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Notes and Comment

Legitimizing Impeachment

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Academic analysis of impeachment is not a crowded field. Most pre-Watergate scholars rely heavily on interpretations of the Federalist Papers, on general constitutional histories and on the dubious lessons of the 1868 trial of President Andrew Johnson. Post-1974 works tend to draw from the works of Irving Brant (1972) and Raoul Berger (1973).[1] Sterling Professor of Law at Yale, Charles L. Black Jr., first published *Impeachment: A Handbook* in 1974, with the declared intention of clarifying the theories and processes of impeachment for the layman.[2] This guide, reissued in 1998, stimulates renewed debate on the ethics of presidential leadership and abuse of power whilst avoiding an excessive preoccupation with precedent and with the works of Alexander Hamilton and James Madison. His use of "hypothetical," contemporary examples to illustrate his points (a President's abuse of the I.R.S. to harrass opponents, unlawful impoundment of funds appropriated by Congress and unauthorized wars) reflects the tumultuous era in which his text was first published. Interestingly, despite his self-confessed aversion to the thirty-seventh President, the author is surprisingly sympathetic, by implication only, to some of the Nixon Administration's arguments with the Special Prosecutor's office. This reinforces the reader's impression of a politically neutral work which retains full force and relevance despite the passage of a quarter of a century. Many of Black's points, in fact, bear direct relevance to the trial of President Clinton, particularly his underlying concern that investigative mania might tempt rampantly partisan prosecutors to transgress not only on a president's legal rights as a citizen but also on his rights as Chief Executive. Dilys Hill (1999) raises a similar concern in noting Congress's insistence in 1994 that the Whitewater investigations into Bill and Hillary Clinton's business affairs continue despite the finding of Special Prosecutor

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[1] Brant, Irving, *Impeachment: Trials and Errors* (New York: Alfred Knopf, 1972). Berger, Raoul, *Impeachment: The Constitutional Problems* (Cambridge, Mass.: Harvard University Press, 1973).

[2] Black, Charles L., *Impeachment: A Handbook* (New Haven: Yale University Press, 1974, 1998).

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Robert Fiske that the White House had not obstructed justice or been guilty of "ethical wrongdoing."[3]

Black criticizes the Supreme Court's 1974 decision to waive executive privilege and force the release of Nixon's private tapes, a view which places him foursquare with Clinton on the issue of compelling testimony from Secret Service agents, one of the most controversial elements of the Starr investigations. Black also opposes the notion that incumbent presidents should face trial in civil suits and one suspects he would disapprove of incumbents being called to give testimony in such actions (though this is not specifically stated). Black's view that all indictments should be suspended until after the president's term expires is one with which overworked White House lawyers would wholeheartedly agree.

The central question for Black is to ascertain what constitutes an impeachable offence and he devotes an entire chapter to the dilemma. The Constitution is, as always, both specific and vague on this point. Article II, Section 4, states that the president may be removed for "Treason, Bribery, or other high Crimes and Misdemeanors" and, whilst judges and scholars have not found it particularly difficult to define the former two categories of offense, the latter causes endless problems. Congressman Gerald Ford, supporting a move to impeach Justice William O. Douglas in April 1970, claimed that an impeachable offence was simply "whatever a majority of the House of Representatives [considers it] to be at a given moment in history."[4] Ford's observation, however tactless, is broadly true since the term "high crimes and misdemeanors" allows for just such broad discretion. Nor is this latitude confined to the presidency. Federal judges enjoy life tenure only "during good behaviour" (Article III, Section 1), clearly indicating that removal from office may result from deviations from *unspecified* behavioural standards which are left for Congress to determine on a case-by-case basis. This interpretation becomes crucial when juxtaposed with the defence strategy deployed by David Kendall and his team of White House lawyers in December 1998. Kendall relied heavily upon the argument that the President should be impeached and convicted only *for statutory violations* (proven criminal acts) and that sexually "immoral" conduct was insufficient reason for removal.

Black concedes that Ford's statement is fraught with "great difficulties of interpretation."[5] The prevailing consensus, followed by Berger and Gerhardt (1996), is that attempts to list impeachable offences are doomed to failure. Gerhardt observes that it would be "almost absurd to attempt it."[6] Black does not produce a list but does suggest a broad definition in an effort to defend presidents from attacks by partisan Congresses. The word "misdemeanors" leaves so much open to interpretation that presidents become vulnerable to a hostile Congress which may use it to define and punish executive actions they find ideologically or morally repugnant *without* having to demonstrate that any indictable offence has been committed. Presidents could be also impeached for pursuing unpopular policies, with prosecutors using "immoral conduct" as a

[3] Herrnson, Paul S. & Hill, Dilys M., *The Clinton Presidency: The First Term, 1992–96* (London: Macmillan, 1999), 11.

