RAOUL BERGER

IMPEACHMENT

THE CONSTITUTIONAL PROBLEMS

ENLARGED EDITION

"THE BEST BOOK" ON THE UNTHINKABLE SUBJECT WE ARE ALL THINKING ABOUT.

The New York Times

IMPEACHMENT:

THE

CONSTITUTIONAL

PROBLEMS

Raoul Berger

Harvard University Press
Cambridge, Massachusetts
London, England

TO MY DEAR FRIENDS
AT HARVARD

Library of Congress Catalog Number 73-75055
ISBN 0-674-44478-7 (paper)

ACKNOWLEDGMENTS

This study was pursued in the incomparable library of Harvard Law School, greatly facilitated by the quarters furnished to me by the Faculty, and in no little part inspired by admission to what is surely one of the goodliest intellectual Round Tables extant.

To members of the Faculty who have generously taken time to read one or the other portions of the manuscript and to give me the benefit of their views I am additionally indebted: Jerome A. Cohen, Verne Countryman, John P. Dawson, Paul A. Freund, Albert Sachs, David L. Shapiro and Samuel E. Thorne. I should be remiss did I not express special appreciation to Morton J. Horwitz, who has always found time to debate some knotty point, and to Stanley N. Katz of the University of Chicago who, during a sojourn at Harvard, called my attention to early American sources which I might have overlooked. To him, too, I owe more than the formal acknowledgment one makes to an editor. My thanks are also due to Morton Keller of Brandeis University.

All sins of commission and omission are, of course, my own. If I have persisted in "error" it was not for want of searching criticism but because one must have the fortitude to adhere to hard-won conclusions which are not shaken by criticism, however high its source.

Quotations from *The Court and the Country,* Perez Zagorin (Copyright © 1969 by Perez Zagorin), are reprinted by permission of Atheneum Publishers. Special thanks are due to the publishers mentioned in the bibliography for lightening the labors of scholarship by permitting quotation without further ado.

Thanks are also due to the editors of the *University of Southern California Law Review* and the *Yale Law Journal* for permission to reprint Chapters II and IV, which appeared therein, respectively.

AUTHOR'S NOTE

Spelling and capitalization in all quotations have been conformed to present-day American usage.

ABBREVIATIONS

Adams	Adams, John, *Works* (Boston, 1850)
1 *Ann. Cong.*	*Annals of Congress,* vol. 1, 1789, 2d ed. (Washington, D.C., Gales & Seaton, 1834; print bearing running-head "History of Congress")
Bacon	Bacon, Matthew, *A New Abridgment of the Laws of England* (London, 1768)
Bailyn	Bailyn, Bernard, *Ideological Origins of the American Revolution* (Cambridge, Mass., 1967)
Berger, *Congress v. Court*	Berger, Raoul, *Congress v. The Supreme Court* (Cambridge, Mass., 1969)
Berger, Executive Privilege	——— "Executive Privilege v. Congressional Inquiry," 12 *UCLA L. Rev.* 1044, 1288 (1965)
Blackstone	Blackstone, Sir William, *Commentaries on the Laws of England* (Oxford, 1765–1769)
Borkin	Borkin, Joseph, *The Corrupt Judge* (New York, 1962)
Brock	Brock, W. R., *An American Crisis: Congress and Reconstruction* (London, 1963)
Campbell, *Chancellors*	Campbell, Lord John, *Lives of the Chancellors* (London, 1848–1850)
Campbell, *Justices*	Campbell, Lord John, *Lives of the Chief Justices* (New York, 1874)
Chafee	Chafee, Zechariah, Jr. *Three Human Rights in the Constitution* (Lawrence, Kan. 1956)
Chandler I	Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003 (1966)
Chandler II	Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970)
Coke, *Institutes*	Coke, Sir Edwards, *Institutes of the Laws of England* (London, 1628–1645)

