

Letters to the Editor

Of Impeachable Offenses and the Andrew Johnson Case

To the Editor:

The staff study prepared for the House committee on impeachment has been made public. The Constitution states the President may be impeached for "high crimes and misdemeanors." The study does not attempt to define impeachable offense, but it would include actions which might represent "grave misconduct, constitutional wrongs that subvert the structure of the Government or undermine the integrity of the office and even the Constitution."

This sounds laudable; however, it is an insidious amplification of the Constitution which would augur, if adopted, a profound change in the institution of the Presidency as a strong, dynamic executive branch of the Government, necessary to carry on the tremendous responsibilities of world leadership thrust upon our nation.

In this fast-moving world, its imperatives have demanded that all our recent Presidents assert a command of power which might be interpreted as "constitutional wrongs that subvert the structure of our government."

This may be found in Roosevelt's agreement with Churchill in 1940 in sending to England destroyers for bases and in his Supreme Court packing move; Truman's steel industry take-over; Kennedy's commitment of tactical support of the Bay of Pigs, ending in a fiasco and resulting in the awesome missile crisis in 1962, and now in Nixon's authorizing the bombing in Cambodia and the blocking of legislated housing funds.

In each instance, it should be remembered, the President acted in the

national interest according to the dictates of conscience and in the belief that it was within the discretionary power of the Presidency.

Would not law-school moot courts have a fertile field for post mortem impeachment trials of our former Presidents? And would not future Presidents feel hamstrung because of threatened impeachment for their political decisions and executive acts considered anathema by their Congressional political opponents?

Whatever thoughts were uttered by some delegates during the Constitutional Convention of 1787, the fact is that their agreement of what should be impeachable conduct was finally written in the words found in the Constitution. And there has been no change of this since its adoption.

Only one impeachment proceeding in the history of our country has been brought against a President. It was against Andrew Johnson in 1868. Might it be considered a precedent? The House used as the criterion of impeachable offense the severe abuse of power; however, the Senate then considered only criminal conduct and did not impeach him.

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New York, Feb. 25, 1974

The writer is a retired Justice of the Supreme Court of the State of New York.

To the Editor:

The Doar-Jenner memorandum to the House Judiciary Committee, which responds to the historical facts, brings the contours of impeachable offenses

into high relief. Such is the importance of the nature of impeachable offenses as to impel me, however, to differ with the view expressed in your Feb. 24 Week in Review by James N. Naughton that in the impeachment of President Andrew Johnson the Senate "sought proof of criminality and acquitted the President." Having studied the sprawling Johnson trial at first hand, and in particular the opinions filed by the recusant Republican Senators who saved Johnson from conviction, I was convinced that his acquittal did not turn on the failure to prove criminality.

The core of the charges was that Johnson had violated the Tenure of Office Act in removing Secretary of War Edwin Stanton, and the trial largely turned on two issues: (1) the statute did not embrace the Stanton discharge and (2) if it did, it was an unconstitutional invasion of Presidential prerogatives. It was these considerations, in my judgment, not the absence of criminality, that were decisive.

Mr. Naughton justly emphasizes the "vast" differences between the Johnson and Nixon situations. As he states, "The Johnson impeachment represented . . . a basic clash in philosophy over reconstruction," in which the victorious North had demonstrated at the mid-term elections that it stood behind Congress. President Nixon himself has condemned the illegal activities of his subordinates; and the question (among others) of his responsibility presents no "basic clash in philosophy" over divisive national issues.

RAOUL BERGER
Concord, Mass., Feb. 24, 1974