[4] Gerhardt, Michael J., *The Federal Impeachment Process: A Constitutional and Historical Analysis* (New Jersey: Princeton University Press, 1996), 103.

[5] Black, 27.

[6] Gerhardt, 106.

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disguise for covert, partisan ends. Black points out that Madison had rejected the word "maladministration" as a justification for impeachment at the Philadelphia convention because it left the president in office "during pleasure of the Senate." Inexplicably, the word "misdemeanors" was an acceptable alternative for Madison, but left future generations with essentially the same problem.

In an effort to develop an acceptable definition of an impeachable offence, Black employs an old rule of legal construction, *eiusdem generis* – "of the same kind" – to argue that certain offences are morally wrong "to any man of ordinary honor,"[7] and thus accompany treason and bribery, *eiusdem generis*, as impeachable offences even though such abuse of power may not, in itself, be a statutory offence. In other words, Black insists that impeachment should only result from "serious assaults on the integrity of the processes of government."[8] Smaller offences *which may still be criminal* can often be ignored. He suggests, as an example of a criminal, but non-impeachable, offence, the case of a president helping a young White House intern to conceal his or her possession of three ounces of marijuana. Black summarizes his definition of "High Crimes and Misdemeanors" as:

> those offenses which are rather obviously wrong, whether or not "criminal," and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator.[9]

By now, the reader is aware that the author places his emphasis consistently on the "high" nature of the alleged crimes and misdemeanors. A "high" crime (for example, murder) *is* impeachable (indictment for a "lower" crime may be deferred until after the president leaves office) but a 'misdemeanor' *must* also be 'high' to warrant a trial.

At first glance, this interpretation may not seem particularly helpful, since what is "rather obviously wrong" can still be subjective and no narrower as a definition than that proffered by Madison. The key to Black's argument lies in the "serious threat" to political order, from which it becomes clear that his focus is on the *gravity* of the offence and on its intrinsically *political* nature. The implication is that these two preconditions should coexist to qualify a president for removal from office. An act may be "morally wrong" but this is not enough by itself to warrant a trial if no evident damage is done to the body politic. Black is not alone in this interpretation. Fisher (1997) also stresses the political aspects of impeachment as part of his work on executive-legislative relations and observes:

> Impeachment is a political, not a judicial, act. The purpose is to remove someone from office, not to punish for a crime. Impeachable conduct need not be criminal.[10]

Fisher diverges from Black, however, by placing greater emphasis on those offences which harm the "dignity" of the presidency or abuse the trust of the nation but which may not necessarily involve breaking the law. This viewpoint echoes the stipulation of Hamilton, in *Federalist 65*, that impeachable crimes must:

[7] Black, 38. [8] Ibid. [9] Ibid., 39–40.
[10] Fisher, Louis, *Constitutional Conflicts Between Congress and the President* (University Press of Kansas, Hutchinson, 1997), 179.

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proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[11]

The question is ultimately one of emphasis. Fisher is more concerned than Black with notions of executive "dignity" and "legitimacy," both necessarily subjective concepts which have certainly changed since the days of Madison. He stresses far more than Black those intangible elements of presidential power (trust, decency, integrity) which underscore the symbolic power of the office. These may be badly eroded, along with the president's political efficacy, by acts which Black would deem non-impeachable. This difference of emphasis mirrors the division of American public opinion in 1998–99, with millions more concerned with the President's stewardship of the economy than with his private conduct. President Clinton's Republican detractors spoke often of the diminishing of the President's authority in the light of the Starr revelations, but the authority to which they referred was intangible and symbolic, not merely the enumerated powers of a Commander-in-Chief or executive head. This view comes closer to Fisher's analysis than to Black's, as the latter tends to underemphasise the link between moral authority and executive legitimacy, thus making his case sometimes appear rather one-dimensional. Ironically, the Lewinsky affair and apparent public indifference to Clinton's philandering may have demonstrated that society's opinions are more in tune with the older of these two texts. Under Fisher's interpretation, even a minor case of obstruction of justice by assisting in the concealment of marijuana could lead to a Senate trial, since the moral integrity of the presidential office is jeopardized (Hamilton's words can easily be interpreted to support this stance). Under Black's interpretation, there would be no impeachment. This perhaps explains why the Hamilton quote, ubiquitous in impeachment texts, is nowhere to be seen in Black's 1974 pamphlet.

