

A Look at Impeachment

IMPEACHMENT: The Constitutional Problems. By Raoul Berger. (Harvard Press. 345 pages. \$14.95).

Reviewed 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. I, 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. I, 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.

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 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 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.

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.

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 Berger addresses himself in "Impeachment: The Constitutional Problems."

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.

Berger's book is a disinterested inquiry into basic and perennial issues. 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 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 minor 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.

Berger wrote before Watergate, but "Impeachment: The Constitutional Problems" is essential reading for all who want to know where Watergate may lead us.

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