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IMPEACHMENT

The Constitutional Problems

By Raoul Berger

Harvard. 345 pages. $14.95

By ARTHUR SCHLESINGER Jr.

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. (Art. II, Sec. 4)

The House of Representatives . . . shall have the sole Power of Impeachment. (Art 1, Sec. 2)

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. (Art. 1, Sec. 3)

—The Constitution

WATERGATE HAS HAD UNEXPECTED side effects, not least the revival of interest in the musty and largely forgotten subject of impeachment. For impeachment by the mid-20th century had come to seem in Great Britain and the United States an archaic process. Originating in 14th-century England as a means by which the House of Commons could indict high officers of the realm for a variety of offenses and hale them for trial before the Lords, impeachment attained its English high point in the 17th century and vanished entirely after the acquittal of Lord Melville in 1806. Once Britain had achieved a modern parliamentary system, there could no longer by definition be serious disagreement between the government and the Commons majority, and hence no need for the Commons to impeach high government officials. One of the last, longest and most famous of English impeachments, that of Warren Hastings, was under way when the Constitutional Convention gathered in Philadelphia in the summer of 1787.

The founding fathers, who feared despotism and had an entirely realistic view of human nature, were quite prepared to believe that presidents might abuse their power and were therefore determined to provide the new republic with a way of removing any who did so. At the same time, as Raoul Berger points out in this valuable and illuminating study, they did not wish to make impeachment so easy that Congress would find it a convenient means of bringing presidents to heel. So, while they borrowed their language—"treason, bribery, or other high crimes and misdemeanors"—from British law, they specified these as the sole grounds for impeachment, thereby denying Congress the unlimited power to define impeachment enjoyed by 17th-century Parliaments. Also, where Parliament could inflict criminal punishment, the founding fathers limited Congress to the removal and disqualification from future office of persons convicted, leaving criminal penalties to subsequent indictment and judgment in the courts. (One wishes that Mr. Berger, so resourceful in exploring the British precedents, had told us what, say, the Canadians and the Australians have done with their inheritance of impeachment.)

The American Constitutional Convention was mainly concerned with the impeachments of presidents. Indeed, vice presidents and other "civil officers" were inserted into the impeachment clause as an afterthought only a few days before adjournment. The first impeachment under the Constitution was an abortive attempt in 1797 to remove a senator; but the Senate expelled the unfortunate William Blount before the House impeached him and then blandly concluded that, in any case, a senator was not a "civil officer" within the meaning of the impeachment clause. Thereafter, with the spectacular exception of President Andrew Johnson and the less notable exception of Grant's Secretary of War W. W. Belknap, who escaped jurisdiction by resigning, impeachment has been confined to federal judges. Of these, all, save for Justice Samuel Chase of the Supreme Court, were minor figures from lower courts.

This is probably not what the founding fathers had in mind. Certainly the Senate grew increasingly resentful over having to waste time assessing the peccadillos of inferior judges. By 1932, when the House submitted the case of Judge Harold Louderback to the Senate, it was, as Hatton Sumners, the chairman of the House Judiciary Committee, later said, "the greatest farce ever . . . For ten days we presented evidence to what was practically an empty chamber." After the trial in 1936 of another lower-court judge, Halsted Ritter, Sumners concluded that impeachment took the time of the Senate "away from all of the other business of a great nation. . . [We] know they will not try district judges, and we can hardly ask them to do so." There has not been an impeachment since.

Impeachment in the American system has thus been an infrequent and irregular affair, very often disfigured by partisan emotion and ideological prejudice. Because of the small number of cases, the intervals between them and the haphazard manner in which they have been tried, many questions of principle and procedure remain unresolved. It is to the more important of these questions that Raoul Berger addresses himself in *Impeachment: The Constitutional Problems.* Mr. Berger, now Charles Warren Senior Fellow in American Legal History at the Harvard Law School, is a lawyer who combines government experience with a rare passion for exact legal scholarship. He has written the best examination anywhere of the issue of executive privilege (in the UCLA Law Review in 1965) as well as a significant book on *Congress V. the Supreme Court;* and he has become this year a familiar witness at congressional hearings, where with imperturbable good humor and unquenchable faith in reason he exhorts senators and congressmen to read the Constitution and stand up for their rights. His writings are distinguished by *(Continued on page 2)*

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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.

