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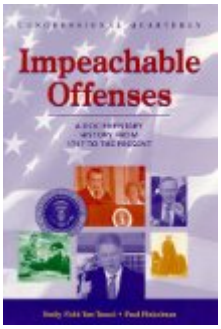

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The Quandary of Defining Impeachable Offenses

In 1998, impeachment of the President has grown from a preoccupation entertained by a small segment of the political spectrum to the central issue of American public life. Without going into the details of the case, we can generalize that those supporting impeachment of President William Jefferson Clinton have pounded what they claim are the facts, while those opposing Clinton's impeachment have pounded what they argue is the law–specifically the argument that, assuming all the facts alleged against President Clinton to be true, the charges on the table do not amount to impeachable offenses within the meaning of Article II, section 4 of the Constitution. *Impeachable Offenses: A Documentary History from 1787 to the Present* provides a valuable foundation on which this argument over constitutional law can proceed.

Owing principally to the Watergate crisis of 1972-1974, we now have a large, impressive literature on the history and workings of the Constitution's impeachment process.[1] Surprisingly, however, we have had to wait until the current impeachment crisis to get a useful and thought-provoking documentary history of impeachment. It is a curious irony that, on the day that the first copies of this useful book arrived at the publisher's office (that is, 10 December 1998), the House Judiciary Committee proposed three of the four articles of impeachment now under consideration by the full House of Representatives. In future editions of this book, its editors will include these articles of impeachment and extracts from relevant debates by the Judiciary Committee, the full House, and (at this writing) perhaps the full Senate.

The co-editors of *Impeachable Offenses* are experienced constitutional historians and practitioners of historical documentary editing. Emily Field Van Tassel, now visiting associate professor of law at Case Western Reserve University, is a veteran of the *Documentary History of the Supreme Court of the United States, 1789-1800* and an expert on the history of judicial removals. Paul Finkelman, now John F. Seiberling Professor of Constitutional Law at the University of Akron, has written extensively on the constitutional and legal history of slavery and federalism, and he has edited documentary anthologies concerning the law of slavery. Their choices are surefooted (with two minor reservations, discussed below), and their methods of presenting and excerpting documents are first-rate. Much of the balance of this review, therefore, reports on their choices of selection, arrangement, and presentation.

The editors have structured this volume by reference both to chronology and to topical coverage. After a brief, deft Introduction (Part I, pp. 1-15) laying out the history of impeachment and the specific concept of impeachable offenses, they launch their main inquiry with Part II, which focuses on "The Framers' Understanding of Impeachment" (pp. 17-39). This Part reprints selected provisions of the Constitution (pp. 20-21), extracts from James Madison's *Notes of Debates in the Federal Convention of 1787* presenting the Federal Convention's debates on the impeachment process (pp. 21-29), and two *Federalist* es-

says (Nos. 65 and 66) by Alexander Hamilton, which are often cited as the definitive analysis of the framers' position on impeachment's functions and purposes (pp. 30-39). The one qualm this Part raises is that it presents the "usual suspects" of inquiries into the original understanding. Other proponents and opponents of the Constitution discussed impeachment and its strengths and weaknesses; extracts from such documents would have increased the value of this Part of *Impeachable Offenses* and avoided the usual, conclusory judgment that Madison's *Notes* plus *The Federalist* equals the basis for an authoritative understanding of impeachment in the eyes and minds of the Founders.