Cong. Globe (*C.G.*) 40.II.134	*Congressional Globe,* 40th Cong. 2d Sess., p. 134 (other volumes and pages will be similarly cited)
Dewitt	Dewitt, David M., *The Impeachment and Trial of Andrew Johnson* (New York, 1903)
Elliot	Elliot, Jonathan, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, D.C., 1936)
E.R.	English Reports
Farrand	Farrand, Max, *The Records of the Federal Convention of 1787* (New Haven, Conn., 1911)
Federalist	*The Federalist* (New York, 1937)
Hallam	Hallam, Henry, *Constitutional History of England* (London, 1884)
Hatsell	Hatsell, John, *Precedents of Proceedings in the House of Commons* (London, 1796)
Hawkins	Hawkins, William, *History of Pleas of the Crown* (London, 1716)
Hill	Hill, Christopher, *The Century of Revolution* (New York, 1961)
Holdsworth	Holdsworth, Sir William, *A History of English Law* (London, 1903–1938)
Howell	*Howell's State Trials* (London, 1809–1826)
Jefferson, *Manual*	Jefferson, Thomas, *Manual of Parliamentary Practice* (1801)
L.Q.R.	*Law Quarterly Review*
Lomask	Lomask, Milton, *Andrew Johnson: President on Trial* (New York, 1960)
McKitrick	McKitrick, Eric, *Andrew Johnson and Reconstruction* (Chicago, 1960)
Malone	Malone, Dumas, *Jefferson and His Times* (Boston, 1948–1970)
Morison	Morison, Samuel Eliot, *Oxford History of the American People* (New York, 1965)
Otis	Otis, Merrill, *A Proposed Tribunal: Is it Constitutional?* 7 *Kan. City. L. Rev.* 3 (1938)
Plucknett, *Concise History*	Plucknett, Theodore, *Concise History of the Common Law* (Boston, 1956)

Poore	Poore, Ben P., *Federal and State Constitutions, Colonial Charters* (Washington, D.C., 1877)
Rawle	Rawle, William, *A View of the Constitution* (Philadelphia, 1829)
Roberts	Roberts, Clayton, *The Growth of Responsible Government in Stuart England* (Cambridge, 1966)
Rushworth	Rushworth, John, *Historical Collections* (London, 1721)
Russell	Russell, Conrad, "The Theory of Treason in the Trial of Strafford," 80 *Eng. Hist. Rev.* 30 (1965)
Shartel	Shartel, Burke, "Federal Judges: Appointment, Supervision and Removal—Some Possibilities under the Constitution," 28 *Mich. L. Rev.* 870 (1930)
Simpson	Simpson, Alexander, *A Treatise on Federal Impeachment* (Philadelphia, 1916)
Stephen	Stephen, Sir J. F., *History of Criminal Law* (London, 1883)
Story	Story, Joseph, *Commentaries on the Constitution of the United States* (Boston, 1905)
Trevelyan	Trevelyan, G. M., *Illustrated History of England* (London, 1956)
Trial	*The Trial of Andrew Johnson,* Congressional Globe, 40th Cong. 2d Sess. Supp. (1868)
Tucker	Tucker, St. George, ed., *Blackstone's Commentaries* (Philadelphia, 1803)
Warren	Warren, Charles, *The Supreme Court in United States History* (Boston, 1922)
Wharton	Wharton, Francis, *State Trials of the United States* (Philadelphia, 1849)
Wilson	Wilson, James, *Works* (Cambridge, Mass., 1967)
Wooddeson	Wooddeson, Richard, *Laws of England* (Dublin, 1792)
Zagorin	Zagorin, Perez, *The Court and the Country* (New York, 1969)

PREFACE

When Chapter II of this book, "High Crimes and Misdemeanors," was submitted as a separate article to the editors of the *Southern California Law Review* in midsummer of 1970, Watergate and the subsequent possibility that President Nixon might be impeached were buried in the future. Through a remarkable conjunction of events, publication of the book in 1973 coincided with the emergence of impeachment as a distinct possibility, and that chapter suddenly ceased to be merely of antiquarian interest and became highly "relevant." What was originally written for scholars and jurists thus became of interest to a wider public; and it now seems desirable to summarize Chapter II in simpler fashion so that what otherwise might seem like an impenetrable historical thicket will be more widely understood.

