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Bruce Ackerman. *The Case Against Lameduck Impeachment.* New York: Seven Stories Press, 1999. 80 pp. $8.00 (paper), ISBN 978-1-58322-004-7.

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Forensic History, the Impeachment Fiasco, and Constitutional Discourse

Introduction

The book under review emerged from a curious and provocative episode in a constitutional fiasco. On 8 December 1998, in an "op-ed" article for *The New York Times* and in testimony before the House Committee on the Judiciary, Bruce Ackerman, Sterling Professor of Law at Yale Law School, offered a novel argument. If the House were to adopt articles of impeachment against President Bill Clinton, he insisted, it would acting as a lameduck body exercising its powers in the twilight period between an election of Representatives on 3 November 1998 and the beginning of the new House's term of office on 3 January 1999. That lameduck House would go out of existence on 3 January; all its pending actions–including any articles of impeachment that it might adopt–would be extinguished with it. To be consistent with the democratic principles enshrined in the Constitution and bolstered by the Twentieth Amendment (ratified in 1933), which adjusted the opening dates of Presidential terms and congressional sessions, Ackerman concluded, the new House should vote again on any articles of impeachment adopted by the lameduck House rather than considering itself bound by that body's actions. Ackerman's argument was arresting for two reasons:

* First, Ackerman proposed a major shift in evaluating the impeachment of President Clinton. Most historians, political scientists, law professors, and constitutional theorists focused on defining an impeachable offense.[1] Instead, stressing the *procedural* defects of a lameduck House's vote to impeach the President, Ackerman asked whether that vote could bind the new Congress. In the process, Ackerman suggested newfound substantive significance for the Twentieth Amendment, often dismissed as a "housekeeping provision" lacking the dignity and grandeur that should accompany a constitutional provision.[2]

* Second, Ackerman's charge that the House was about to launch a lameduck impeachment highlighted the difference between the lameduck House and its newly-elected successor, and thus cast further doubt on the impeachment effort's legitimacy. The 1998 congressional elections had produced startling results. For the first time since 1934, the party controlling the Presidency had gained seats in the House (five, in 1998) and had lost no seats in the Senate. The changed balance of power between House Republicans and Democrats would have incalculable consequences for any vote by the new House on impeaching the President. Moreover, many political observers concluded, the 1998 results expressed voter disapproval of impeachment, which had been a central agenda item for House Republicans in the fall campaign. Indeed, Speaker Newt Gingrich (R-GA) had announced his resignation from the Speakership and the House, in a quasi-parliamentary acceptance of responsibility for his chosen campaign strategy's failure.

Ackerman's argument against lameduck impeachment fell on deaf ears in the Judiciary Committee, the House of Representatives, and the Senate. On 18 December 1998, the House voted to adopt two of four articles of impeachment proposed by its Judiciary Committee.[3] The new House did not reappoint the impeachment managers named by the lameduck House, and the Senate launched an impeachment trial in which the President's attorneys did not raise the lameduck argument. On 12 February 1999, the Senate voted, 55-45, to acquit President Clinton on the perjury charge, and 50-50 on the charge that he had obstructed justice.

Undaunted, Ackerman revised and expanded his presentation, which now appears as a title in the Open Media Pamphlet Series coedited by Greg Ruggiero and Stuart Sahulka. Ackerman's text (on pp. 10, 16, 69-70, 73, 75, 76-77) and notes (pp. 51n37, 58n42) make clear that his principal audience was Chief Justice William H. Rehnquist, who presided over the Senate's impeachment trial and who could have entertained a motion by the President's lawyers or by a Senator to dismiss the charges on those

grounds.[4] That the Chief Justice did not receive such a motion to dismiss does not deprive this book of significance and interest, however. Ackerman also intends to reach a much wider audience of intelligent general readers, which is why he published his study as a small book rather than a law-review article. *The Case Against Lameduck Impeachment* provides an opportunity to assess his argument in a variety of contexts, in particular its illumination of (a) the intersection between original-intent analysis and forensic history and (b) the problematic role of the scholarly community in American constitutional discourse.

I. The Structure of the Argument

After an introduction (pp. 7-16) sketching his case, its significance, and its consequences for the impeachment trial of President Clinton (still in the future as he wrote), Ackerman sets forth his argument in four brisk chapters.