Overall, Black's text is one of the clearest expositions of the difficulties inherent in preserving the political and constitutional "legitimacy" of impeachment procedure, but he inevitably falls between two stools, along with Gerhardt and Fisher, in the effort to resolve these problems. The *Federalist* and the Constitution, combined with the experiences of 1868 and Watergate, offer only loose guidelines for determining the nature of an impeachable offence. On the one hand, Black, Gerhardt et al. tend to concur that such offences cannot be "listed" whilst, on the other, such lists are substituted for various generalized definitions which leave the interpretive field wide open to the very force they most wish to exclude as a motivating factor – partisan animosity. The dilemma would appear insoluble and the question of legitimacy, it seems, must remain open.

Bruce Ackerman's *The Case Against Lameduck Impeachment*, published during Clinton's trial, addresses a seemingly more straightforward problem, also revolving around notions of political legitimacy. This is the little-noticed constitutional question of the vestigial power of a Congress in session between the November elections and the first sitting of the new Congress on 3 January.

[11] Hamilton, Madison, Jay, *The Federalist Papers*, *65* (New York: New American Library, 1961), 396.

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The author observes an "uncontested general rule"[12] that all bills voted out by the old, "lameduck" House but with Senate consideration still pending, automatically become null and void. Citing this tradition, Ackerman adopts Black's *eiusdem generis* in arguing that precedent and logic presuppose identical treatment for bills of impeachment. Given their contentious nature, he believes it imperative that such bills be voted upon again by the new House in order that they be "reauthorized," thus more clearly representing the will of the people. Ackerman clearly takes the aura of political legitimacy conferred by the ballot box extremely seriously, and in this way reflects *contemporary* American political values rather than the more elitist assumptions of the eighteenth century. Ackerman denounces lameduck action in general as "an intolerable violation of democratic principles."[13] This argument has, of course, direct relevance to the Clinton impeachment circus in Washington, since the 105th House voted to impeach the 42nd President in December 1998, more than a month after the midterm elections and only three weeks before the arrival of the 106th Congress. In the November 1998 elections, the Republican majority snatched defeat from the jaws of victory and *lost* five House seats, whilst failing to make any Senate inroads. These results were interpreted by pundits, alongside the President's skyrocketing opinion poll ratings, as proof that the House GOP was out of step with public opinion. Had reauthorization been a constitutional requirement, Ackerman believes, the new 106th House might well have thought twice and spared the nation a Senate trial. At the very least, one article of impeachment might not have been passed a second time by the chastened GOP majority. This particular argument, unsurprisingly, never formed a major part of the Clinton defence strategy. Once a general consensus emerged that the President's conviction was unlikely, the issue of the moral authority of the articles of impeachment themselves did not need to be raised and might have dragged the debates onto new and dangerous ground. Had Clinton come close to conviction, however, Ackerman's argument might well have been employed as a final, desperate gambit.

Ackerman is at pains to stress that he does not dispute the constitutional right of the 105th House to impeach after November, but seeks to raise the broader issue of the wisdom or legitimacy of the actions of soon-to-be defunct officeholders. These, as history demonstrates, can be unpredictable at best and farcical at worst. After his defeat by Jimmy Carter in 1976, President Gerald Ford made a hasty and abortive attempt to secure statehood for Puerto Rico before leaving office. President George Bush issued a presidential pardon (for unspecified offences) to former Defence Secretary Casper Weinberger in December 1992, provoking sharp criticism that Bush was deliberately stymieing further investigation of the Iran–Contra affair. Most notoriously, President John Adams, in 1801, signed scores of last-minute commissions for Federalist judges and officeholders in order to deny Thomas Jefferson the opportunity to fill places with his own Republican supporters. Ackerman cites the outrage of Progressive Republican George Norris as the source of one attempt to alter the constitution. Norris pushed for the Twentieth amendment, altering presidential and

[12] Ackerman, Bruce, *The Case Against Lameduck Impeachment* (New York: Seven Stories Press, 1999), 11.

[13] Ibid., 8.

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congressional term expiry dates, after President Warren Harding called a lameduck Congress into special session in 1922 to push through his administration's policies ahead of the arrival of a new, less predominantly Republican, Congress in 1923. His initial efforts failed, but the amendment finally passed in 1933, after the four-month delay between Herbert Hoover's departure and Franklin Roosevelt's succession helped plunge the nation deeper into economic depression. Such cases demonstrate that the dangers of the vengeful wielding of power by retiring or rejected politicians have long been taken seriously by politicians.

