

Spearing the Chief

Impeachment: A Handbook. By Charles L. Black, Jr. *New Haven: Yale University Press*, 1974. Pp. ix, 80. \$5.95 clothbound; \$1.95 paperbound.

Reviewed by Walter E. Dellinger[†]

In less than seventy pages of unfootnoted text, Professor Black has produced the most valuable analysis yet of that awesome constitutional weapon, the power of impeachment. Written with remarkable clarity and economy, this slender essay illuminates such murky and troublesome matters as the proper scope of "high Crimes and Misdemeanors," the procedural and evidentiary rules to be followed in an impeachment trial, and the propriety of judicial review of a Senate verdict convicting and removing a President. This is not a partisan work written to attack or defend the incumbent President. It is animated by a passion of a different sort: a passion for lawfulness. If there is a central theme it is a deeply felt concern that the well-being of the nation vitally depends upon the impending impeachment proceedings being "visibly and faultlessly lawful."¹ Black's *Impeachment* advances this goal by bringing to bear upon these difficult questions a combination of constitutional learning and good common sense.

In addressing the major unsettled issues surrounding the impeachment of a President, Black's arguments seek reasonable and workable solutions that are compatible with the structure and spirit of the constitutional system. Although such arguments, as he notes, "do not have the fine savor of ancient learning . . .,"² Black's sensitive analysis of constitutional structure and values often provides more useful insights than the historical search for the "intent of the Framers" that characterizes the work of Raoul Berger.³ This is seen in the discussion of a crucial contemporary issue: the question of the range of impeachable conduct embraced by the constitutional phrase, "Treason, Bribery, or other high Crimes and Misdemeanors."⁴

[†] Professor of Law & Associate Dean, Duke University Law School.

1. See C. BLACK, *IMPEACHMENT: A HANDBOOK* 69 (1974) [hereinafter cited to page number only].

2. P. 4.

3. See R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

4. U.S. CONST. art. II, § 4.

Counsel for the President and others have advanced the argument that a President may be impeached only for conduct that would be subject to criminal indictment, presumably under the United States Code.⁵ A historical approach is principally useful in negating this contention, for it tells us that "high Crimes and Misdemeanors" was a term of art, the traditional charging language of parliamentary impeachments;⁶ it thus cautions against the assumption that the words "Crimes" and "Misdemeanors" are intended to convey their contemporary common language meanings. Furthermore, the English and American precedents contain a number of impeachments based upon conduct that was clearly not indictable as a crime.⁷

An interpretation that would confine impeachments to indictable offenses is especially suspect, moreover, when one considers the rudimentary nature of the early federal criminal code. Notwithstanding that the impeachment clause explicitly includes "all civil Officers,"⁸ it was not until 1863 that a federal statute made bribery an offense for all these officials.⁹ It is no answer to suggest that this inadequacy could have been remedied by the existence of federal common law crimes. For if the Framers had been satisfied to leave the scope of impeachable offenses to case-by-case development in the fashion of the common law, surely they would not have paled at the thought that a similar process would continue for impeachment even if the federal judiciary subsequently renounced the authority to adjudicate common law crimes for private citizens.¹⁰ Even under the more comprehensive federal criminal code that presently exists, conduct that should clearly warrant impeachment would not be covered.¹¹ This, in itself, is the single most telling argument against a construction that would allow impeachment only for indictable criminal offenses.

Since most of the serious accusations concerning the incumbent President involve crimes—obstruction of justice, tax fraud, bribery—

5. See J. St. Clair, *An Analysis of the Constitutional Standard for Presidential Impeachment*, issued in late February, 1974, at 59-60. The memorandum refers to "the commission of a crime named in the Constitution [presumably treason and bribery] or a criminal offense against the laws of the United States." *Id.* at 59.

6. See R. BERGER, *supra* note 3, at 59-63.

7. *Id.* at 59-78.