Chapter One, "The Campaign Against the Lameduck Congress" (pp. 17-32), revisits the history of lameduck Congresses, including key examples of the evils flowing from the ability of a lameduck Congress to legislate, and the framing and adoption of the Twentieth Amendment.[5] Ackerman insists that the amendment's purpose was to abolish lameduck congressional sessions, preventing further abuses of such sessions by Representatives and Senators no longer accountable to the electorate. Drawing on the House and Senate debates on the amendment, the autobiography of Senator George W. Norris (R-NB)–the noted Progressive who was the amendment's longtime champion–and contemporary newspaper coverage, Ackerman provides an illuminating account of the objectives of the amendment's framers, though, as noted in Part III below, one refracted through his presentist purpose in examining that history.

Chapter Two, "The Lameduck House and the Presidency" (pp. 33-41), examines the concerns of the amendment's framers about the consequences of lameduck congressional sessions for the Presidency, in particular for the election of a President should a deadlock result in the Electoral College. In the process, it examines and refutes the claim that impeachment of a sitting President is somehow different from other exercises of power by a lameduck House of Representatives.

Chapter Three, "The Precedents" (pp. 42-66), refutes the supposed authorities and precedents invoked by opponents of Ackerman's arguments against lameduck impeachment. Two of the three precedents cited to support lameduck impeachment predate the Twentieth Amendment's adoption. The 1803-04 impeachment of U.S. District Judge John Pickering is widely (and rightly) seen as a blot on the history of impeachment (albeit for reasons far beyond its being a lameduck impeachment). The 1932-33 impeachment and trial of U.S. District Judge Harold Louderbeck not only predated the amendment, but the new House voted to reappoint the House managers named to conduct the judge's trial before the Senate. The sole post-1933 precedent, the 1988-89 impeachment and trial of then-U.S. District Judge Alcee Hastings, was not an impeachment by a lameduck House. Furthermore, Judge Hastings and the Senate agreed to delay his trial till the new Congress opened in 1989, thus removing the contention over the point that would have prompted the Senate to consider the issues of lameduck impeachment with seriousness and care.[6]

Chapter Four, "The House, the Senate, and the Chief Justice" (pp. 67-77), outlines a sliding scale of appropriate responses to a lameduck impeachment of the President. Ideally, the leadership of the new House should hold a second vote on the articles of impeachment and only then send those articles (should they be adopted) to the Senate. Failing that, the House leadership could hold a vote to reappoint the House managers, following the Louderbeck precedent; but, Ackerman notes, this step might cause a "procedural nightmare" (p. 71) that would further undermine the House's credibility in the public's eyes. If neither of these options happens, "the responsibility then falls on President Clinton" (pp. 72-73), or, more precisely, on his legal defense team. The last chance to address this matter would fall to Chief Justice Rehnquist, who arguably (following the actions of Chief Justice Salmon P. Chase presiding over the trial of President Andrew Johnson) could exert independent constitutional authority over the impeachment process.

Ackerman presents his case with cogency and skill, though he sometimes falls prey to rhetorical overkill. For example, he dismisses any citation of the Pickering impeachment as authoritative precedent with the comment: "The right response to this appeal to 'precedent' is a belly-laugh" (p. 60). This kind of stylistic excess undermines rather than bolsters an argument in print. Nonetheless, given the novelty of the problem Ackerman raises, his presentation is rigorous, convincing, and highly accessible to the general readers who are his intended audience beyond the Chief Justice.

Ackerman also argues, less persuasively, that the precedent set by impeaching President Clinton will haunt future Presidents confronting a lameduck House controlled by the opposition political party. In this light, the prevailing embarrassment attending the Senate's trial of

President Clinton, and the general relief on the part of Senators and the electorate at the trial's conclusion, suggest otherwise. Given, also, that Democratic members of the House and the Senate resisted the impeachment with vigor and passion, denouncing it as a partisan political move unwarranted by the facts or the law, it is unlikely that the scenario Ackerman envisions (pp. 10, 68-69) of a lameduck House moving against a less popular President will ever take place. Indeed, the only other full impeachment proceeding against a President that in 1868 against Andrew Johnson so discredited the Presidential impeachment process that it was not used again for more than a century. And, by contrast with the Clinton impeachment of 1998-99, the impeachment and trial of Andrew Johnson stated a more plausible, though disputable, case against the President. (To be sure, however, in the early 1970s, before Watergate, nobody ever believed that another Presidential impeachment would take place, nor could anyone have foretold the Clinton impeachment effort, in whole or step by step.)