HIGH CRIMES AND MISDEMEANORS

The Constitution provides for impeachment for "Treason, Bribery, or *other* high Crimes and Misdemeanors." "High crimes and misdemeanors," the historical sources show, meant both "high crimes and *high* misdemeanors." The key word is "high," and to lose sight of this and consider that the reference is to "crimes and misdemeanors" is to indulge in the kind of thinking which would identify a shoe-tree with a tree. They are entirely different.

In English law, from which our impeachment is borrowed, "high crimes and misdemeanors" were offenses against the state, like treason or bribery, triable by Parliament under the law of Parliament. When

"high crimes and misdemeanors" was first employed there was in fact no such crime as a "misdemeanor." "Crimes and misdemeanors," on the other hand, are offenses against the individual, like murder and assault, triable by courts under the general criminal law. In England impeachment was criminal in nature because removal from office and criminal punishment were united in one proceeding, so that a man could lose his office and his head at one blow.

The Framers made a sharp departure from the English practice—they divorced impeachment and removal from indictment and criminal trial. Political passions no longer could sweep an officer to the gallows. The sole consequence of a separate trial for impeachment by the Senate was to be removal from office and disqualification, plainly not criminal penalties. If the offense also constituted a crime, the offender could be tried criminally before a court. The meaning of this separation is highlighted by the Bill of Rights. If impeachment be regarded as criminal in nature, then an impeachment would preclude indictment, or indictment would preclude impeachment, because the Fifth Amendment forbids that a person shall be "subject for the same offense to be twice put in jeopardy." And since the Sixth Amendment provides for trial by jury "in *all* criminal prosecutions," a conclusion that impeachment is criminal might require trial by jury rather than the Senate. Thus avoidance of such constitutional doubts counsels an interpretation that impeachment is civil in essence, not criminal.

True it is that the Constitution employs criminal terminology in the impeachment provisions, but that derives from the English wedding of criminal and impeachment proceedings. It was convenient for the Framers to use familiar terms in order to identify both the criminal and civil offenses which proceeded from the very same act. In everyday terms, an assault and battery can give rise both to a criminal proceeding and to a suit for damages; and no one would maintain that because the words "assault and battery" are used to describe the acts upon which the suit for damages is based that the suit is in consequence criminal in nature.

Even, therefore, were impeachment to proceed on facts which also constituted an indictable crime, the impeachment proceeding, being civil, would not require proof "beyond a reasonable doubt."

Finally, the Founders were well aware of the meaning of "high crimes and misdemeanors"; repeatedly they referred to the familiar English categories—"subversion of the Constitution" (usurpation of power), "abuse of power," "betrayal of trust," "neglect of duty," and the like. To insist, as defense counsel habitually do, that an indictable crime is required for impeachment would, as Justice Joseph Story stated 140 years ago, enable impeachable offenders to escape scot-free and render the impeachment provisions "a complete nullity." For federal law contains only such crimes as Congress enacts by statute; and in the 185 years since the adoption of the Constitution, Congress has never seen fit to make "usurpation of power," "abuse of power," and the like indictable offenses, reflecting a continuing judgment by the impeachment tribunals that indictable crimes are not a prerequisite to impeachment, as four convictions by the Senate for nonindictable offenses confirm.

Since publication of the book, a much mooted claim has been that impeachment must precede indictment, and that claim is examined in the Epilogue. There too I shall dissect a lengthy memorandum submitted by President Nixon's chief defense counsel, Mr. James St. Clair, to the House Judiciary Committee and broadcast to the nation, wherein Mr. St. Clair invokes history for the proposition that impeachment requires an indictable crime as its basis. It may be worthy of note that my demonstration to the contrary in Chapter II has been accepted by eminent scholars: Professors Thomas Emerson, Willard Hurst, Nathaniel Nathanson, Telford Taylor, and Dean Robert Kramer.

Acknowledgment is made to the editors of the *Yale Law Journal* for permission to reprint the materials set forth in the Epilogue.