8. U.S. CONST. art. II, § 4.

9. See REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 25 (Comm. Print 1974).

10. Federal common law crimes were in fact eliminated by the Supreme Court in 1812. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

11. Black offers a number of examples ranging from the humorous (hypothetical President moves to Saudi Arabia so he can have four wives and conducts business from there by wire, p. 33) to the chilling (hypothetical President uses tax system "consistently and massively" as a means of punishing opponents, p. 38).

Spearing the Chief

one might ask whether the presence or absence of an indictable crime limitation on impeachment is of any current importance. Black, in fact, considers it "somewhat strange" that the question has assumed such prominence.¹² I believe he thereby undervalues its importance. Even if a President is accused of conduct which most members of the society consider "criminal," this issue assumes an important secondary role. For if impeachment is strictly limited to statutorily enumerated offenses, all elements of the offense must be fully proven. If not, the President may be acquitted on a technical defense. For example, under such a view, the Senate would be obligated to acquit a President even though clear and convincing evidence showed him to have taken bribes, if the Senate concluded that he was not "an officer or employee or person acting for or on behalf of the United States, or any department" within the meaning of 18 U.S.C. § 201(a).¹³ Thus, restricting impeachable offenses to activities violative of a code designed to regulate the conduct of private citizens may produce clearly inappropriate results in a proceeding intended to determine whether the President should remain in office.

But if the constitutional standard of "high Crimes and Misdemeanors" is not constrained by the criminal code, what bounds are there? Can a President be impeached for ill-conceived policies or for a dreadful lack of administrative skills? It is here, in determining how an impeachable offense actually *should* be defined, that history is only of limited usefulness. Professor Berger moves from the fact that most of the members of the Constitutional Convention were generally aware of English impeachments to the more dubious suggestion that virtually any conduct which was the subject of impeachment in England from 1376 to 1787 should constitute grounds for removal of an American President. Thus, for Berger, the English precedents serve, "broadly speaking, to delineate the outlines of 'high crimes and misdemeanors,'"¹⁴ and they are reducible to "intelligible categories" such as abuse of official power, misapplication of funds, encroachment on or contempts of Parliament's prerogatives, and corruption.¹⁵ These are not very precise limits upon a power to depose a President chosen through the process of a national election.¹⁶ And, as Black notes, the

12. P. 34.

13. See Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1140 (1974).

14. R. BERGER, *supra* note 3, at 69-70.

15. *Id.*

16. Berger himself appears to balk at some English precedents. He notes that "[t]oday impeachment and severe punishment for giving 'bad advice' seems extravagant." *Id.* at 71. He also suggests that the English practice of impeaching judges for rendering unconstitutional opinions would, if incorporated in the United States, be inconsistent with

English cases sometimes seem to prove too much by treating as "high Crimes and Misdemeanors" petty acts of maladministration which no sensible person could think impeachable offenses in a President . . ."¹⁷

In contrast, Black presents arguments of subtlety and elegance that give meaningful and limited content to the perplexingly vague standards of "high Crimes and Misdemeanors." Reviewing the brief colloquy in the Constitutional Convention concerning the rejection of "maladministration" and the insertion of "high Crimes and Misdemeanors" as grounds for impeachment, Black concludes that the acts charged in articles of impeachment should have about them "some flavor of criminality."¹⁸ He then proceeds to find further restraints on the sweep of impeachment implicit in the Framers' proscription of *ex post facto* laws and bills of attainder. Parliamentary bills of attainder, often directed at public officials, made past conduct of the person attainted criminal, and imposed punishment for it, without judicial trial and without any necessary reference to the violation of preexisting law. Prohibition of attainders in the Constitution thus overlaps with the ban on *ex post facto* laws. Though the letter of these provisions cannot apply (the phrase "high Crimes and Misdemeanors" is itself too vague to satisfy clear warning standards in ordinary criminal cases), the Framers' abhorrence of these devices—from which our law has never wavered—must mean that it would be demonstrably wrong for Congress to act in an impeachment proceeding as though these prohibitions did not exist. The spirit of these clauses can be approximated, Black contends, by treating as impeachable "those offenses, and only those, that a reasonable man might anticipate would be thought abusive and wrong, without reference to partisan politics or differences of opinion on policy."¹⁹