II. Original Intent and Forensic History

The Case Against Lameduck Impeachment illuminates two overlooked aspects of the argument over original intent, original meaning, or original understanding in constitutional interpretation. Indeed, though Ackerman does not mention the original-intent controversy, he persistently refers in these pages to "the Framers" (meaning the framers of the Twentieth Amendment, despite his use [pp. 11-14] of the capital "F" usually reserved for the framers of the Constitution of 1787) and their intentions as to the amendment's functioning. He argues that he is expounding that intent and seeks to persuade his readers that that intent ought to be given effect.

First, whatever the merits of the controversy over original intent, the problem of lameduck impeachment of a President has never arisen before. That fact complicates another historic first: the Clinton impeachment was the first impeachment of a democratically-elected President.[7] Despite the likelihood that it is best to interpret the Constitution by reference not merely to the ideas and expectations of the generation that framed and adopted it, but by reference to the entire course of constitutional history from 1787 to the present, that history sometimes does not give us the guidance we need. Original-intent evidence and constitutional theory are all that we have available to resolve such conundrums. That holds true whether we are talking about the original Constitution or about such previously unproblematic constitutional provisions as the Twentieth Amendment. Indeed, the Twentieth Amendment apparently has worked so well that it has all but erased the concept of a lameduck Congress from most Americans' understanding.

Second, Ackerman's book illustrates the interaction between the original-intent controversy and the concept of "forensic history," explored by the recent work of Professor John Phillip Reid of New York University School of Law. Reid's work on the American Revolution has led him to investigate the nature of historical and legal argument and the relations between them–whether made by seventeenth-century English polemicists, eighteenth-century British and American controversialists, or twentieth-century American jurists and legal theorists. Reid has coined the term "forensic history" to describe the use of historical evidence and arguments built on that evidence for legal or constitutional ends. As Reid notes, "[this] species of history ... does not meet the canons of historians' history, but for centuries [forensic history] has made legitimate contributions to Anglo-American law, especially to Anglo-American constitutional law."[8] Reid's work on the American Revolution, displaying the uses to which polemicists on both sides of the controversy put the strategies and tactics of forensic history, has led him into a wider inquiry exploring the various uses of forensic history. In part, his project responds to J. G. A. Pocock's influential *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century*,[9] which identifies the constitutional disputes of seventeenth-century England as the fertile ground from which modern historical methodology sprang. Reid disputes Pocock's division of the polemicists of that era into nonhistorical versus historical writers. In Reid's view, both the polemicists opposing the Stuarts and those defending them were practicing forensic history, "not to teach a lesson in history, but to propagate a principle of constitutional law."[10]

Read together, the studies of Reid, Pocock, H. Trevor Colbourn, and the late Douglass G. Adair[11] have valuable and as yet untapped lessons for the original-intent controversy. Specifically, they lead to the conclusion that a critical development for the practice of forensic history was the rise, in the late nineteenth and twentieth centuries, of a profession devoted to the study, writing, and teaching of history. In such modern contexts as the controversy over original intent, invoking history to support a position on a constitutional issue contains an implied warranty that the person citing history to support that position has investigated that history according to professional standards of historical inquiry, analysis, and interpretation. That implied warranty of historical accuracy blurs or cloaks from view the practices and logic of forensic history.

We must not overstate the issue. The problem is not the existence of forensic history, in and of itself, as a form of constitutional argument. Rather, it is the risk of confusion between forensic uses of history and the work of the historian. *The Case Against Lameduck Impeachment* exemplifies this risk, as suggested by the following extracts. First, concluding his discussion of "the lameduck House and the Presidency," Ackerman declares, "It is here where the history I have recited speaks decisively. It establishes beyond all reasonable doubt that lameduck bills of impeachment are not entitled to some specially privileged status in our constitutional law" (p. 41). Second, consider this passage from the conclusion of his discussion of the precedents: "Nevertheless, two centuries of history and fundamental democratic principles point in one direction only–as a general proposition, all pending bills *do* expire with the expiration of the House or Senate that endorsed them.... The only serious question, then, is whether we should create *by implication*, an exception to this salutary, and historically rooted, rule...." (pp. 64-65, emphasis in original). A historian may well agree with Ackerman's reading of history (and this historian does), but the language Ackerman uses to invoke history as authority is the language of forensic history, conscripting the past in the service of the present, rather than the language of the historian.

