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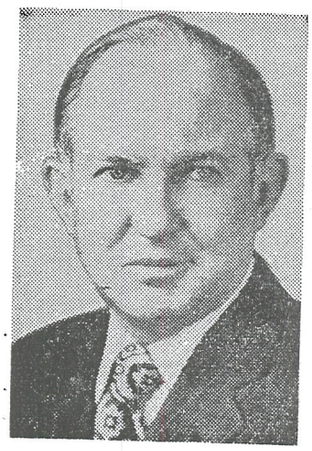
Getting Rid of A President on General Principles

Reno, Nev.

WE HAD BEEN talking for nearly an hour of impeachment, mostly in terms of the law, and a student on the second row was struck by inspiration. Under the Constitution, he noted, a president now can be impeached only for treason, bribery, or other high crimes and misdemeanors.



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"How about a constitutional amendment," he proposed, "that would add 'or on general principles.'"

If the House is going to go in the direction suggested by counsel for the Judiciary Committee, such an amendment might be a fine idea. The staff has concluded that an impeachable offense need not be a criminal offense, but merely a serious offense against the public interest.

Granted, this line of reasoning has respectable support among constitutional scholars. Raoul Berger of the Harvard Law School, perhaps the leading authority in the field, came to this same conclusion in his erudite study of impeachment last year. One has to be impressed by Berger's careful tracing of the meaning that should be attached to "other high crimes and misdemeanors."

Yet the non-criminal approach is fraught with danger to our whole political system.

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THERE IS general understanding among both lawyers and laymen, created over centuries of the law, about what constitutes a "criminal offense." There is no such clear understanding about a "serious offense against the public interest." This line of thinking takes us close to the "only honest answer" once propounded by Gerald Ford, when he was asked in the midst of the uproar over Justice Douglas to define an impeachable offense.

"The only honest answer," said Ford, "is that an impeachable offense is whatever a majority of the House considers it to be at a given moment in history."

Ford's blunt definition echoes the famed aphorism of Charles Evans Hughes, that the Constitution "is what the judges say it is." Hughes later regretted his brevity, and doubtless Ford, in a less impassioned hour, would reconsider his Humpty Dumpty view.

If this is all there is to it — that an impeachable offense is whatever the House says it is — the Nevada student is on the right track. Let us impeach a president "on general principles" and stop fooling around.

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BUT LET US pause. Once we leave the high hard ground of criminal law, with its rules of evidence and its protections of due process, we plunge into a swamp of faction, prejudice and impulse. We invite a situation in which a president serves merely at the pleasure of the Congress. Our constitutional structure could be undermined before we know it.

To be sure, no one would contend that an impeachment proceeding can be equated absolutely with a criminal prosecution. Counsel for Mr. Nixon could not move for a change of venue, or plead prejudicial pretrial publicity, or challenge the 100 jurors for bias.

In the trial of Andrew Johnson in 1868, the rulings of Chief Justice Chase on the admissibility of evidence were promptly overturned by the senators present. There are Wonderland aspects.

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SUPPOSE THE HOUSE proceeds to impeach Mr. Nixon, in effect, on "general principles." Suppose the Senate convicts on a plainly non-criminal offense. Could such a conviction be reviewed and reversed by the Supreme Court? Most persons might instantly answer "no," but Professor Berger argues persuasively that the Senate's "sole power to try" impeachments does not exclude Supreme Court review.

The case of Adam Clayton Powell is in point: The House tried to expel the Harlem congressman, but the court ruled that the House had acted unconstitutionally in going beyond the "qualifications" for membership laid down in Article I. If the Senate should go beyond the constitutional provisions for impeachment laid down in Article II, the Supreme Court conceivably might reverse the outcome.

What a scenario! The next step would be to impeach the Supreme Court, throw the justices onto the street, declare Gerald Ford president and confirm a new court. The vista is marvelous. But by such a time, of course, the election of 1976 would have intervened.

It can't come too soon.

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