Trawling through two-hundred years of legal and constitutional history, the author determines that the only feasible precedent for "holdover" impeachments, the 1988 trial of Federal Judge Alcee Hastings, which was deferred by the 100th Congress for consideration by the 101st, cannot count since the holdover occurred with the consent of both prosecutors and defendant. The 1803–04 removal of Judge John Pickering, another possible precedent, is treated with contempt by Ackerman. Jeffersonian Republicans in the House hurriedly impeached on the last day of the 7th Congress, with the Senate opening deliberations on the first day of the 8th. To Ackerman, this "precedent" is deeply flawed as a model for future impeachments since it clearly formed part of Jefferson's ongoing war with the Federalists. The author has formidable support in this view from Chief Justice William H. Rehnquist, whose 1992 book, *Grand Inquests*, also dismisses the constitutional significance of the Pickering trial.[14] Ackerman rejects any potential claim for precedent based upon Pickering, observing, "The right response to this appeal … is a belly-laugh … (it) … is just the sort of precedent we want to avoid inflicting on our posterity."[15] Ackerman is prone, at times, to overstate his case, claiming at one point that failure to address this issue might result in tit-for-tat impeachment wars between successive Presidents and hostile lameduck Congresses well into the 21st century. Acknowledging that the lameduck problem is not taken seriously by constitutional scholars, he warns that, if it is not resolved, it could "destabilise the presidency for a long time to come."[16]

This claim is exaggerated, but it returns us to the difficulties inherent in relying upon precedent and upon the words of the Founders in resolving glitches in the constitutional process. Whereas the relevant constitutional clauses (Article II, Section 1 and Amendment XX) are more specific than those to which Black, Gerhardt et al. had recourse, they are still not particularly helpful. Ackerman relates that the framers of Amendment XX intended to remove the dangers of lameduck action, for example by specifying in debates that the *new* Congress, not the old, should determine the result of a deadlocked presidential election. Yet the language of that amendment proves nothing of the sort. He intimates that House debaters named their foremost concern as the desire to prevent lameduck Congresses from dealing with anything but the most mundane and insignificant business prior to January 3rd. Certainly, impeachment votes would be out of the

[14] Rehnquist, William H., *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: William Morrow, 1992, 1999).

[15] Ackerman, 60.

[16] Ibid., 10.

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question. Again, nothing of this intention is apparent in the wording of Amendment XX. Quite *why* there should be so large a gap between the stated intention of the framers and the final wording of the amendment is never really made clear by Ackerman, who simply suggests that the framers assumed that their hostility to lameduck action, in electing or impeaching presidents, would be taken as read and thus did not bother to include specific language on either issue. It hardly seems fair for the author to accuse the 105th Congress of "reckless indifference to the democratic values motivating the enactment of the twentieth amendment"[17] when the framers themselves appear to have neglected them. Overall, Ackerman's case is strengthened by precedent but weakened by this rather *blasé* dismissal of an important question.

Inevitably, the debilitating process of presidential impeachment and accompanying constitutional debates will raise as many questions as it answers. The prospect of removing an elected Chief Executive places enormous strain upon public confidence in its leaders and political institutions. This more than explains the wave of relief, mixed with self-congratulation, which washed over House and Senate following the President's acquittal on 12 February 1999. This relief has tended to disguise the fact that some complex constitutional issues were raised by the trial, issues which were often obscured by intensive media coverage of the more sordid details of the Lewinsky affair.

The works of Black and Ackerman attempt to highlight and dissect these issues. Both warn against succumbing to temptations which can deprive impeachment of its political or constitutional "legitimacy," thus both warn against use of impeachment as a partisan weapon. Yet, as Rehnquist indicates, this was a prime motive in some past trials. Supreme Court nomination hearings over the past two decades suggest partisan politics dominates the process of *appointment*. Why it should take a back seat in *removal* is, therefore, less than clear, and Gerhardt's view that partisanship is diminishing as a factor in impeachment of judges may be regarded with some scepticism. The dangers of division along strictly partisan lines can produce, for Black, serious transgressions of executive privilege which endanger the separation of powers whilst, in Ackerman, they provoke a disregard for precedent in the stampede to convict. Both adopt a defensive posture in relation to executive prerogative (also notable in Fisher's work) but concur that impeachment should not be concerned with purely criminal actions. It is here that all impeachment texts tend to come unstuck, since no real consensus exists in the works mentioned as to the nature of "offenses" *beyond* the purely criminal, other than vague stabs at defining the "dignity" of the office. Ackerman, for example, asserts members must simply consider if the nation's fundamental values are threatened, a widely held view which brings us no nearer a definitive statement on the subject.

Black and Ackerman have attempted short, blunt treatises focussed upon identifiable weaknesses in the constitutional process. Whilst they may not have resolved these problems, their contributions foreshadow a renewed and vigorous debate on the mechanisms and motives for presidential impeachment.

[17] Ibid., 31.

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