III. Forensic History and the Breakdown of Constitutional Discourse?

Despite its considerable merits, one large problem with Ackerman's case against lameduck impeachment remains: It is not the kind of argument that wins general favor. Indeed, for most Americans, unversed in the intricacies of constitutional history and law, it is the kind of argument that only a law professor could love. In this respect, Ackerman's case against lameduck impeachment resembles many of the arguments that President Clinton's lawyers made before and during the impeachment fiasco–and many arguments about the definition of impeachable offenses deployed by many historians and constitutional scholars in the fall of 1998.

Many ordinary Americans dismissed or ignored the complex debates over the nature of impeachable offenses and the legal definition of perjury, which preoccupied historians and legal scholars. They had made their own minds up, on quite different grounds. Others, chiefly within the news media, were more vocal in rejecting scholarly intervention in a constitutional controversy. Thus, when on 30 October 1998 a group calling itself "Historians in Defense of the Constitution" purchased a full-page advertisement in *The New York Times* stating that the proposed impeachment of the President would violate the separation of powers and the intent of the framers, the four hundred historians who signed the advertisement met vigorous denunciation by politicians and newspaper editorialists.

Recently, constitutional historians and theorists[12] have agreed that a key component of constitutional governance in the United States has been constitutional discourse–the shared conversation about the Constitution's origins, purposes, and interpretation taking place among what Ackerman (in his major work *We the People*[13]) has called the People of the United States, echoing the Constitution's Preamble. One key community helping to maintain American constitutional discourse has been the scholarly community, which includes overlapping groups of historians, political scientists, legal scholars, and constitutional theorists. The role of the scholarly community in recent constitutional crises, however, has been problematic at best.

One of the most famous components of Ackerman's constitutional theory is his concept of "constitutional moments"–occasions during which constitutional discourse focuses on constitutional politics, reuniting for that purpose the amorphous entity of the People of the United States and bringing the various political, professional, and intellectual communities comprising the People in a shared discussion of what the specific constitutional moment means and how best to respond to it. One would expect the scholarly community to play a vital cohesive role in such constitutional moments. In Ackermanian terms, however, the Clinton impeachment fiasco was a constitutional moment that failed. The indications of this failure were many and obvious: (a) the pronounced lack of interest in the impeachment crisis by most Americans; (b) the seeming disconnect between the popular will as expressed in the 1998 elections and the insistence of the House and Senate Republican leadership to persist with the impeachment effort; and (c) the seeming marginalization of the scholarly community from the impeachment controversy. Few episodes of the fiasco were more painful to watch than the appearance of various panels of historians and constitutional scholars in December 1998 before the House Judiciary Committee, and the studied indifference with which the Committee greeted their arguments. And, in a memorable low point of the Senate trial, Rep. Henry Hyde (R-IL) declared that "an intellectual is someone who is educated beyond his intelligence." (To be sure, politicians, like jurists, are known for their embrace of intellectuals who agree with them and their disdain and contempt for intellectuals who disagree with them.)

Invoking what most Americans would view as the arcana of lameduck congressional action and a constitutional amendment that has proved so successful as all but to erase the problem it was intended to solve, Ackerman's argument met a fate as unsurprising as it might have been undeserved.[14] It may be that the problem is one of the inability of many within the scholarly community to address a wider audience or to command its attention. That failure, however, has ominous portents for the idealized vision of a shared conversation about the Constitution that is the hallmark of constitutional discourse. Both the general rough reception accorded the historians and legal scholars who signed joint letters and advertisements opposing impeachment, and the unceremonious dismissal of Ackerman's case against lameduck impeachment, raise increasingly troubling questions for those who envision a role for scholars of whatever persuasion in public deliberation on significant constitutional questions. The appearance of *The Case Against Lameduck Impeachment* should spark renewed discussion about the role of scholars in notable constitutional controversies.

Notes

I am deeply grateful to Gaspare J. Saladino and Shalom Doron for their comments on this review and its argument.

