

MAR 20 1974

NYTimes

The Key Question: How High the Crimes?

By Peter Grose

It would be a sad thing for the Republic if the grounds for impeaching President Nixon came down to something legally watertight but, in the scope of things, trivial—say, a technical violation of a little-used Federal statute or a personal-income-tax fraud, though at least the latter has some heritage of legitimacy as a means of punishing dubious characters who can evade trial on more serious charges.

An interesting reversal of public sentiment appears to have occurred in the last two weeks. The conventional assumption used to be that unless President Nixon could be shown in open violation of the law, then impeachment would not be justified, either constitutionally or as a matter of political reality. "Evidence of a crime" was sought before the undecideds could make up their minds for or against impeachment. Abuses of public trust, misuse of the powers that the electorate had put into his hands—as charges, these things often seemed too amorphous or, even worse, just politics as usual.

With the conspiracy indictments of his once-most-trusted agents by the Watergate grand juries, plus Mr. Nixon's own damaging admissions about weighing the options in paying hush money to petty burglars who could cause him political harm, the situation is reversed. There now seems a good possibility that the House of Representatives may find a prima facie case that Mr. Nixon violated a Federal statute. Yet, even assuming that a majority of House members find "evidence of a crime" at hand, would the majority of the American people really accept the impeachment of a President because of something called "misprision of a felony?" Only grief would follow if Mr. Nixon were forced out of the Presidency on grounds that left any reasonable basis for an unconvinced faction to coalesce around him in his involuntary retirement.

So the old problem of defining an impeachable offense remains lively. Learned tomes have been composed on the meaning of "high crimes and misdemeanors," that deceptively concise phrase from the Constitution that holds the key to the propriety of all the impeachment proceedings. For all the controversy, there is ample evidence that in selecting this phrase from English jurisprudence the framers of the Constitution "knew what they meant," to borrow Mr. Nixon's phrase. It is superfluous and misleading to impose a literal, modern-day meaning onto a technical, historical term.

The fact that the phrase had a special meaning to the constitutional authors is not contested by either side in the current argument. President Nixon's lawyers stated in their brief: "High crimes and misdemeanors" was the standard phrase used by those [English] impeachments from 1376 onwards. To the framers it had a unitary meaning, like 'bread-and-butter issues' has today."

To parse this phrase in search of literal meaning, therefore, is as uncomprehending as to challenge whether the price of crackers and mayonnaise can legitimately be considered a bread-and-butter issue.

"The phrase 'high crimes and misdemeanors' was historical terminology which encompassed breaches of public trust not amounting to crimes," concluded a committee of New York City's Association of the Bar. The bipartisan study of the House Judiciary Committee staff reached the same conclusion: "Particular allegations of misconduct under that heading were not necessarily limited to common law or

statutory derelictions or crimes."

The American precedents leave no room for ambiguity. Since the founding of the Republic thirteen officeholders have been impeached on a total of 83 charges; less than one-third of these accusations "explicitly charged the violation of a criminal statute or used the words 'criminal' or 'crime' to describe the conduct alleged," the Judiciary Committee staff argued. Four times the Senate has convicted on impeachment, and in only one of these cases—all involved Federal judges—did the charges include criminal offenses.

Constitutional practice clearly permits conviction on impeachment even in the absence of a criminal violation. In today's political atmosphere, however, such a move could be taken as an affront to much of the American electorate. As it happens, the way evidence is accumulating, this aspect of the issue may become moot in Mr. Nixon's situation.

Now the case is being turned around. It would be an affront to the meaning of the Constitution to pin as serious a step as impeachment on a narrow statutory violation. The charges against the President must be drawn as broad-

ly as all the evidence permits—including alleged criminal violations, of course, but encompassing as well the particular offenses that only the wielder of great public power is capable of committing.

The ultimate case against Mr. Nixon must be grounded on the totality of an impeachable offense as the framers of the Constitution meant it—in lawyers' language, "a gross breach of trust or serious abuse of power."

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