some havoc in the latter part of the 20th Century, at least amongst constitutional scholars. We learn how this issue has been defined and redefined by interpretation and history over the last 200 years. Clearly, the language targets the Executive Branch and the Judicial Branch but, as Professor Gerhardt takes pains to note, not the Legislative Branch (p. 76).

One cannot help but wonder why or whether the Framers believed that oversight by the legislature was necessary to discipline the Chief Executive and his appointees, including the judiciary, but not the legislature itself. Perhaps the Senate thought, at least as to judges, that life tenure and the requirement that there be no diminution in compensation was of such importance as to require another branch of government to look after them. Hamilton believed

10. U.S. CONST. art. II, § 4.

that these incidents of office alone would be sufficient to ensure judicial independence and the omnipresent prospect of impeachment would not dampen that independence (pp. 16-17). I wonder. Yet Professor Gerhardt recounts how the impeachment of Senator Blount of Tennessee initiated by John Adams provided the backdrop for a debate which culminated in the refusal of the Senate to include its members within the reach of the impeachment net. Instead, on July 8, 1797, the day after Senator Blount was impeached by the House, the Senate expelled the Senator by a vote of twenty-five to one (p. 48). Ever since, the Senate has taken unto itself the role of meting out any necessary discipline among its members.

The book is in large measure devoted to the impeachment proceedings against the judiciary. The book chronicles at length almost every judge ever subject to articles of impeachment by the House, whether successful or not. In these chronicles, Gerhardt raises and provides historical perspective on other provocative questions. For instance, should it be fair game to indict and convict a federal judge for criminal activity before impeachment or should impeachment be the sole remedy by which to unseat an Article III judge? Alexander Hamilton was prominent in this debate at the Convention. His view, as expressed by Professor Gerhardt, was to the effect that:

The Constitution sets forth the grounds for impeaching the president in a different place from its provision that every impeachable official, including the president, is "liable and subject to Indictment, Trial, Judgement, and Punishment, according to law." Yet, Hamilton read this text as providing that a president would first be impeached and removed from office and "would afterwards be liable to prosecution and punishment in the courts of law." Given that the constitutional convention delegates did not discuss the preferred order of impeachment and legal actions and that the Constitution does not state in so many words that a president's liability at law should attach only after he has left office, Hamilton's reading seems to have assumed its conclusion. [p. 16]

The language of the Constitution raises a variety of other similar conundrums; another discussed at length by the author is the language that seemingly calls for the Vice President to preside at all impeachment trials. If followed slavishly, it would, of course, leave him or her to preside over his own or her own impeachment trial.

IMPEACHMENT FOR WHAT?

For me, the most interesting theme throughout the volume is the in-depth study of what "high crimes and misdemeanors" means and how that meaning has changed from the days of our country's Founders. The change is highlighted by the background wrongs for which those impeached, primarily judges, have been charged. When all is said and done, one comes to the frightening realization

that then-Representative Gerald Ford's remark that an impeachment offense is "whatever a majority of the House [considers it] to be at a given moment in history," may hit the mark (p. 103). While many may have believed, as the Framers did, that "high crimes and misdemeanors" meant that some sort of criminal act was an essential predicate for impeachment, this view may have deteriorated over time into little more than a fantasy. History supports the proposition that such a predicate has rarely been necessary and makes the Ford pronouncement all the more real and all the more frightening.

Take, for example, the plight of United States District Judge John Pickering of New Hampshire. In 1803 he was the second officeholder to be impeached under the Constitution. The vote was forty-five to eight. The articles of impeachment charge him with drunkenness and profanity on the bench. No criminal conduct was alleged or proven. Indeed, his son argued he was too ill and so incapable of exercising any sort of judgment as not to be a fit subject for impeachment. The Senate voted nineteen to seven to convict and twenty to six to remove him from office (p. 50). While this would appear to expand the "high crimes and misdemeanors" language of the Constitution beyond all bounds, that is just the beginning.

If this sort of activity is truly what the Framers had in mind — and few believe it was¹¹ — impeachment of federal judges is no more extraordinary and equally as fragile as the calumny practiced by some city- and state-appointing authorities today. The city- and state-level appointment and reappointment process may depend less on merit and more on some assurance that the judge will follow or has followed the appointing authority's political philosophy. Of course such conduct cannot help but have a chilling effect on judicial independence. The author suggests that the impeachment and conviction of Judge Pickering may have been aberrational and occurred

"because the question of guilt was put in the form of asking senators whether the judge stood guilty as charged," rather than whether the acts he allegedly committed constituted impeachable offenses. In other words, the Senate's vote to convict may not reflect an acknowledgement by the Senate that violations of impeachable offenses were actually involved. [p. 51]

While the author supports his argument by suggesting that Pickering was a Federalist judge and all nineteen votes to convict came

11. See, e.g., CHARLES LUND BLACK, *IMPEACHMENT* 27-32 (1915); David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 248 (1998); William L. Reynolds, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291, 306-07 (1987). *But cf.* RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 56-57, 184-85 (1973).

from the Republican majority (p. 51), it provides cold comfort for those who maintain that for judicial independence to thrive, party labels must be discarded following election or appointment.