[1]. On the issue of defining impeachable offenses, see generally R. B. Bernstein, "Review of Emily Field Van Tassel and Paul Finkelman, eds, *Impeachable Offenses: A Documentary History from 1787 to the Present*," H-Law, H-Net Reviews, December,1998. URL: <http://www.h-net.msu.edu/reviews showrev.cgi?path=14939914277036.>

[2]. I take this term from William N. Eskridge, Jr., and Sanford Levinson, eds., *Constitutional Stupidities, Constitutional Tragedies* (New York: New York University Press, 1998), 4. I will review this book for H-Law.

[3]. Indeed, forty-one lame-duck Representatives took part in the House vote. Three lame-duck Representatives, as newly-elected Senators, then voted on the articles of impeachment after the Senate conducted its trial; one, Senator Charles Schumer (D-NY), had voted no fewer than three separate times on the impeachment matter as a member of the House Judiciary Committee, as a member of the full lame-duck House, and as a member of the Senate.

[4] Note, also, that Ackerman cites (pp. 51n37, 57-58 &n42) to William H. Rehnquist, *Grand Inquests: The Historic Impeachments of President Andrew Johnson and Justice Samuel Chase* (New York: William Morrow, 1992; paperback ed., 1999), rather than from more scholarly treatments such as Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge, Mass.: Harvard University Press, 1973; paperback ed., 1999); Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (New York: W. W. Norton, 1973); Peter Charles Hoffer and N. E. H. Hull, *Impeachment in America, 1635-1805* (New Haven: Yale University Press, 1984); or Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* (Urbana: University of Illinois Press, 1992). But see 75n50 (citing Benedict, *Impeachment and Trial of Andrew Johnson* on Chief Justice Salmon P. Chase's conduct of the Senate trial of President Johnson).

[5]. For other accounts of the amendment's origins, see Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York: Times Books/Random House, 1993), 154-156 (emphasizing the consequences of the amendment for the Presidency rather than for lameduck Congresses); David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence: University Press of Kansas, 1996), 268-275 (emphasizing amendment's limiting of lameduck action by Congress and President alike); George Anastaplo, *The Amendments to the Constitution: A Commentary* (Baltimore: Johns Hopkins University Press, 1995), 207-208 (regarding amendment as unnecessary because most of its subjects were formerly left to Congress and still are subject to congressional adjustment); John Copeland Nagle, "Essay: A Twentieth Amendment Parable," *New York University Law Review* 72 (May 1997): 470-494 (emphasizing lameduck Congresses as drafters' focus but noting difference between drafters' intent and effect of amendment's text limiting but not abolishing lameduck sessions).

[6]. Ironically, Hastings is now a member of the U.S. House of Representatives from Florida, and he is the only federal official once subjected to an impeachment who has since had the opportunity to vote on an impeachment.

[7]. Andrew Johnson succeeded to the Presidency in 1865 on the assassination of the elected President, Abraham Lincoln; and Richard Nixon resigned from the Presidency in 1974 to avoid his all-but-certain impeachment, trial, conviction, and removal.

[8]. John Phillip Reid, "Law and History," *Loyola of Los Angeles Law Review* 27 (November 1993): 193-223 (quote at 205).

[9]. J. G. A. Pocock, *The Ancient Constitution and the*

Feudal Law: English Historical Thought in the Seventeenth Century (Cambridge, Eng.: Cambridge University Press, 1957; expanded ed., 1987).

[10]. Reid, "Law and History," 211.

[11]. H. Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1965; reprint, with new introduction, Indianapolis: Liberty Fund, Inc., 1998); Trevor Colbourn, ed., *Fame and the Founding Fathers: Essays of Douglass Adair* (New York: W. W. Norton for the Institute of Early American History and Culture, 1974; reprinted, Indianapolis: Liberty Fund, Inc., 1998).

[12]. For example, see Richard B. Bernstein, "Review Essay: Charting the Bicentennial," *Columbia Law Review* 87 (1987): 1565-1624, and Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, N.J.: Princeton University Press, 1988).

[13]. Bruce Ackerman, *We the People: I. Foundations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991); idem., *We the People: II. Transformations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998). A third volume, tentatively subtitled "Interpretations," is in progress.

[14]. For further discussion of this question, see the valuable article by Bruce A. Schulman, "As American as Hating Intellectuals," *Los Angeles Times*, February 21, 1999.

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