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Book Review: The Federal Impeachment Process:
A Constitutional and Historical Analysis. by
Michael J. Gerhardt.

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THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS. By Michael J. Gerhardt.¹ Princeton, N.J.: Princeton University Press. 1996. Pp. xvi, 233. Cloth, \$24.95.

*Frederick Schauer*²

In an age in which special prosecutors proliferate and in which journalists stumble over each other in their competition to see who can bring down the largest number of politicians, it would be plausible to ask whether the impeachment and removal powers set out in Article I of the Constitution retain any contemporary relevance. President Clinton, many of us suspect, worries most about what might be reported in the *New York Times* and the *Washington Post*, and then about what Special Prosecutor Kenneth Starr might do, and then about public criticism or condemnation from prominent political figures, with the possibility of impeachment in the House of Representatives and a trial and conviction in the Senate being far down the list, perhaps little more than an afterthought. In the language of those inside the Beltway, it is doubtful that impeachment is even on the President's radar screen.

Yet despite its seeming decrease in relevance in post-(Richard) Nixon politics, impeachment is anything but a dead letter. Federal judges named Aguilar, Claiborne, Collins, Hastings, and (Walter) Nixon have all recently been through or threatened with impeachment proceedings, and as impeachment declines as the political weapon it was in the early days of the republic, it has appeared to emerge anew in its less political role as one of the most visible means of disciplining members of the federal judiciary.

Against this background, and against the background of increasing concern over whether members of the House and Senate have the inclination to devote the time and energy that the process seems to demand, Michael Gerhardt has written an important and definitive book setting forth the constitutional and procedural issues surrounding the impeachment process. Unlike earlier works on the topic, most notably Raoul Berger's *Impeachment: The Constitutional Problems*,³ Gerhardt's impressive

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3. (Harvard U. Press, 1973).

work is not largely devoted to an historical analysis, nor to recovering the intentions of those who drafted and ratified the impeachment provisions in the Constitution. Chapters 1 and 2 do a competent job with the history, and the impeachment proceedings of the nineteenth and early twentieth centuries are described at various points throughout the book, but the heart of the book is an analysis of the constitutional dimensions and procedural issues surrounding the impeachment proceedings that have taken place subsequent to the impeachment processes directed against Richard Nixon. Much of Gerhardt's analysis, therefore, emanates out of the proceedings culminating in the Supreme Court's decision in *Walter Nixon v. United States*,⁴ and focuses on the vital set of issues relating to the procedures that Congress does and ought to use in conducting impeachment proceedings, the constitutional questions surrounding these procedures and the various ways in which Congress has sought to truncate them and thus to make them more manageable, and the extent to which any of these procedural (or substantive) issues are or should be reviewable by the federal judiciary.

One of the book's chief virtues is that Gerhardt is actually interested in *procedure*, thus setting himself apart from the bulk of American constitutionalists and giving him the expertise and inclination to treat as more than just a passing matter questions of the burden of proof, (pp. 40-42, 112-13, 141-43) admissibility of evidence, (pp. 40-42, 115-16) pretrial discovery, (pp. 45-46) scheduling of proceedings, (p. 45) issue preclusion, *res judicata*, and collateral estoppel, (pp. 42-43; 151-52; cf. pp. 155-56) and, most importantly, the use of trial committees (or experts) in place of the full membership. (pp. 116-17, 153-56) Moreover, Gerhardt wisely and insightfully discusses the important second-order procedural issue of who has the authority to set the procedures. (pp. 169-72) Someone reading this book will get the sense, and an entirely correct sense at that, that on issues of impeachment, as with much of the rest of law, more of substance turns on questions of procedure than is often supposed. And if someone wishes to understand the procedures the House and Senate now employ in cases of impeachment, the practical and theoretical problems with those procedures, and the arguments for and against various proposals for reform, this book is now, and will likely remain for some time, the definitive work.