Raoul Berger
June 12, 1974

CONTENTS

INTRODUCTION

Impeachment, with us largely a means for the ouster of corrupt judges,[1] was for the English "the chief institution for the preservation of the government." [2] By means of impeachment Parliament, after a long and bitter struggle, made ministers chosen by the King accountable to it rather than the Crown, replacing absolutist pretensions by parliamentary supremacy.[3] Impeachment began in the late fourteenth century when the Commons undertook to prosecute before the Lords the most powerful offenders and the highest officers of the Crown.[4] With the immense accretion of royal power during the Tudor period, however, parliamentary fires were damped and impeachment fell into disuse. Now the King turned to Parliament to legitimate his sanguinary dismissals and reprisals by a bill of attainder, a legislative condemnation to death without a trial.[5] The follies of James I led Parliament once

---

1. Joseph Borkin, *The Corrupt Judge* (New York, 1962).

2. Said by the House of Commons in 1679, quoted 1 Sir W. S. Holdsworth, *A History of English Law* 383 (London, 3d ed. 1922). See Edmund Burke at infra, Conclusion, text accompanying n. 3.

3. Recounted in Zechariah Chafee, *Three Human Rights in the Constitution* 98–140 (Lawrence, Kan., 1956); 1 Holdsworth 380–384 (3d ed. 1922); Clayton Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge, 1966).

4. 4 John Hatsell, *Precedents of Proceedings in the House of Commons* 63 (London, 1796); infra, Chapter II, text accompanying nn. 22–26. In a pioneer study of impeachment, Hatsell explains that the Commons filed complaints with the Lords "against persons of the highest rank and favor with the Crown . . . whose elevated situation placed them above the reach of complaint from private individuals, who, if they failed in obtaining redress, might afterwards become the objects of resentment of those, whose tyrannical oppression they had presumed to call in question." Ibid. Holdsworth states that the House of Lords was "essentially a court for great men and great causes." 1 Holdsworth 380 (3d ed. 1922). See also M. V. Clarke, "The Origin of Impeachment," in *Oxford Essays in Medieval History* 165–166, 173 (Oxford, 1934); Roberts 7. These facts were noted by an early American commentator on the Constitution, William Rawle, *A View of the Constitution* 210 (Philadelphia, 2d ed. 1829).

5. Infra, Chapter I, text accompanying nn. 99–102.

more to flex its muscles and to revive impeachment after a lapse of about 160 years, in order to bring corrupt and oppressive ministers to heel.[6] Direct attack on the King being unthinkable save by the path that led Charles I to the block, Parliament indulged in the fiction that the King could do no wrong but was misled by his ministers.[7]

Where the object of Jacobean impeachments had been the reformation of abuses and "not the venting of private spleen or party hatreds," [8] where the impeachment of the Earl of Strafford (1642) had been designed to break the back of Charles I's absolutist aspirations,[9] the moving force after the Restoration came to be party intrigue in a factional struggle for power.[10] From an "appeal to the nation against wicked ministers," [11] impeachment was transformed into a clumsy instrument for striking at unpopular royal policies; [12] and it was then supplanted by an Address of Parliament to the King asking for removal of a minister. This came to be regarded as a vote of censure and no confidence,[13] and thus by degrees ministerial accountability to the Parliament was achieved.[14] Thereafter impeachment again fell into relative disuse, though the spectacular, long-drawn impeachment of Warren Has-

6. "From 1459 to 1621, a period of 162 years, no impeachment appears to have taken place," 1 Sir J. F. Stephen, *History of Criminal Law* 158 (London, 1883). "It was not till Parliament reasserted itself under James I and Charles I that it became natural or perhaps possible to use impeachment for the punishment of ministers considered corrupt or oppressive." Ibid. See Roberts 23–28. James' ill-considered attempts to promote the interests of Catholicism fanned the flames. Chafee 11.

7. The "difficulties of attacking the King made Parliament throw the chief blame on his outstanding advisers." Chafee 103. Blackstone states: "For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished." 1 Sir William Blackstone, *Commentaries on the Laws of England* 244 (Oxford, 1765–1769). Impeachment, states Roberts 435, "transformed the legal maxim that the King can do no wrong into the political principle that he could not assume responsibility for the unpopular and unsuccessful actions of his ministers." For impeachments grounded on giving pernicious "advice," see infra, Chapter II, text accompanying n. 91.