Part III (pp. 41-83) brings the inquiry to close focus on the book's main theme. Dealing with "Some Recurring Issues" of "The Scope of Impeachable Offenses," this part of the volume presents the range of positions on what constitutes an impeachable offense. Beginning with the 1793 controversy launched by Rep. William Branch Giles (D/R-VA) over Alexander Hamilton's alleged fiscal improprieties as Secretary of the Treasury and Hamilton's 1797 confession of his private misconduct having nothing to do with his public duties (pp. 42-54), it then takes up then-Representative Gerald R. Ford's claim, as he launched the 1970 attempt to impeach Justice William O. Douglas, that "an impeachable offense is whatever a majority of the House considers it to be at any given moment in history; conviction results from whatever offense or offenses two-thirds of the other body [the Senate] considers to be sufficiently serious to require removal of the accused from office" (p. 59). The documents–a lengthy extract from Ford's April 1970 speech to the House, a letter from Ford's Republican colleague but adversary in this debate, Rep. Pete N. McCloskey (R-CA), an extract from the House debate, and another from the House subcommittee's report exonerating Justice Douglas (pp. 54-73)–show the difficulty of determining the applicable standard of "impeachable offenses" and the seriousness with which earlier generations of politicians grappled with the issue. This last point is underscored by an extract from House parliamentarian Lewis Deschler's *Precedents of the House of Representatives* (pp. 73-83) synthesizing the experience of the 1970s–the impeachment inquiries into Justice Douglas and President Richard Nixon–with regard to the issue of defining impeachable offenses.

The lessons of Part III are (i) that at least by reference to the experience of the 1790s, purely private misconduct ought not to be deemed the basis for an impeachable offense; (ii) that the class of impeachable offenses is considerably narrower than the definition that Ford offered in 1970; (iii) that the cases of presidential impeachment are analytically distinct from those of judicial impeachment for reasons having to do with the nature of the office in question and its powers and significance to the overall constitutional system; and (iv) that, although the category of impeachable offenses is at once narrower than the Ford test and seemingly wider than the other often-cited test (an impeachable offense is an indictable criminal offense), one key element of the analysis must be specific intent to do wrong.

Part IV investigates the various categories of impeachment in American history for judges, legislators, and Cabinet officials (pp. 85-198). Each discussion is launched by a headnote setting forth the key issues and historical and constitutional significance of each impeachment discussed, accompanied by a summary box setting forth the name of the impeached official, the result of his case, the charges against him, the major issues, and the House and Senate actions on the impeachment. The key documentary exhibit for each impeachment is the articles of impeachment adopted by the House against each impeached official.

Part IV first examines the case of Senator William Blount (R-TN), a delegate to the Federal Convention of 1787 who in 1798 was charged with a conspiracy to launch a military expedition in the Southwest to seize Louisiana and the Floridas from Spain for England (pp. 86-90). The Blount case's inconclusive resolution tells us much about the unsettled nature of much of American constitutional law and practice in the early Republic, but that story is beyond the scope of this book, which simply notes (p. 88) that, for subsequent congressional practice, Representatives and Senators are not subject to impeachment.[2]

Following the Blount case, the editors next group the series of judicial impeachments spanning the years from 1803 to 1989, beginning with the highly questionable 1803-1804 impeachment and removal of John Pickering, the U.S. district judge for the Distrtict of New Hampshire (pp. 91-100), and concluding with the 1989 impeachment, trial, and removal of Walter L. Nixon, a U.S. district judge for the Southern District of Mississippi (pp. 180-85). The editors conclude this subsection with a discussion (pp. 185-91) of censure (rather than impeachment) of a federal judge; the illustrative case they present is the first known judicial censure, that in 1890 of Aleck Boarman, the U.S. district judge for the Western District of Louisiana. As the editors note, from 1890 to 1980, Congress occasionally experimented with censure of federal judges; in the

Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Congress provided an alternative to congressional censure–"disciplinary action" by an internal administrative mechanism of the federal judiciary, the Judicial Council of the circuit in which the offending judge sits, in conjunction with the chief judge of the Court of Appeals of that circuit (p. 186). Part IV concludes (pp. 191-98) with a discussion of the only impeachment of a cabinet official, the 1876 impeachment of Secretary of War William W. Belknap, who sought to avoid removal from office by resigning before his trial but was nonetheless acquitted by the Senate after a trial.

Most readers of *Impeachable Offenses* will doubtless turn straight to Part V, which addresses impeachment and censure of the President of the United States (pp. 199-302). The editors first examine censure (pp. 200-20), noting that Congress has censured one President, Andrew Jackson, and come close to censuring two others, John Tyler and James K. Polk (pp. 200-3). The focus of this section is the 1834 censure by the Senate (led by Senator Henry Clay [Whig-KY]) of President Andrew Jackson for ordering the Secretary of the Treasury to remove federal deposits from the Bank of the United States (pp. 204-5) and Jackson's heated and lengthy protest of his censure on constitutional grounds as well as in defense of his honor (pp. 205-20). The editors note that, although Jackson could not persuade the Senate to enter his protest into its official records, in 1837 the Senate voted to expunge its censure resolution from its records. As Van Tassel and Finkelman comment, "In what must have been a truly bizarre pseudo-ceremony, the Senate took a copy of its printed journal and drew lines through the original censure" (p. 206).

