No Doubtful Authority Ought to be Exercised

William W. Van Alstyne

Less than three years ago, Gerald Ford moved for the impeachment of Justice William O. Douglas on grounds not constituting any federal crime. At that time, there were many who immediately urged that the House Judiciary Committee should reject Ford's loose, self-serving construction of the impeachment clause.

Admitting that the clause was subject to more than one reasonable view, I argued for a strict construction because of the ease with which the clause would otherwise lend itself to political abuse, and because of the inherent difficulty of drawing any stable line at all if it were not confined to specific *criminal* acts.

In this instance, as in many others, the national interest will be far better served by a strict construction of the Constitution.

Today, the cause is different and the names are not the same. The object of outrage is Richard Nixon, not William O. Douglas. The cause is different in that there is significant public evidence for the House to consider Mr. Nixon's possible commission of federal crimes; there was never any basis to impeach Justice Douglas by that standard.

Again, however, we hear that whether or not Mr. Nixon can be shown to the satisfaction of the Senate to have committed any criminal offense whatever, the impeachment clause does not require it. Rather the clause is said to contemplate removal for scandalous misconduct or maladministration, or for "subverting the Constitution" (whatever that may mean).

The legal staff of the House Judiciary Committee (including minority counsel for the Republican members) now takes this view, the American Civil Liberties Union adopts much of it in a recently published handbook, and scholars as thoughtful as Raoul Berger have given it their professional endorsement.

They all make a strong showing for their position, and I cannot say that they are necessarily wrong. Rather, I say that they are far from being necessarily right and that we shall do a great injustice if we repeat the historical mistake of acting on such doubtful grounds which they themselves would not wish to see sustained in other circumstances. In this instance, as in many others, the national interest will be far better served by a strict construction of the Constitution.

Sen. Sam Ervin, like the late Justice Hugo L. Black, reads the Constitution carefully — and strictly. Highly regarded as the chairman of the Senate subcommittee on constitutional rights (as well as chairman of the subcommittee on separation of powers and the Watergate Select Committee), Ervin is not known as a sycophant or captive of the White House. Relying on the language of the Constitution itself, he has recently concluded that only a specification of federal *criminal* wrongdoing can properly provide grounds for removal by impeachment.

Reading the Constitution is scarcely ever the terminal point of understanding, of course, but it is a good place to begin. The specific clause, and others, too, do appear to favor the senator's view. The impeachment clause itself provides:

. . . 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.

"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."

Treason is a criminal offense defined in the Constitution itself. Bribery was a well-established common law crime subsequently enacted as a statutory felony by Congress. "*Other* high Crimes and Misdemeanors," surely implies that additional grounds for impeachment besides treason and bribery must, like them, be crimes as well.

By a well-settled rule of *ejusdem*

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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 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.

. . . 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.

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 commited 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 exclusive 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 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.

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

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 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.

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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:

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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 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."

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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.

Shall those among us who use one mode of construction (a strict 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?

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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.