Much the same can be said about Gerhardt's even more extensive treatment of the issues relating to the general question of

4. 113 S. Ct. 732 (1993).

judicial review of impeachment procedures and outcomes. One such issue is the one that was the centerpiece of *Walter Nixon v. United States*, the question whether congressional procedural determinations are reviewable at all, a question the Supreme Court answered essentially in the negative in *Nixon*. Gerhardt is scrupulously fair in presenting the arguments in favor of justiciability and reviewability (they are not the same thing, although they are related), but in the end he comes down with the Supreme Court and thus against Supreme Court review. Moreover, Gerhardt takes essentially the same position regarding review of *substance*, largely agreeing with Judge Stephen Williams (whose opinion in the Court of Appeals in *Nixon* Gerhardt quotes at length (p. 138)) that if, to use an example of mine and not of Williams or Gerhardt, the House were to impeach and the Senate were to convict a President or a federal judge for wearing white shoes before Memorial Day, then either the weight of public opinion would come down against such an action, or if it did not then there is nothing the courts could be expected to do about the widespread systemic breakdown that could allow such a thing to happen.

If impeachment proceedings are judicially unreviewable, as is largely the case as a matter of current law and as Gerhardt argues should be the case to an even greater extent, (pp. 118-46, 171-72) then the role of Congress must be seen differently. Under conditions of non-reviewability, Gerhardt argues, the fact of non-reviewability makes Congress a *constitutional decisionmaker* in a particularly strong sense, and Gerhardt's argument for and endorsement of this consequence is one of the important lessons of this book.

Once Gerhardt arrives at this point, however, he appears to lose an opportunity to support this theme in the most effective way. For if Gerhardt is correct in believing that we should understand Congress, especially in its impeachment mode, as a constitutional actor in its own right, then one would expect from this book much more in the way of the flavor of what Congress actually *does* when it is exercising these responsibilities, and what actually motivates members of Congress in carrying out their responsibilities within the process. Yet apart from general description, and a bit more detail in some of the endnotes, (e.g., pp. 191, 193, 213, 215) Gerhardt appears far less interested in what Congress in fact does than one might expect from the general tenor of his argument about Congress as an independent constitutional actor. But if we are interested in congressional behavior

vis-a-vis impeachment proceedings, we might be interested in knowing whether members of Congress who are lawyers dominate the process, and, if so, in what form; whether members of Congress with longer tenure or safer seats behave differently in impeachment proceedings from those members whose every move and every statement is more likely to be monitored and criticized by a political opponent; whether the House behaves differently from the Senate, even controlling for the different tasks each is assigned in the process; whether members of Congress are more involved *personally* (as opposed to their staffs) in impeachment matters than they are with respect to ordinary legislative tasks; and so on. Gerhardt says that these kinds of questions are beyond the scope of the book, (pp. x - xii, 137) but that seems more of a jurisdictional fiat than a claim that fits comfortably with the theme of the book, even recognizing (pp. xi-xii, 45) that some dimensions of the process are conducted out of the most obvious forms of public scrutiny. Rather, the extent to which the theme of the book stresses congressional responsibility cries out for a closer attention to the way in which Congress acts in such matters than we find in Gerhardt's book.

There is an even larger question that surrounds this one, and that is the question whether this is an area in which Congress takes its constitutional responsibilities seriously, since Congress's ability and inclination to do that is the linchpin of Gerhardt's normative argument. And on this question, Gerhardt exposes the fact that this book's greatest strength—its intelligent, persuasive, and careful lawyerly analysis of legal and constitutional arguments, appropriately supported both by the case law and by the relevant constitutional history—is closely related to its greatest weakness. Like the good law professor that he is, Gerhardt too often relies on intelligent speculation in areas in which there actually is, or, more often, could be developed, harder empirical data. Yes, it is reasonable to suppose, as Gerhardt supposes, that Congress, unreviewed and unreviewable, might internalize its constitutional responsibilities to a substantial degree, just as Parliament of the United Kingdom internalizes the non-canonical norms that together comprise the British constitution. (pp. 137, 178) Yet however reasonable this speculation seems, congressional behavior in other areas may inspire less confidence. When we examine the hearings and various public statements over the years on the question of campaign finance reform, we discover that there appears to be no member of Congress who has publicly stated that he believes that campaign finance reform is constitutionally permissible (as against First Amendment

