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Thinking About Impeachment (I)

IT WAS ONLY about a year ago that Richard Kleindienst, then Attorney General of the United States, told a congressional committee that if the members of Congress did not like a particular policy the President was pursuing, they could always impeach him. The remark was freighted with contempt. It was a taunt. Mr. Kleindienst knew (or at least he "knew" in the context of that innocent and now forgotten time) that his remark was less an invitation to the exercise of a congressional prerogative than a cynical reminder of the legislators' inability to exert a reasonable degree of influence on the Executive Branch. It is a measure of how far we have traveled, propelled by the force of continuous disclosure of official wrongdoing over the past year, that the same Congress, along with the public it represents, now finds itself in the midst of a dead serious and highly consequential debate on impeachment. What are the proper grounds for impeachment of a President? And has President Nixon, by his conduct in office, made himself subject to removal from office on these grounds? These are the questions on which all discussions turn.

It is important to remember that we *are* in fact talking about questions here, not answers. The sole purpose of the proceedings now being undertaken by the House Judiciary Committee is to explore the evidence and decide whether, on the basis of it, to report a bill of impeachment for the full House membership to vote on. But because even this prospect seems so momentous and the precedents are so few, there has been a lot of extravagant and mischievous talk on the subject. Consider, for example, the admonition of Senate Minority Leader Hugh Scott not long ago that "history does not look kindly on regicide." Regicide? Surely, the killing of a king is the wrong analogy here. America does not have a king; we have an elected leader who was made subject to a constitutional process of removal from office in large part to distinguish him from a king. And that constitutional process is a lawful and deliberate one, not to be confused with summary execution or politically inspired acts of violence. To say this, of course, is only to begin to define the nature of the impeachment process. And that definition must itself start with at least some general agreement on the standards by which a President should be judged in the matter of his removal from office.

Here again, there has been a great deal of confusion and a certain amount of deliberate obfuscation. Principally it concerns the misbegotten idea that an impeachment proceeding is synonymous with prosecution in the courts for a criminal offense. And from this it has been wrongly concluded that an impeachable offense must itself be a demonstrable violation of a criminal statute. It is this confusion which has led so many members of Congress—not all of them White House supporters—to dismiss the validity of impeachment proceedings against Mr. Nixon on the grounds that there is not what they call "clear-cut evidence" that he has perpetrated an "indictable offense." The point is that we are talking about two entirely different processes, with different purposes, for which, accordingly, two quite different tests of conduct apply. The object of impeachment proceedings is to decide whether an office holder should be removed from office. It is not the prosecution or punishment of an individual for the commission of a crime. And from that, the crucial distinctions flow.

Perhaps the best and most concise explanation of the relationship between these two processes is that made by a committee of the Association of the Bar of the City of New York:

> . . . the grounds for impeachment are not limited to or synonymous with crimes (indeed, acts constituting a crime may not be sufficient for the impeachment of an officeholder in all circumstances). Rather, we believe that acts which undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law.

The report alluded to the kinds of act which met the test. They included, "acts which constitute corruption in, or flagrant abuse of, the powers of official position." The report continued that impeachable offenses:

> . . . may also be found in acts which, without directly affecting government processes, undermine that degree of public confidence in the probity of executive and judicial offices that is essential to the effectiveness of government in a free society. . . . At the heart of the matter is the determination—committed by the Constitution to the sound judgment of the two Houses of Congress—that the officeholder has demonstrated by his actions that he is unfit to continue in the office in question.

When you think about the implications of what the bar association has said—the implications of the argument itself—it becomes easier to understand why so many people seek refuge from the burdens it imposes in the simpler test of a provable criminal offense. For the criminal code, insufficient as it may be as a guide in the matter of impeachment, at least provides a relatively clear and familiar test of wrongdoing, one that is far less susceptible to political manipulation and one that requires far less self-discipline on the part of those who apply it. By contrast, impeachment proceedings, if they are to be conducted at once fairly and rigorously, require much more. They constitute relatively uncharted terrain. And that terrain is full of dangers and temptations. The bar association committee's report said as much and pointed out some of these. Chief among them would be the danger of confusing political dissatisfaction and ideological disagreement or personal dislike with evidence of actual and extraordinary misconduct of office—misconduct that affects the wellbeing of every citizen of the country as distinct from normal political activities that displease or infuriate some sizable part of the electorate.

Somewhere, then, between the narrow reading of impeachment proceedings as a form of criminal prosecution and the broad (and equally misguided) reading of impeachment proceedings as a mechanism to wreak political vengeance for no demonstrable evidence of unfitness, lies the relevant area of concern and of judgment. Within this area, perhaps the most difficult and yet the most important matter that needs defining is that of presidential responsibility, a definition establishing precisely what Mr. Nixon should and should not be held accountable for. Some useful thoughts about all this are contained in articles by Joseph A. Califano Jr. elsewhere on this page today, and by George F. Will on the opposite page.

Even while this important issue is being resolved, however, the House Judiciary Committee must deal with another problem—how to go about acquiring the material it regards as essential to its deliberations. Material that is likely to be relevant is lying all over the place now: in the White House and presumably elsewhere in the Executive Branch; in the Ervin Committee files; and certainly among the evidence collected by the Special Prosecutor, some of which has been passed along to grand juries. In this connection, the principal questions concern the White House's willingness to cooperate with the committee, the Special Prosecutor's authority to do so, and the committee's view of its own powers in relation to both. These and other aspects of the impeachment proceedings will be the subject of subsequent editorials.