

# Impeachment: The Constitutional Problems

Raoul Berger

Impeachment, to most Americans today, seems to represent a dread mystery, an almost parricidal act, to be contemplated, if at all, with awe and alarm. It was not always so. Impeachment, said the House of Commons in 1679, was "the chief institution for the preservation of the government"; and chief among the impeachable offenses was "subversion of the Constitution." In 1641, the House of Commons charged that the Earl of Strafford had subverted the fundamental law and introduced an arbitrary and tyrannical government. By his trial, which merged into a bill of attainder and resulted in his execution, and by a series of other seventeenth-century impeachments Parliament made the ministers accountable to it rather than to the King and stemmed a tide of absolutism that swept the rest of Europe. Thereafter, impeachment fell into relative disuse during the eighteenth century because a ministry could now be toppled by the House of Commons on a vote of no confidence.

Our impeachment, modeled on that of England, proceeds as follows: a committee of the House of Representatives may be instructed to investigate rumors or charges of executive misconduct. If the committee reports that it found impeachable offenses, it is directed by the House to prepare articles of impeachment, which are the analogue of the accusations contained in the several counts of an indictment by a grand jury. Strictly speaking, it is the articles that constitute the impeachment. The articles, if approved by a majority of the House, are then filed with the Senate.

At that point, the articles are

served by the Senate on the accused, who is given time within which to file an answer to the charges. At an appointed time, the Senate convenes as a court. If it is the President who is being tried, the Chief Justice of the Supreme Court acts as the presiding officer. Evidence is subject

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to the exclusionary rules applied by a court and the accused is permitted by his counsel to cross-examine witnesses and to make arguments for acquittal. A vote of two-thirds of the Senators present is required for conviction.

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out-worn, clumsy institution, not particularly well-suited to a tripartite scheme of government protected by the separation of powers. Why, then, did they adopt it?

The reason lies in the fact that the Founders vividly remembered the seventeenth-century experience of the mother country. They remembered the absolutist pretensions of the Stuarts: they were haunted by the greedy expansiveness of power; they dreaded usurpation and tyranny. And so they adopted impeachment as a means of displacing a usurper — a President who exceeded the bounds of the executive's authority.