In seeking affirmatively to suggest the scope of impeachable conduct, Black applies to the language "Treason, Bribery, and other high Crimes and Misdemeanors," the rule of construction and common sense, *eiusdem generis*: when a general or indefinite term (such as "high Crimes and Misdemeanors") follows specific words (such as "Treason" and "Bribery"), the meaning of the general phrase ought

the American doctrine of judicial review. And he reads the comments made in the various ratifying conventions as precluding resort to impeaching for "petty misconduct." *Id.* at 90. Nonetheless he apparently accepts Madison's statement at the Virginia ratification convention that impeachment is permissible "if the President be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter him." *Id.* at 89.

17. P. 49.

18. P. 29.

19. Pp. 32-33.

Spearing the Chief

to be limited to the same kind or class of things as that of the specific words. He does not apply this rule in the simplistic fashion of those who suggest that because treason and bribery are indictable crimes, high crimes and misdemeanors can only be indictable offenses. Rather, Black suggests, one can draw from treason and bribery the common thread that they are acts "(1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of the words on the statute books."²⁰

It is important to note that the illegality of an act is not wholly irrelevant under this schema. The further removed an impeachment charge is from ordinary criminality, the less comfortable the House or Senate ought to feel. If this still seems "unbearably abstract"²¹ it becomes far less so in an important section in which Black applies his suggested principles to particular problems such as improper campaign tactics, unauthorized military operations, impoundment of funds, obstruction of justice, and income tax fraud.²² It is, in fact, principally through these discussions of hypothetical but realistic cases that the reader is able to understand Black's sensitive touch in dealing with the nuances of impeachable offenses.

Of the many procedural aspects of impeachment explained and examined in the book, one especially deserves critical discussion: the question of televising the impeachment proceedings. Believing that cameras and microphones have no more place in such solemn proceedings than they do in an ordinary criminal trial, Black strenuously opposes live radio and television coverage of a House impeachment debate or a Senate trial. Television and radio, he argues, "*act* upon what they purport to *observe*; what one sees and hears is not what would have occurred if these modern means of communication were not there."²³ And such coverage, he fears, would enhance the danger of a snow of telegrams affecting (or appearing to affect) the result. While these objections are substantial, they are, in my view, outweighed by countervailing considerations. It is unrealistic to assume, as Black does, that the public will be able satisfactorily to judge the proceedings by careful consideration of the record and transcript. That may be enough for history, but the present also has its claims. It is absolutely essential that average citizens throughout the nation be

20. P. 37.

21. *Id.*

22. Pp. 41-46.

23. P. 20.

convinced that an impeached President was removed only after a demonstration of clear, convincing, and detailed evidence of guilt. Sober consideration of the record may be possible if one has available daily transcripts in the *New York Times*, but those who read only truncated wire service reports in the *Durham (N.C.) Morning Herald* may be left with the impression that something approaching a political coup has taken place. Moreover, the *absence* of full, live national television coverage may itself affect the outcome. Is it not possible that a member of the Senate, personally convinced by a careful and detailed presentation of the evidence that the President is guilty of impeachable offenses, might nonetheless be reluctant to vote for conviction if his constituents are significantly less aware than he of incriminating evidence? A television spectacle may well be the lesser of evils.

In a thoughtful concluding section, Black notes that certain tribal cultures know only two ways of dealing with deviant behavior: toleration and death. A troublemaker is simply endured and endured—and then set upon with spears. Finer gradations of sanction are unknown in these societies.

Looking beyond the present impeachment proceedings, Black states:

In the long haul, we must put the spear of impeachment back in the closet, though coated with cosmoline against rust. There are infinitely numerous milder ways in which the elephantiasis of the presidency can be treated.²⁴

Problems such as presidential impoundment of funds, unauthorized military operations, and the use of the tax system to harass political opponents can be mitigated in the future if Congress will but use its vast constitutional powers to enact prophylactic legislation.

This is an extremely valuable book. It deserves to be read by all, but especially by the men and women who will constitute—if it comes to that—the Grand Inquest of the Nation and the High Court of Impeachment.

24. P. 69.