WHO MAY IMPEACH

Another area of concern and exploration by Professor Gerhardt is the recent trend toward impeachment by committee. This approach lacks, at least at the outset, involvement by the whole Senate. Some agree, with at least superficial merit, that this is another constitutionally infirm approach but it is within the Rules of Procedure & Practice promulgated by the Senate. The infirmity, as the author points out, is that language in the Constitution which dictates that an impeachment trial be brought before the whole Senate (pp. 116-17).

Central to the Senate's adoption in the 1980's of a committee system for impeachment proceedings is the ever-increasing business of the Senate and the time impeachment trials take away from that business. This also accounts for the decreasing attendance by Senators at such trials (pp. 34-35). Of course, there are other concerns that have contributed to the decreased number of trials; they include the ever-changing complexion of Congress with the attendant frequent leadership changes. These changes, if they find the opposition in power and the public official allied with them politically, may result in a slowing of the process. The new approach designating twelve senators as a special trial committee to hear and report, utilized in connection with the three impeachment trials in the 1980's, obviates all these problems to a greater or lesser extent. This approach is as follows:

The committee prepares a transcript of the entire hearings before it, a neutral statement of the facts, and a summary of the evidence that the parties have introduced on the contested issues of fact. Neither the transcript nor the summary contains any recommendation from the trial committee as to the impeached official's guilt or innocence. [p. 34]

Interestingly, one or more of those three impeachment proceedings followed a criminal trial, a conviction and an affirmance by the Circuit Court of Appeals. Assuming that Congress uses its power in accordance with its Constitutional mandate or what appears to be its Constitutional mandate, i.e., impeachment for "high crimes and misdemeanors," awaiting the outcome of criminal charges makes the committee approach even more reasonable. This is so because once proof beyond a reasonable doubt has been established it is less important that such proof be provided first hand to 100 senators. While testimony is taken before less than the full Senate, the transcript is made available to all Senators. Should it reach

the stage where the Senate votes on the articles or charges, the full Senate participates.

THE WAGES OF IMPEACHMENT

We might ask what happens to those who are impeached and found guilty by the Senate. Professor Gerhardt points out at least one fact that has garnered far less attention than it deserves: that the Senate has the opportunity not only to convict or acquit but also upon conviction to disqualify the civil officer from ever holding future public office. While this seems perfectly reasonable, the fact is that it does not always happen. Perhaps because it requires two separate and distinct votes by the Senate. From time to time, there have been impeachments without disqualification and the impeached officeholder remains competent to occupy yet another position of public trust. An example of this failure to act by the Senate resulted in the impeachment a decade ago, and the subsequent election to Congress in 1992 of Judge Alcee Hastings. Although impeached for bribe-taking, he is now at work as an influential Congressman, having been elected every two years thereafter (pp. 60-61).

The book is filled with other allied revelations. Another concern regarding punishment is the result of incomplete impeachment proceedings — a point worth recounting, especially in light of our avowedly budget-conscious Congress. Failing initiation (to say nothing of completion) of impeachment proceedings, an officeholder may — even after a felony conviction and exhaustion of all appeals — continue to draw his or her full salary and all attendant raises, COLAs, etc. There may be, according to the author, incarcerated Article III judges who continued to draw full pay due to unfinished impeachment proceedings (p. 172).

CONCLUSION

Many of those who take the time to read this book will regard it as simply providing a valuable analysis of the way the Framers approached the impeachment process, how it was employed over the last 200 years, and the more recent changes in procedure. For some federal judges, and to an extent some state judges, it says much more. For those who believe there is a world of difference between appropriately protected criticism of a judicial decision and a threat by Congress or the President to initiate impeachment proceedings against the judge who wrote it, this volume shrinks that world.

In a very real way, although not likely uppermost in the author's mind, *Impeachment* provides a glimpse into the fragility of our form of government. At least from my vantage point as a federal judge, it suggests that of the three equal branches of government, one, the

judicial branch, may be less equal than the others. Put another way, if judicial independence is to remain a mainstay of our form of government, it will require constant vigilance.