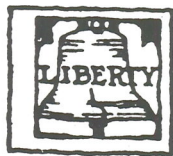
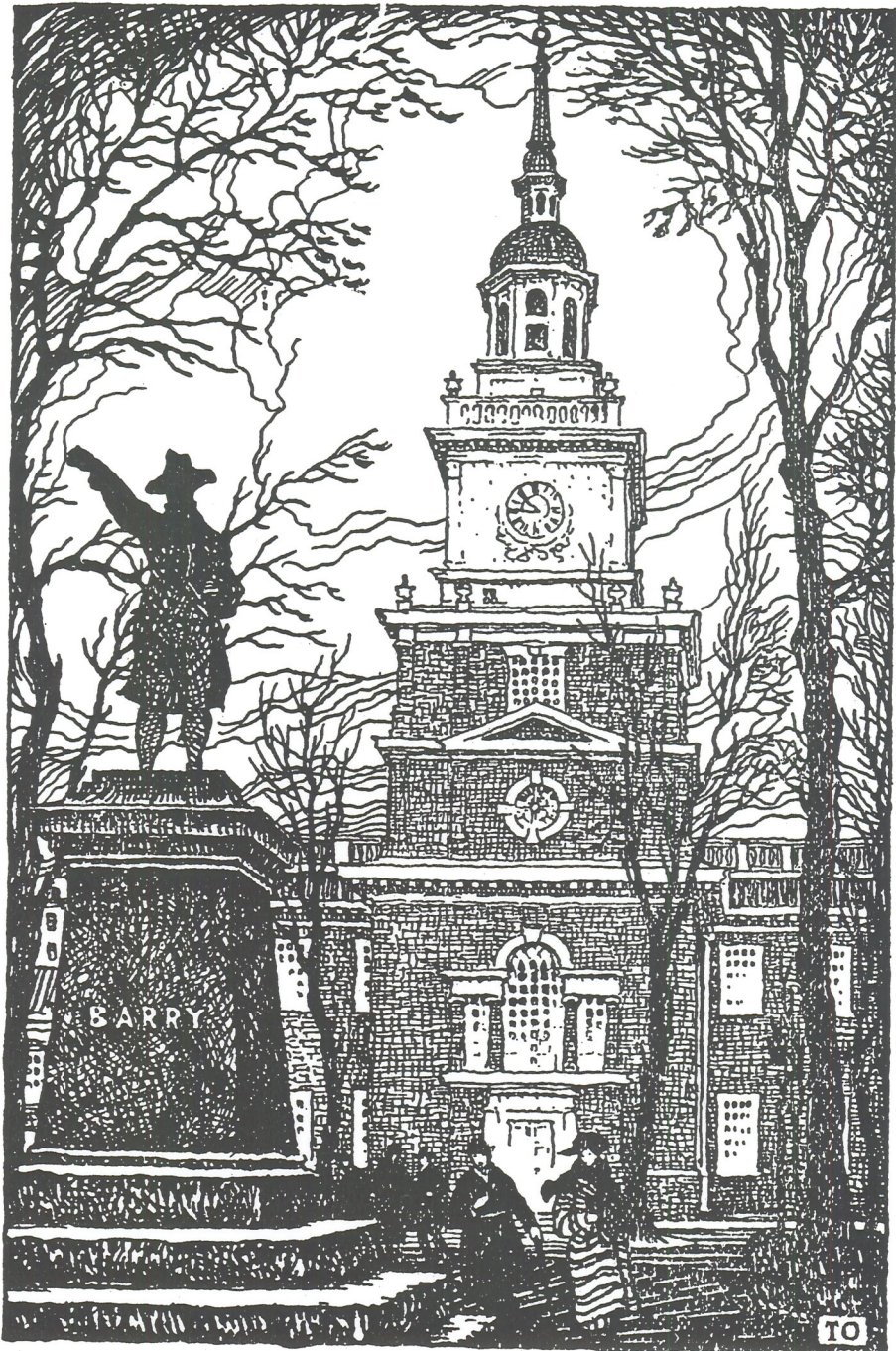
The colonists, after all, regarded the executive, in the words of Thomas Corwin, as "the natural enemy, the legislative assembly the natural friend of liberty." Throughout the colonial period, they had elected their own assemblies and trusted them as their own representatives. The governors, on the other hand, were often upper-class Englishmen with little understanding of American aspirations, who had been foisted on the colonists by the Crown. Hence, Congress was given the power to remove the President. This power, it must be emphasized, constitutes a deliberate breach in the doctrine of separation of powers, so that no arguments drawn from that doctrine (such as executive privilege) may apply to the preliminary inquiry by the House or the subsequent trial by the Senate.

The Constitution adopts the old English formula: impeachment for and conviction of "treason, bribery, or other high crimes and misdemeanors. Because "crimes" and "misdemean-

ors” are familiar terms of criminal law, it is tempting to conclude that “high crimes and misdemeanors” is simply a grandiloquent version of ordinary “crimes and misdemeanors.” Not so. As the terms “treason” and “bribery” suggest, these were offenses against the state, political crimes as distinguished from crimes against the person, such as murder. The association of “treason, bribery” with “other high crimes and misdemeanors” indicates that the latter also refer to offenses of a “political” nature. They were punishable by Parliament, whereas courts punished “misdemeanors,” that is, lesser *private* wrongs. In short, “high crimes and misdemeanors” appears to be a phrase confined to impeachments, without roots in the ordinary English criminal law and which, so far as I could discover, had no relation to whether a criminal indictment would lie in the particular circumstances.\* Certain political crimes — treason and bribery, for example — were also indictable crimes, but English impeachments did not require an indictable crime. Nonetheless, the English impeachment was criminal because conviction was punishable by death or imprisonment.

\*The phrase “high crimes and misdemeanors” is first met, not in an ordinary criminal proceeding, but in the impeachment of the Earl of Suffolk in 1386. At that time there was no such crime as a misdemeanor. Lesser crimes were prosecuted as “trespasses” well into the sixteenth century, and only then were trespasses supplanted by “misdemeanors.” As “trespass” itself suggests, “misdemeanors” derived from private wrongs, what lawyers call torts. Fitzjames Stephen stated that “prosecutions for misdemeanors are to the Crown what actions for wrongs are to private persons.”

Although “misdemeanors” entered into ordinary criminal law, they did not become the criterion of the parliamentary “high misdemeanors.” Nor did “high misdemeanors” find their way into the general criminal law. As late as 1757, Blackstone could say that the “first and principal [high misdemeanor] is the *maladministration* of such high officers, as are in the public trust and employment.”