8. Roberts 32.

9. G. M. Trevelyan, *Illustrated History of England* 403–404 (London, 1956).

10. Roberts 182.

11. Ibid. 220.

12. Ibid. 218.

13. Ibid. 244, 267, 360.

14. See supra, n. 3; J. H. Dougherty, "Inherent Limitations upon Impeachment," 23 *Yale L. J.* 60, 69 (1913).

tings, spearheaded by that paladin of American liberty, Edmund Burke, was under way while the Federal Convention sat in Philadelphia.[15]

Thoughout the heyday of impeachments relatively few judges had been impeached, and these not so much for corruption as for lending themselves to hated royal policies, as when Robert Berkley and John Finch labored on behalf of Charles's "Ship-Money Tax" to circumvent the need of coming to Parliament for money.[16] Even the fall of Lord Chancellor Francis Bacon, ostensibly for corruption, was more, we are told, because he was a "sycophantic minister." [17] And the several Chief Justices and Justices were impeached, not because there was no other way of removing them —for judicial appointments were generally at the royal pleasure [18] and easily terminable, witness James's abrupt dismissal of Coke— [19] but because they had served their royal master too well, and presumably enjoyed his protection.

Once initiated to topple giants—Strafford, Clarendon, Hastings—impeachment has sunk in this country to the ouster of dreary little judges for squalid misconduct.[20] Our preoccupation with judicial impeachment tends to obscure the grand design of the Framers, to whom impeachment of judges was decidedly periph-

15. There were the impeachments of Lord Chancellor Macclesfield, 16 *Howell's State Trials* (Cobbett's Collection) 767 (1725) (London, 1809); Lord Lovat, 18 Howell 529 (1746); Warren Hastings (1787–1795). For abstract of charges in the Hastings impeachment, see Alexander Simpson, *A Treatise on Federal Impeachment* 167–188 (Philadelphia, 1916). The disuse of impeachment testifies not so much to the abandonment of an outmoded instrument of government as to the flexible good sense and incorruptibility of English administration. The parallel removal by Address, become statute for the removal of judges in 1700 (infra, Chapter IV, text accompanying n. 131), has found employment against a judge only once in the intervening centuries. H. R. W. Wade, *Administrative Law* 281 (Oxford, 2d ed. 1967). For an English evaluation in 1791 of the place of impeachment in the future, see infra, Chapter II, n. 214.

16. Impeachment of Justices Robert Berkley and John Finch for high treason and other great misdemeanors, 3 Howell 1283; charges abstracted in Simpson 105–109. Despite the charges of subversion of fundamental law and the like, their real sin was to exert pressure in favor of the "Ship-Money Tax." 2 Henry Hallam, *Constitutional History of England* 15–24 (London, 1884); 1 T. B. Macaulay, *Critical and Historical Essays* 448–450 (London, 1890); Evan Haynes, *Selection and Tenure of Judges* 60 (1944). See also infra, Chapter I, n. 111; Chapter II, nn. 175, 176.

17. Roberts 27.

18. Charles H. McIlwain, "The Tenure of English Judges," 7 *Am. Pol. Sci. Rev.* 217, 218 (1913); 7 Edward Foss, *The Judges of England* 4 (London, 1857); 6 Holdsworth 503–510 (1924).

19. 5 Holdsworth 430–440 (2d ed. 1937).

20. Borkin, passim.

eral. The Framers were steeped in English history; [21] the shades of despotic kings and conniving ministers marched before them.[22] Notwithstanding the predominant fear of oppression at the hands of Congress (in no little part the product of state legislative excess during the 1776–1787 period),[23] and the consciousness that the Executive powers were on the whole rather limited,[24] there was yet a nagging concern (noted by Madison with respect to the earlier period [25]) that the Executive might be transformed into a monarchy.[26] The problem of cabinet "accountability" to Parliament was not really relevant under our tripartite system of government, in which members of the Cabinet are responsible to the President alone.[27] It was not developments in parliamentary government during the eighteenth century upon which the eyes of the Framers were fixed, but rather on the seventeenth century,[28] the great period when Parliament struggled to curb ministers who were the tools of royal oppression. Familiarity with absolutist Stuart claims [29] raised the specter of

---

21. H. T. Colbourn, *The Lamp of Experience* 19, 25, 156, 183, 185 (Chapel Hill, N.C., 1965); Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge, Mass., 1967). See also infra, John Adams, at Chapter IV, text accompanying n. 95; n. 97; n. 4; Chapter VII, text accompanying nn. 17–20; James Wilson, 2 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, D.C., 2d ed. 1836), 449, 470, 487.