His new book, though it grows more relevant every day the Ervin Committee sits, is not a tract for the times. The only other American book on impeachment, Irving Brant's *Impeachment: Trials and Errors* (1972), was written in an outburst of understandable indignation over the assertion of Congressman Gerald Ford, in his attempt to impeach Justice William O. Douglas in 1970, that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." Brant's book is curiously, and perhaps courteously, unmentioned by Berger; for, though quite an achievement for a man of 87, it *is* a tract for the times and not in the same class with his great biography of Madison. Berger's book is something different—a disinterested inquiry into basic and perennial issues, concluding with set pieces on the impeachments of Chase and Johnson. It is at times repetitious and occasionally (at least to a non-lawyer) opaque, but it is an admirable and powerful work of scholarship.

Insofar as Mr. Berger has a topical point, it is to argue that the Constitution envisaged impeachment as a remedy for offenses at the highest level of government and, contrary to received opinion, left room for other ways of removing min-

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or judges. Beyond this, he contends that an impeachable offense need not be an indictable crime; on the other hand, it must be something more than maladministration or misbehavior. "High crimes and misdemeanors," he argues persuasively, is a term of art, a category with ascertainable British content, of crimes against the state, which the Constitutional Convention meant to restrict to "great and dangerous offenses" by "great offenders." The phrase has, he says, no roots in the ordinary criminal law; therefore, no relationship can be assumed between "high misdemeanors" (he has no doubt that the adjective modifies both nouns in the Constitution) and "misdemeanor" as known in contemporary law.

Authorities from Justice Story to Professor Herbert Wechsler have read the Constitution to mean that the Senate's action in impeachment cases is final; but Berger (like Brant before him) disagrees and makes out an interesting case for the Supreme Court's right to review senatorial convictions. He also doubts that the Senate was right when in 1797 it exempted its own members from impeachment. He is most unorthodox in saying that Justice Samuel Chase should have been found guilty; I wish, however, he had dealt with the point mentioned by E. S. Corwin and others that if Jefferson had succeeded in getting Chase he would have tried next to get John Marshall himself.

Mr. Berger is a good deal more orthodox in regarding the impeachment of Andrew Johnson as "a gross abuse of the impeachment process, an attempt to punish the President for differing with and obstructing the policy of Congress." His book was completed before the publication of M. L. Benedict's *The Impeachment and Trial of Andrew Johnson;* but Professor Benedict's case, it must be said, would be more convincing if the offenses he ascribes to Johnson had been listed in the House bill of particulars. Johnson was impeached primarily because he declined to execute a law—the Tenure-of-Office Act—that he and his cabinet rejected as unconstitutional, a judgment which the Supreme Court eventually endorsed. A crucial question, therefore, is whether a president is obligated to carry out duly enacted laws that he personally considers unconstitutional. Mr. Berger says that ordinarily he is so obligated, but (here he acknowledges a change from his earlier position) he now agrees with Chief Justice Salmon P. Chase that this general rule does not apply in cases where the law "directly attacks and impairs the executive power" confided to the president by the Constitution.

Mr. Berger wrote before Watergate, but *Impeachment: The Constitutional Problems* is essential reading for all who want to know where Watergate may lead us. President Nixon has been flirting with two sorts of impeachable offenses. The first might be his refusal to obey, say, a law forbidding him to continue to wage war in Southeast Asia. Here the President might argue that, in his judgment, such a law invaded his prerogatives as Commander in Chief; and, though Mr. Berger as a constitutional fundamentalist would properly deride an interpretation of the powers of the Commander in Chief so totally remote from the ideas of the founding fathers (see, for example, Hamilton in the 69th Federalist), still the Constitution changes with changing circumstances, and it is hard to impeach a president for an honest disagreement over constitutional construction.

Mr. Nixon's second flirtation, however, would be more serious. If the President, as his latest explanation of his role in the Watergate affair suggests, did connive in a limitation of the inquiry, and especially if he claimed that the inquiry would jeopardize a covert CIA operation while omitting to ask anyone in the CIA whether this might be so, he might then well be guilty of misprision, which my legal dictionary defines as "silently observing the commission of a felony without endeavoring to apprehend the offender." The fact that no previous president has stooped so low hardly exempts Mr. Nixon. He has always been proud of his historic firsts. Perhaps he might spend a profitable evening at Key Biscayne or San Clemente reading Mr. Berger's book.