## Independence Hall Philadelphia • Built 1732

In fact, under English practice, there were a number of impeachable offenses that might not even be crimes under American criminal law. First and foremost was subversion of the Constitution: for example, the usurpation of power to which Parliament laid claim. Other impeachable offenses were abuse of power, neglect of duty, corrupt practices that fell short of crimes, even the giving of "bad advice" to the King by his ministers. Broadly speaking, these cate-

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gories outlined the boundaries of "high crimes and misdemeanors" at the time the Constitution was adopted.

Let us now turn to Philadelphia in 1787. Article II, Section 4 of the Constitution provides that "the President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

There is good reason to conclude that the Framers consciously divorced impeachment from the necessity of proving an indictable criminal offense. This is because Article I, Section 3(7) provides that "judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office . . . but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Thus the Framers sharply separated removal from office from criminal punishment by indictment and conviction, in con-

trast to the English practice, which joined criminal punishment and removal in one proceeding. From the text of the Constitution there emerges a leading purpose: partisan passions should not sweep an officer to the gallows.

The starting point, therefore, to borrow from Justice Story, is that impeachment "is not so much designed to punish as to secure the state against gross official misdemeanors." It is prophylactic, designed to remove an unfit officer from office, rather than punitive. Two important considerations persuade us to understand American impeachment in noncriminal terms, though it may, of course, include offenses such as bribery and obstruction of justice, which are indictable "political" crimes. First, since Article I contemplates both indictment and impeachment, the issue of double jeopardy would be raised if impeachment were deemed criminal in nature. The Fifth Amendment, which embodies a centuries-old guarantee, provides that no person "shall be subject for the same offence to be twice put in jeopardy." This means that if a person were indicted and convicted he could not be impeached, or if he

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were impeached he could not be indicted. By providing that impeachment would not bar indictment, the Framers plainly indicated that impeachment was not criminal in nature. Therefore, criminal punishment may precede or follow impeachment.

A second consideration is the Sixth Amendment provision that

"in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." If impeachment be deemed a "criminal prosecution," it is difficult to escape the requirement of trial by jury. Earlier, Article III, Section 2(3) had expressly exempted impeachment from the jury "trial of all crimes"; and with that exemption before them, the draftsmen of the Sixth Amendment extended trial by jury to "all criminal prosecutions" without exception, thereby exhibiting an intention to withdraw the

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former exemption. We must conclude either that the Founders felt no need to exempt impeachment from the Sixth Amendment because they did not consider it a "criminal prosecution," or that a jury trial is required if impeachment is in fact a "criminal proceeding."

Elsewhere\* I have discussed the problems that arise from the Framers' employment of criminal terminology. I would only reiterate that if impeachment is indeed criminal in nature, it must comprehend the offenses considered grounds for impeachment at the adoption of the Constitution. On this score, the Senate, which tries impeachments, has on a number of occasions found officers guilty of nonindictable offenses, and to the Senate, at least initially, is left the construction of "high crimes and misdemeanors."

It does not follow that Rep. Gerald Ford was correct when he declared that an impeachable offense is whatever the House and Senate jointly "consider [it] to be." Still less can

\**Impeachment: The Constitutional Problems* (Harvard University Press, 1973).

it be, as Mr. Nixon's then Attorney General Richard Kleindienst told the Senate, that "you don't need facts, you don't need evidence" to impeach the President, "all you need is votes." That would flout all requirements for due process, which must protect the President no less than the lowliest felon. The records of the Convention make it quite plain that the Framers, far from proposing to confer illimitable power to impeach, intended only to confer a *limited* power.

When an early version of impeachment for "treason, bribery" came up for discussion, George Mason moved to add "maladministration," explaining that "treason as defined in the Constitution will not reach many great and dangerous offenses . . . Attempts to subvert the Constitution may not be treason as above defined." Mark that Mason was bent on reaching "attempts to subvert the Constitution." But Madison demurred because "so vague a term [as maladministration] will be equivalent to a tenure during the pleasure of the Senate." In brief, Madison refused to leave the President at the mercy of the Senate. Thereupon, Mason suggested "high crimes and misdemeanors," which was adopted without objection.