The censure episode is of particular interest today because of the Clinton case. Democrats and some Republicans, arguing that the facts of Clinton's conduct do not amount to impeachable offenses, have insisted that censure is the appropriate mechanism. Most Republicans reject censure, arguing that it is unconstitutional (on the grounds cited by Jackson in his protest, including the Constitution's failure to mention censure). The editors note:

Jackson's protest raises a fundamental question about censure: Would a censure be more legitimate if it was specific; if it was endorsed by more than 50 percent of the House and two-thirds of the Senate; and if the president was allowed to prepare a defense? In other words, might Congress vote to censure rather than vote to impeach? And if Congress does vote to censure, must Congress give the president due process rights to defend his good name? One argument is that if Congress can remove a president from office, then it also has the power to condemn and censure the president without removing him from office. That Congress can choose to pass a resolution of censure without impeaching the president is illustrated by the censures of Jackson, Tyler, and Polk, and the proposed censure of Nixon. (p. 206)

(A second gap in this otherwise valuable book is the lack of a discussion of the proposed censure of President Richard Nixon during the Watergate crisis of 1972-1974, mentioned fleetingly on p. 206).

Part V presents discussions of the three presidential impeachment efforts–against Andrew Johnson in 1868, Richard Nixon in 1974, and Bill Clinton in 1998 (the last, of course, still pending as of this writing [16 December 1998]). Again, the documents are well-chosen and well-presented. The articles of impeachment in the Johnson and Nixon cases appear in full, supplemented with extracts from (in the Johnson case) the House debates and Senate trial proceedings and (in the Nixon case) the debates of the House Judiciary Committee.

The editors faced what must have been a vexing problem with the Clinton case, as it still is unresolved at this writing and is likely to be so for weeks or even months to come. They have arrived at the best treatment under the circumstances–presenting a terse, dispassionate summary of the story through the end of November 1998 (pp. 267-72) and documentary extracts–from the September 1998 "Referral" submitted to Congress by Independent Counsel Kenneth W. Starr (pp. 272-74) itemizing Clinton's allegedly impeachable offenses in the Monica Lewinsky case: the charges made in October 1998 against Clinton by the counsel to the House Judiciary Committee, Davide Schippers, based on Starr's referral (pp. 274-287), and the October 1998 memorandum prepared by President Clinton's counsel on standards for impeachment (pp. 288-302). The attentive reader will note that the editors present but do not seek to resolve the current disputes over impeachable offenses–whether Mr. Starr was obliged not only to inform Congress of impeachable offenses but to provide them with the yardstick he applied to that inquiry, and whether the conduct alleged by Mr. Starr and then by Mr. Schippers rises to the level of impeachable offenses. Instead, they note wryly, "Confusion over the reach of the phrase 'high Crimes and Misdemeanors' reigned" (p. 272) and conclude, "Whether censure is an appropriate response to President Clinton's behavior–or whether impeachment will in the end prove

to be the direction Congress moves–will in part be determined by how Congress and the American people view the traditions and precedents of our political system" (p. 272).