Senator Maclay derided some of the "high ideas of English jurisprudence" in the First Congress. William Maclay, *Sketches of Debates in the First Senate of the Uinted States, 1789–91*, 102 (Harrisburg, Pa., 1880).

22. Infra, n. 29; Chapter II, n. 215; Chapter IV, n. 97.

23. Raoul Berger, *Congress v. The Supreme Court* 8–14, 82, 126–127, 132, 182 (Cambridge, Mass., 1969).

24. Raoul Berger, "Executive Privilege v. Congressional Inquiry," 12 *U.C.L.A. L. Rev.* 1044, 1071–1076 (1965).

25. "The founders of our republics," i.e., the States, said Madison, "seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate . . . They seem never to have recollected the danger from legislative usurpations." *The Federalist*, No. 48 at p. 322 (New York, 1937). By the time of the Convention, disenchantment with excesses of State legislatures had set in (Berger, *Congress v. Court* 10–11), but as late as 1791 James Wilson still felt it necessary to admonish the American people that it was time to regard executive and judiciary equally with the legislature as representatives of the people. 1 James Wilson, *Works* 293 (R. G. McCloskey ed., Cambridge, Mass., 1967).

26. Infra, Chapter II, n. 216.

27. Infra, Chapter II, n. 207.

28. For the impact of seventeenth-century revolutionary thought on the Colonists, see Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge, Mass., 1967). Cf. Julius Goebel, Jr., "Constitutional History and Constitutional Law," 38 *Colum. L. Rev.* 555, 563 (1938).

29. Bailyn 29n refers to the "universally despised apologists of Stuart authoritarianism." See infra, Chapter II, n. 215.

a President swollen with power and grown tyrannical; and fear of presidential abuses prevailed over frequent objections that impeachment threatened his independence.[30] So the Framers confided to Congress the power, if need be, to remove the President, to tear down his arbitrary ministers and "favorites." [31] This was but another reflection of colonial partiality to the legislative branch, which, as James Wilson noted, sprang from the fact that the Assemblies were their own, whereas Governors and Judges had been saddled on the Colonists by the King or his minions.[32] And it was yet another cog in the system of checks and balances, an exception to the separation of powers,[33] albeit a narrowly channeled exception.[34] Fear of Executive usurpation emphatically did not prompt the Framers to throw the President and his ministers to the wolves.

The constitutional grant of power to impeach raises important questions. Is it limited to criminal offenses? Is it unlimited? Does it exclude other means of removal? Does it comprehend insanity, incapacity, or nonofficial misconduct? Are members of Congress exempt from impeachment? These and still other questions have yet to receive satisfactory resolution.[35] Bald assertion, proceeding from assumptions that are at war with the intention of the Framers, has too often substituted for analysis. Resort to the historical sources and close analysis of the several textual provisions may throw fresh light on the problems. To grasp the place of impeachment in the constitutional scheme, and its

30. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 64–69 (New Haven, Conn., 1911); cf. infra, Chapter II, nn. 167–171; text accompanying nn. 213–225.

31. Infra, Chapter IV, text accompanying nn. 85–88; Chapter II, n. 228; for royal "favorites" see infra, Chapter II, n. 95.

32. Infra, Chapter II, n. 222; cf. statement of Justice Brandeis, infra, Chapter II, n. 225.

33. Infra, Chapter IV, text accompanying n. 88.

34. Infra, Chapter II, text accompanying nn. 157–172.

35. Kurland states with respect to removal of judges that "there is more literature than learning." Philip Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History," 36 *U. Chi. L. Rev.* 665, 688 (1969). Stolz refers to the opposing views of Burke Shartel and Judge Merrill Otis as "some distinguished though partisan scholarship of about thirty years ago." Preble Stolz, "Disciplining Federal Judges: Is Impeachment Hopeless?" 57 *Calif. L. Rev.* 659, 660 (1969).