Shortly before, the Convention had rejected "high misdemeanors" in another context because it "had a technical meaning too limited," so that adoption of "high crimes and misdemeanors" exhibits an intent to embrace the "limited," "technical meaning" of the words for purposes of impeachment. If "high crimes and misdemeanors" had an ascertainable content at the time the Constitution was adopted, that content marks the boundaries of the power. It is no more open to Congress to ignore those boundaries than it is to include "robbery" under the "bribery" offense, for "robbery" had a quite different common-law connotation.

Recent events are of surpassing interest, and it behooves us to weigh them in traditional common-law terms. It will be recalled that the first and foremost impeachable offense was subversion of the Constitution, of the fundamental law. Had Mr. Nixon persisted in his position that he could not be compelled by the courts to furnish the tapes of his conversations, that would have been a subversion of the Constitution. That issue may not yet be dead. In the wake of Mr. Nixon's dismissal of Special Prosecutor Archibald Cox, and the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus, the "fire storm," as a White House aide called it, that blew up across the country impelled President Nixon, by White House counsel,

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to advise Judge John Sirica, "This President does not defy the law . . . he will comply in full with the orders of the court." Let the sober appraisal of *The Wall Street Journal* sum up the inferences we must draw from this event:

*In obeying the appeals court order requiring that the tapes be submitted to Judge Sirica, the President has indeed ceded, without a final Supreme Court test, some of the privilege to withhold information that he previously claimed for the Chief Executive. A precedent is being established whereby judges can demand White House evidence . . . The President tried to protect a presidential claim and*

*lost. The claim may not have been entirely valid, but the loss is for real.*

Nevertheless, during his press conference on the evening of October 26, 1973, Mr. Nixon stated, "We will not provide Presidential documents to a special prosecutor . . . if it is a document involving a conversation with the President. I would have to stand on the principle of confidentiality." Thus he renews the claim, lost before the Court of Appeals, to which he apparently yielded when he advised Judge Sirica that he would comply with the court's order. "Confidentiality," in short, still remains at issue. Were an independent prosecutor set up by Congressional enactment, and were he to insist on production of White House tapes and documents, a confrontation between the President and the courts would be replayed.

If Mr. Nixon were again to refuse to comply with a court order to produce tapes or documents, that would constitute subversion of the Constitution. Ours is a government of enumerated and limited powers, designed, in the words of the Founders, to "fence" the Congress and the executive about. To police these limits the courts were given the power of judicial review. On more than one occasion they have declared Acts of Congress, though signed by the President, unconstitutional. Although the House of Representatives was made the sole judge of the qualifications of its members, the Supreme Court held that in excluding Adam Clayton Powell for misappropriation of Government funds, the House had exceeded its power, the sole qualifications for membership being age, residence, and citizenship. In short, it is the function of the courts finally to interpret the Constitution and to determine the scope of the powers conferred on either President or Congress. By what reasoning the President claims to be exempted from this judicial

authority passes my comprehension. In disobeying a court order, the President would undermine a central pillar of the Constitution, and take a long step toward assertion of dictatorial power. Benign or otherwise, dictatorial power is utterly incompatible with our democratic system. Disobedience of a court order, I submit, would be subversion of the Constitution, the cardinal impeachable offense.

A second article of impeachment based on subversion of the Constitution could rest on the President's impoundment of appropriated funds. The Constitution gives Congress the sole power to provide for the general welfare; in so doing, it is entitled to select priorities. Nowhere in the Constitution is power given to the President to substitute his own priorities. Some twenty courts have held his impoundments to be unconstitutional, that is, in excess of his powers and an encroachment on the prerogatives of Congress.

The secret bombing of Cambodia in 1969-70 may also be viewed as a subversion of the Constitution. It is widely agreed among eminent historians that so far as the "original intention" of the Founders is concerned, the power to make war was exclusively vested by the Constitution in Congress. They intended, in the words of James Wilson, second only to Madison as an architect of the Constitution, to put it beyond the power of a "single man" to "hurry" us into war. The argument for a President powerful enough singlehandedly to embroil the nation in war rests on comparatively recent Presidential assertions of power.

No President, or succession of Presidents, can by their own unilateral fiat rewrite the Constitution and reallocate to themselves powers purposely withheld from them and conferred on the Congress alone. On this reasoning, the Cambodian bombing, being a usurpation of Congressional power, constitutes

a subversion of the Constitution, and is a clearly impeachable offense.

