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'Negligence Or Perfidy'

By Anthony Lewis

John W. Davis, great figure of the bar in the first half of this century, once took part in an impeachment proceeding. He was a member of the House of Representatives when it impeached Judge Robert W. Archbald in 1912 and was one of the managers on the part of the House in the trial before the Senate.

In a lengthy argument, Mr. Davis dealt with a central legal question: When the Constitution says that Federal officers may be impeached for "high crimes and misdemeanors," does it mean to limit impeachable offenses to acts otherwise punishable as specific crimes? Mr. Davis's answer was no, and the statement makes interesting reading today.

The word "misdemeanor" in this use "has always been treated as having a meaning of its own in parliamentary law," he said. "One impeachment proceeding after another has been based upon offenses not within the law of crimes."

He quoted Alexander Hamilton's definition of impeachable offenses in the 65th Federalist: "Offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust."

In the case of judges, Mr. Davis said, impeachable offenses would include "notorious partiality and favoritism, indolence and neglect . . . personal vices as intemperance." None of those might be ordinary crimes, he said, but they were "calculated to

bring the court into public obloquy and contempt and to seriously affect the administration of justice."

Modern scholarship agrees with the Davis analysis. The word "misdemeanors," it is now widely accepted, was used by the Framers in a particular historical sense. Raoul Berger, the leading writer on impeachment today, shows that in the ancient English precedents "high misdemeanors" were political crimes such as, in Blackstone's word, "maladministration."

Again, many authorities today would agree with an implication in the Davis view: that what is impeachable may depend on the nature of the function involved. Abusive language or open bias would be disabling in a judge, for example, but not necessarily in an executive official. When the Constitution says that judges shall serve "during good behavior" it in effect defines "misdemeanors" for them in terms of their special role. An impeachable offense, then, is serious misconduct that injures the performance of an official function.

As for the President, we have considerable historical evidence of what those who wrote the Constitution thought should be grounds for his impeachment. In a broad sense, they had in mind abuse of power.

"The Executive will have great opportunitys of abusing his power," Edmund Randolph of Virginia warned in the discussion of impeachment in the Constitutional Convention of 1787. James Madison spoke of defending the community against the "negligence or perfidy of the chief magistrate."

Madison spoke on the subject again in the very first Congress that sat under the new Constitution. On May 19, 1789, the House debated whether to let the President not only appoint but remove the Secretary of State and others whose offices were being created.

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"I think it absolutely necessary that the President should have the power of removing from office," Madison said. "It will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct so as to check their excesses."

When Gerald Ford appeared before the House Judiciary Committee in the hearings on his nomination for Vice President those words of Madison were read to him. Mr. Ford was asked whether he "would think that was good law." He replied, "I would think so."

It is of course Mr. Ford's assumption of the Vice-Presidency that quickens public and especially Congressional interest in impeachment. So manifest is Republican yearning for an easy transition to a Ford Administration that the change is increasingly unlikely to require going through the process of impeachment. But the process must begin.

That there is ample basis to begin is evident if one considers only, for a starter, Madison's words about a President who "neglects to superintend" the conduct of those he appoints 'so as to check their excesses." But what troubles the country, what embarrasses Congressional Republicans, is something more than the legal or moral excesses of President Nixon's appointees. It is defined, in a way, by the hope that we see in Gerald Ford of a different kind of Presidency: open, decent, respectful in its use of power.

John W. Davis, trying to generalize about the attitude required of American officials, spoke of "noblesse oblige." By that old-fashioned phrase he may have meant the obligation on those given power in a democracy to respect the public origin of that power —to understand, as a matter of fundamental legitimacy, that their authority is r[illegible] personal.