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Issue and Debate

Search for a Definition Of Impeachable Offense

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WASHINGTON, July 23—Representative Peter W. Rodino Jr. will walk into the hearing room of the House Judiciary Committee tomorrow evening and pound his gavel for order. The chatter will stop, the television cameras will switch on. The debate on the Impeachability of Richard M. Nixon will begin.

And to a great extent, the debate will be a replay—the latest of many—of a debate almost two centuries old.

The crucial issue before the committee is the definition of an impeachable offense, just as it has been in every impeachment before. And the answer in the Nixon case, like the answer in the cases before him, will likely depend on politics as well as law.

There is wide agreement in the legal profession on at leat a general standard of impeachability. But President Nixon has offered a narrower standard, just as many impeachment defendants before him have, and some of the committee members appear to favor his view. He is arguing that he can be impeached only for a serious, indictable offense.

The 38 members of the Judiciary Committee have a massive record of a Presidency gone awry.

Their chief counsel, John M. Doar, says that the record adds up to four impeachable offenses.

1. Mr. Nixon's personal and direct responsibility for the Watergate cover-up.
2. His direction of "a pattern of masive and persistent abuse of power for political purposes involving unlawful and unconstitutional invasion of the rights and privacy of individual citizens of the United States," through such means as the so-called "Plumbers."
3. His refusal to comply with the committee's subpoenas and his "contempt of the Congress and of the cause of constitutional government."
4. His "fraud upon the United States" in the form of his tax returns.

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Mr. Doar, and the committee members who suggested alternative articles of impeachment last week based on these and similar allegations, rests his conclusion on the majority view among legal experts as to what is an impeachable offense — conduct, as the committee staff put it last February, that is 'seriously incompatible with either the constitutional form and principles of our Government or the proper performance of constitutional duties of the Presidential office."

James D. St. Clair, the President's chief defense attorney, rejected Mr. Doar's conclusions last Saturday and told the committee that there was "complete absence of any conclusive evidence demonstrating Presidential wrongdoing sufficient to justify the grave action of impeachment."

Partly it was a difference in the way the lawyers interpret the evidence. But partly it was a difference of opinion about the nature of an impeachable offense.

The text of a brief submitted to the House Judiciary Committee Saturday on behalf of President Nixon appears on Pages 24 to 29. It was prepared by the Office of the Special Counsel to the President, headed by James D. St. Clair.