Although some twenty courts have gone against the President on the issue of impoundment, the Supreme Court has yet to speak. So too, although Presidential usurpation in the secret Cambodian bombing seems quite clear to me, the President has yet to have his day in court. Little as I attach to Presidential assertions of power plainly withheld from him by the Constitution, I am reluctant to have the Senate decide an issue of constitutional law, disputed by the President, in its own favor. That issue, the trial of Andrew Johnson teaches, is better

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left to the courts, removed from any suspicion of partisan bias, unclouded by conflict with the tradition that one should not sit in judgment on his own case.

There may well be other grounds of impeachment which the House Judiciary Committee will in due course consider. For example, thus far the implications of the Watergate cover-up have been considered in terms of criminal complicity; but a statement by James Madison in the First Congress indicates that it may be viewed in wider perspective. Recall that Madison was the chief architect of the Constitution, and had a hand in the introduction of "high crimes and misdemeanors" in the impeachment provisions. Who would better know what scope the Founders intended to give those terms? Arguing for an exclusive Presidential power to remove his subordinates, Madison stated that this "will make him in a peculiar manner responsible for their conduct,

and subject him to impeachment himself, if he . . . neglects to superintend their conduct, so as to check their excesses."

On March 22, 1973, Mr. Nixon stated, "It is clear that unethical as well as illegal activities took place in the course of [the reelection] campaign . . . to the extent that I failed to prevent them, I should have been more vigilant." This is little short of a confession of neglect; and that neglect is no less clear with respect to the ensuing cover-up launched by his subordinates, an obstruction of justice. Mr. Nixon stated, "I must and do assume responsibility for such [reelection] actions." Responsibility carries with it accountability, not, it is true, criminal responsibility, for no principal is responsible for the crimes of his agent. But he is civilly responsible for the wrongs he enabled them to commit; and impeachment, you will recall, is prophylactic, not criminal. President Nixon can be impeached, in Madison's words, for "neglect to superintend [his subordinates'] conduct, so as to check their excesses."

The Founders feared an excess of power in executive hands; they had just thrown off the shackles of one tyrant, George III, and were not minded to submit to another. Hence, they provided impeachment as an essential restraint against arbitrary one-man rule. The wisdom of the Founders has been abundantly confirmed by recent events. The time has come to regard impeachment, not as a clumsy, outworn apparatus, but rather as an instrument of regeneration for protection of our liberties and our constitutional system.

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*generis* (that a general provision following a specific listing is to be construed in keeping with that specific listing), it is also plausible that the "other high Crimes and Misdemeanors" must not only be criminal offenses like treason and bribery but, like them they must also be *serious* criminal offenses ("high" crimes and "high" misdemeanors).

The constitutional close association of grounds for impeachment with crimes is repeated in the specific language of other articles as well. In guaranteeing the right to trial by jury for "all crimes, except in cases of Impeachment," and in providing that a "party convicted (in an impeachment

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proceeding) shall nevertheless be liable and subject to Indictment, Trial Judgment, and Punishment, according to law," the Constitution furnishes consistent support for Sen. Ervin's view.

In sum, the strict construction of the impeachment clause holds that proper grounds for impeachment must be based on evidence satisfying the Senate that the person to be removed has committed a serious criminal offense reflecting directly upon the office from which he is to be removed. It is not the only possible view of the impeachment clause, but it warrants our most sympathetic consideration in comparison with the slippery slopes of other views.

Against this proffered strict construction of the impeachment

power, there are principally two lines of "authority" which have been invoked in support of a different view — that something the House and Senate may believe to constitute a serious offense, albeit not a *crime*, would be sufficient grounds to remove the President by impeachment.

The first of these is drawn from English history and practice, some portion of which was arguably approved in the formulation of our impeachment clause. The second line of authority is drawn from congressional practice, that is, from the manner in which Congress has previously applied the clause.

As to the first, it is indisputable that English history furnishes numerous examples of Parliament removing officers of the Crown for a vast variety of alleged political affronts to Parliament and for actions which Parliament deemed to be outrageous instances of maladministration.

But the difficulty with using this history to impose a broad (and highly uncertain) meaning on our own Constitution rests in the questionable assumption that our impeachment clause meant to adopt, rather than to narrow, an English practice which had been used to establish parliamentary supremacy by impeachments on grounds specifically rejected in the making of our Constitution.