Part VI, a coda of sorts to *Impeachable Offenses*, presents materials analyzing whether the courts may exercise judicial review over impeachment proceedings (pp. 303-20). Though this matter might at first appear to be distinguishable from this book's main theme, the nature of the Clinton controversy suggests at least the possibility that, should the House vote to impeach the President and the Senate to convict him and remove him from office, he might attempt an appeal on the grounds that his impeachment was for offenses that did not rise to the level of impeachable offenses specified by the Constitution. In 1936, when the Senate convicted and removed from office Halsted Ritter, a United States district judge for the the Southern District of Florida, Ritter did not choose to go quietly. Instead, arguing that the Senate had illegally removed him from office, he sued the United States for his back pay dating from his conviction and removal by the Senate. The Court of Claims unanimously rejected his suit on the grounds that it had no jurisdiction to hear the case (pp. 304-08). Similarly, in 1993, after a trial that was based on an innovation in Senate procedure (allowing a Senate committee to take testimony and evidence that would be the basis for the verdict of the full Senate, rather than tying up the Senate's business with an impeachment trial by the full membership), the Senate convicted and removed Judge Walter L. Nixon from office. Nixon then appealed his removal, fighting his case to the United States Supreme Court. In 1993, the Justices unanimously ruled against former Judge Nixon, but the Court issued three opinions (pp. 309-20). The majority, speaking through Chief Justice William H. Rehnquist, ruled that impeachments raised political questions that the federal courts could never review (pp. 310-15). Justices Byron R. White and Harry A. Blackmun concurred in the result but disagreed with the majority's reasoning, arguing that the federal courts may review an impeachment trial but holding on the merits of the case that Judge Nixon was properly tried, convicted, and removed from office (pp. 315-19). Justice David H. Souter also concurred in the result, arguing that, whereas for the most part the courts ought to leave impeachment trials and judgments undisturbed, they ought to review such trials in the event that the Senate seriously abused its authority to try impeachments so as to have serious "impact on the Republic" (pp. 319-20).[3]

The reader comes away from *Impeachable Offenses* with a variety of impressions. First, the law of impeachment is different from just about any other body of law in the American constitutional system, being tied to the facts of each particular case to an extent greater than in those other spheres of law. Second, the issues of impeachments are political to a greater extent than other areas of constitutional law. As John R. Labovitz wrote in his 1978 monograph *Presidential Impeachment*:

Presidential impeachment is a remarkable mechanism: a lawyer's solution to a statesman's problem. It is a legal procedure, but one for which there can be very little law because (out of good fortune or otherwise) it is so rarely used. It is not meant to be partisan, but it is directed at a critical political problem and consequently reflects existing partisan divisions and may create new ones. It poses fundamental questions about the nature of our constitutional government, which it forces Congress to address in the midst of a possible governmental crisis. It requires clear-cut choices–to accuse or not, to adjudge guilty or not–by the branch of government most prone to compromise or defer controversial decisions. It involves, in short, a complicated and sometimes contradictory tangle of legal and political considerations.[4]

Van Tassel and Finkelman bear out Labovitz's judgment.

Because of its excellence of presentation and its filling of a notable gap in the literature of impeachment, *Impeachable Offenses* should join the shelf of books of first resort not only for future scholars of the impeachment process but also for those politicians, elected officials, attorneys, and jurists who will have to cope with future impeachments, as well as the one threatening to overwhelm us.

Notes

[1]. Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge, Mass.: Harvard University Press, 1973); Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (New York: W. W. Norton, 1973); Charles L. Black, Jr., *Impeachment: A Handbook* (New Haven: Yale University Press, 1974); John R. Labovitz, *Presidential Impeachment* (New Haven: Yale University Press, 1978); Peter Charles Hoffer and N. E. H. Hull, *Impeachment in America, 1635-1805* (New Haven: Yale University Press, 1984); Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* (Urbana: University of Illinois Press, 1991); William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New

York: William Morrow, 1992); Mary L. Volcansek, *Judicial Impeachment: None Called for Justice* (Urbana: University of Illinois Press, 1993); Michael P. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Princeton: Princeton University Press, 1996); and, most recently, Buckner M. Melton, Jr., *The First Impeachment: The Constitution's Framers and the Case of Seantor William Blount* (Macon, Ga.: Mercer University Press, 1998). All but the last study are cited in the editors' "Selected Bibliography" (p. 321).

[2]. Oddly, the editors did not cite and apparently did not use Melton's fine study of the Blount case. See generally Melton, *First Impeachment* (supra note 1).

[3]. The editors might also have noted, in this section, Raoul Berger's argument in his 1973 monograph that the federal courts could exercise judicial review over federal impeachments. See generally Berger, *Impeachment* (supra note 1).

[4]. Labovitz, *Presidential Impeachment* (supra note 1), p. xi.

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