objections⁵) but inadvisable as a matter of policy, and no member of Congress who has publicly stated that she believes that campaign finance reform would be wise public policy but is constitutionally impermissible because of the kinds of First Amendment constraints that have been recognized since *Buckley v. Valeo*.⁶ Every member of Congress who has addressed the issue appears to believe either that campaign finance reform is inadvisable *and* unconstitutional, or advisable and not unconstitutional. And in the wake of this remarkable coincidence of policy and constitutional views, one might wonder whether Congress has the capacity to engage in the kind of independent constitutional analysis that is at the heart of Gerhardt's prescriptions.

The inference I draw from an isolated issue might be wrong, and I recognize that it is open to question ("tacky" might be a better description) whether the appropriate support for my criticism of Gerhardt for being insufficiently sensitive to the empirical dimension of political and legislative behavior is my own largely unsupported speculation. Still, even though I cannot in this context test the hypotheses I find reasonable, it remains worthwhile, I believe, to underscore the testability and investigability of the claims about congressional behavior that are central to Gerhardt's argument. Moreover, my quarrel is methodologically neutral. Although one might imagine investigating congressional behavior through the use of surveys or analyses of large data sets, one can imagine doing the same thing in the impeachment context by exploring in some detail just how members of Congress actually behaved in the small number of recent cases that are Gerhardt's focus.

Such an inquiry might well support the conclusion that impeachment is different, and that congressional behavior in impeachment cases might be more sensitive to second-order constitutional concerns than it is in most other cases. The evidence that Gerhardt does provide appears to support the possibility that Congress, like the courts, behaves at its best when the political stakes are at their lowest, as in most modern cases involving impeachment of federal judges for misconduct, or when the future of the republic is seen to be at risk, as with the Watergate and Richard Nixon impeachment hearings. It is just in the middle, perhaps, that the hurly-burly of ordinary politics makes constitutional conscientiousness beyond the grasp of so many

5. See, e.g., *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309 (1996); *Buckley v. Valeo*, 424 U.S. 1 (1976).

6. 424 U.S. 1 (1976).

policymakers. Yet even this picture might be slightly too optimistic. When we observe the unalloyed and unseemly partisanship that has surrounded both Whitewater and the ethics charges against Newt Gingrich, the Speaker of the House, there is cause to wonder whether congressional ability to deal with charges of misconduct in a non-partisan, non-ideological, and non-demagogic manner is getting worse rather than better. And if that is the case, then one wonders whether the optimism about congressional ability to rise above raw politics that undergirds Gerhardt's arguments for non-reviewability is justified.

The answer to that question, however, lies neither in my speculations nor in Gerhardt's, but in the world of empirical fact, a world that is less present in this book than it might have been. It is, of course, all too easy to criticize an author for not writing a book he did not set out to write, but it is central to my claim here that the empirical and political dimensions of actual impeachment proceedings are rendered relevant not by my own interests, but by the central line of Gerhardt's own claims.

That Gerhardt leaves the reader—or at least this reader—wanting more on the empirical and political side may be testimony to the power and success of Gerhardt's constitutional and legal arguments. This book is by some margin the most successful analytic and constitutional analysis of impeachment issues to have been written, and it will be the standard work for years to come. The substance of Gerhardt's persuasive arguments, however, demands an inquiry beyond the covers of this volume, and while we no longer await the definitive constitutional analysis, we still wait for the definitive analysis of congressional behavior in impeachment cases, an analysis without which it is impossible to evaluate the deeper plausibility of Gerhardt's central arguments.