Parliament impeached Governor General of India Warren Hastings in 1786 (within a year of our Philadelphia Constitutional Convention) for gross maladministration, a term also included at the time in six of the 13 state constitutions of this country. Yet, at Philadelphia, when George Mason of Virginia proposed to add the word "maladministration" to "treason and bribery" as grounds for impeachment the proposal was at once rejected — as too vague and too broad.

The rejection of Mason's "English" suggestion was followed at once, without debate, by adding only "other high Crimes and Misdemeanors" to "treason" and "bribery" as the ex-

clusive grounds for removal by impeachment. Thus, the extent to which English practice and English "understandings" were attached to (rather than rejected in) the impeachment clause of our Constitution is by no means clear.

So far as the unexamined habit of construing our Constitution by reference to English practice and usage is concerned, moreover, it must be recognized at once how treacherous that rule of construction can be. It was once believed that the First Amendment's protection of "the freedom of speech" which Congress is

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forbidden to abridge was to be determined by looking to English law of the same period, in order to establish the same degree of protection here. The result was immediately disastrous.

Seditious libel (basically, any statement deeply critical of government whether or not true) was unprotected under English law and, accordingly, an early Congress presumed to adopt alien and sedition acts which put critics in jail, with the full approval of the lower federal courts. Not until the 1920s did the Supreme Court even begin to consider seriously the possibility that the First Amendment did not accept the English law, but that it greatly narrowed that law and virtually repudiated it.

Thus those inclined to lean heavily on English usages for "clarification" of our Constitution must be made to feel the difficulty they may suffer when it is not Mr. Nixon, but some interest of their own, which is involved.

The other line of argument that would spread apart the narrow net of

the impeachment clause is based upon past congressional practice — that Congress has invoked the clause 13 times, and often on grounds unrelated to any crime. But aside from being weak on the merits (10 of the 13 instances involved federal judges who hold office on “good behavior”), this is the worst possible source of argument for those most eager to impeach Mr. Nixon — an argument they should shudder to use.

It was the very argument he himself partly relied upon to explain why no declaration of war was required for

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Vietnam — that several Presidents had presumed to wage undeclared war in the past, and that this practice was itself some evidence that no formal declaration by Congress was constitutionally required.

That this style of argument often has little justification has recently been acknowledged by the Supreme Court. A few years ago, the House defended its action in denying Adam Clayton Powell his seat in Congress partly on the basis that it had previously acted the same way against other elected representatives and that the longevity of this practice (about 100 years' worth) itself furnished evidence of its constitutional authority. The Supreme Court took a different view:

“That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”

Harry Truman ran into the same response when he sought to justify his authority for seizing certain steel mills

partly on the basis of similar actions by other Presidents:

“(It) is difficult to follow the argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality.”

Besides all this, the actual history of the impeachment clause teaches us something very different when Congress has used it loosely: that in fact they tend to demean themselves and to martyr the object of their effort. Andrew Johnson was impeached for something clearly not a crime, and conviction failed in the Senate where Johnson was defended by a former Supreme Court justice who argued that impeachment lay only for crime.

Sixty years earlier, Thomas Jefferson capitulated to politics, lending his support to the impeachment of U.S. Supreme Court Justice Samuel Chase on noncriminal grounds — and Chase was acquitted. (Chase's counsel also argued that impeachment lay only for crimes.) What, then, can we truly say of past congressional practice as a guide to the impeachment of Richard Nixon?

The guide for Congress to follow was suggested long ago by Alexander Hamilton in the advice he gave a

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President on an issue of similar gravity, advice Mr. Nixon himself should have taken more frequently than he has. “In so delicate a case,” Hamilton suggested, “in one which involves so important a consequence . . . my opinion is that no

doubtful authority ought to be exercised.”

The question here ultimately is not what clever argument can make out of the impeachment clause, but what we say about ourselves in how we treat this matter.

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construction) for the First Amendment or the declaration of war clause now urge a different one in respect to the power of impeachment? Are we so unconvinced that Mr. Nixon is truly subject to removal for a clearly defined “high Crime or Misdemeanor” that we think it well to strain and, in our zeal to “get him,” thereby to confess a weakness and a political motive, ironically undermining the gravity of the charges otherwise to be raised against him?

Without pausing here to detail the list, I think it is clear that the House Judiciary Committee has ample specific cause to pursue its inquiry into the President's possible complicity in specific high crimes and misdemeanors. We may, however, seriously degrade that inquiry — as well as the impeachment power itself — by going a single step beyond.