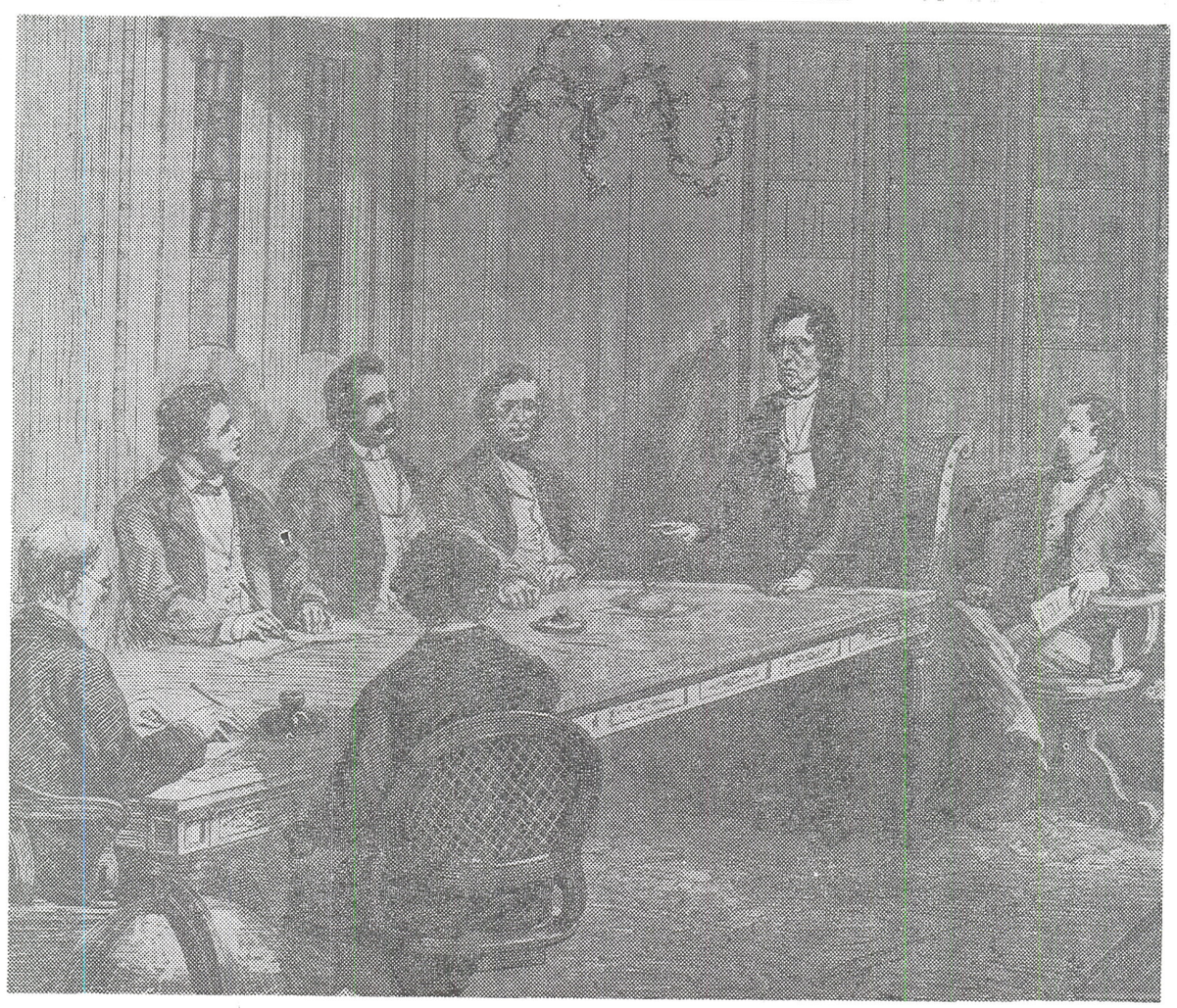
The Background

Article II, Section 4 of the Constitution gives the basic rule — 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."

The Constitution defines "treason" as "levying war" against the United States or "adhering to" the enemies of the United States, "giving them aid or comfort." It gives no definition of "bribery," though, and more to the point—bribery being a gives no explanation of "other high crimes and misdemeanors."

"Crime" and "misdemeanor" each have distinct meanings under current law—a crime is a violation of a criminal statute; a misdemeanor is a crime that ranks lower in seriousness than such crimes as murder or robbery, which are classified as "felonies."

But in the summer of 1787, when James Madison and Benjamin Franklin and the other delegates were meeting in Philadelphia to draft the Constitution, "high crimes and misdemeanors" had a different meaning — the words, when used together, were a special phrase 400 years old referring to the grounds on which the English Parliament



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House committee on the impeachment of President Andrew Johnson listening to Thaddeus Stevens, Republican of Pennsylvania, a leader of the anti-Johnson movement, during debate in 1868.

mpeached and punished officials of the Crown who could not be reached through the courts.

The English had devised impeachment as a way to call these officilas to account for their misconduct and, in the process, give Parliament some control over the King. High crimes and misdemeanors were supposedly offenses against the state and were grounds for imprisonment and sometmes death.

Over the years, they included crimes such as bribery. They also included such offenses as giving the King medicine without a doctor's advice, losing a ship by failing to moor her and giving the King bad counsel.

In 1787, the Governor of India, Warren Hastings, was under impeachment in England. The charges against him were gross maladministration, cruelty and corruption in the form of bribery, a mixture of the criminal, and noncriminal.

Knew About Case

The delegates in Philadelphia knew about the Hastings case. On Sept. 8, they debated a proposed impeachment proceeding of their own, one without the criminal penalties imposed by the English. The draft proposal allowed impeachment only for treason and bribery, and George Mason, citing Hastings, objected.

"Treason as defined in the Constitution will not reach in fancy great and dangerous offenses," Colonel Mason said. "Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined."

He suggested "maladministration" as an additional ground for impeachment. Then — after James Madison complained that the term was too "vague" and the "equivalent to tenure during pleasure of the Senate" and Gouverneur Morris said that elections every four years would take care of maladministration — he suggested "high crimes and misdemeanors," the standard English phrase.

The suggestion carried, 8 states to 3. It was the only time the question was debated.

Since then, the House of Representatives has impeached 13 men. A number of the articles of impeachment described criminal offenses; many of them though, described offenses nowhere to be found in the criminal law.

The Senate, for its part, has convicted defendants on noncriminal charges. Moreover, one of the four men it convicted, Judge Halsted L. Ritter, was acquitted by the Senate of the criminal counts against him and convicted, in 1936, only on a general count of bringing his court into "scandal and disrepute."

The Senate has also acquitted defendants who were impeached on noncriminal counts, including some who defended themselves with the argument that indictable crimes were the only valid impeachable offenses.

And the Senate acquitted the only President to be impeached, Andrew Johnson. Johnson had been charged in an openly partisan proceeding with 11 articles—10 of them stemming from his violation of a new statute that included a provision that violation would be a "high misdemeanor" and an additional count of trying to "bring Congress into disgrace, ridicule, hatred, contempt and reproach."

The Narrow Interpretation

The White House defines an impeachable offense as a "serious" crime, indictable under criminal law, that relates in some way to governmental or "quasi-governmental" actions — a "great crime against the state."

The argument goes Ike this: English impeachments subjected the defendants to criminal punishments; hence, "high crimes and misdemeanors," the English phrase for impeachable offenses, necessarily connoted criminality. The noncriminal charges on which many English impeachments were based were simply abuses of the system, arising when Parliament used the impeachment process in an effort to gain supremacy over the King.

The President's lawyer contends that the drafters of the Constitution wanted to retain the essence of the English impeachment — the check of criminal offenses harmful to the nation by government officials — but eliminate the excesses. Thus, the choice of "high crimes and misdemeanors," and the rejection of "maladministration," as impeachable offenses.

The Nixon lawyers give some alternative arguments for their definition of high crimes and misdemeanors. A few early American statutes posed criminal penalties for offenses dsecribed as "high misdemeanors"; the term "misdemeanor" thus had a criminal connotation even outside the impeachment area at the time the Constitution was written. Under current law, they add, a misdemeanor is also a crime.

The lawyers point to "due process"—Madison and Monroe and Franklin and the other men who wrote the Constitution wanted to give American citizens a full measure of due process, the lawyers argue; the "limits" surrounding the impeachment clause show that the impeachment defendant was to have due process, too, and that allowing a President to be impeached for noncriminal acts would deny him due process and be a step back toward the English abuses.

As for the 13 American impeachments, the White House lawyers make two points.

They note, first, that the only persons convicted of noncriminal offenses, were judges. The Constitution provides that judges "shall hold their offices during good behavior," and so, the lawyers argue, judges are subject to a different standard in impeachment proceedings from the standards that Presidents are subject to.

And then, they cite the acquittal of Andrew Johnson, who defended himself on the ground that the charges against him did not add up to high crimes and misdemeanors. The acquittal, they say, "strongly indicates that the Senate has refused to adopt a broad view of 'other high crimes and misdemeanors' as a basis for impeaching a President."

The Broad Interpretation

The first and most obvious rationale for the broader view of high crimes and misdemeanors is history—for hundreds of years, first in England and then in America, men have been impeached for noncriminal as well as criminal offenses.

The standards of impeachability in England, the Judiciary Committee staff argued in its memorandum last February, was not criminality but "damage to the state." In America, the staff said, the standard has been "misconduct incompatible with the official position of the officeholder."

The next rationale rests on the words of the men who drafted and lobbied for the Constitution, and what those words say about the purpose of the impeachment proceeding—especially the words exchanged in the debate of Sept. 8, 1787, when George Mason submitted the phrase "high crimes and misdemeanors" in an effort to make impeachment cover what he called "attempts to subvevrt the Constitution."

"Under Mr. St. Clair's interpretation, the manifest intention of the Framers to reach subversion would be frustrated by the lack of an indictable crime, for no Federal statute has made it a crime," Raoul Berger, a leading authority on the law of impeachment, wrote in a recent article in The Yale Law Journal.

The definition of an impeachable offense, the argument goes, must thus be broad enough to allow impeachment for gross abuse of power damaging to the constitutional system.

The Judiciary Committee made a similar point. "In an impeachment proceeding, a President is called to account abusing powers that only a President possesses," it said. To judge a President's impeachability only in terms of standards set by the criminal law for ordinary citizens would miss the point, the committee said.

Proponents of the majority view of impeachable offenses make another point as well to buttress their argument against the Nixon view.

The drafters of the Constitution striped their impeachment proceeding of the criminal penalties that were part of English impeachments; ordinary criminal prosecutions were to be handled separately. Thus, the argument goes, they changed it from a criminal proceeding to a political one, and thus the grounds for impeachment need not be criminal.

The majority view is less precise than the view favored by Mr. Nixon. But its proponents say that that is necessary. As the Judiciary Committee staff put it, "Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable."

The Outlook

In 1970, when he was a Representative trying to convince the House to impeach Supreme Court Justic William O. Douglas, Vice President Ford suggested that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment." But there is little talk any more of such a standard.

The Democrats on the Judiciary Committee outnumber the Republicans, and it is well known that most of them favor the majority view of an impeachable offense. But it is considered doubtful that they will push that definition to the extreme; the probability is that they will opt for articles of impeachment something like the ones that Mr. Doar suggested—encompassing noncriminal as well as criminal offenses but, nevertheless, only serious offenses.

"The limitation of impeachable offeuses to those offenses made generally criminal by statute is unwarranted —even absurd," Charles L. Black Jr. of Yale concluded in a newly published book—"Impeachment: A Handbook."

"But it remains true that the House of Representatives and the Senate must feel more comfortable when dealing with conduct clearly criminal in the ordinary sense, for as one gets further from that area it becomes progressively more difficult to be certain, as to any particular offense, that it is impeachable."