# THE QUESTION OF

## Aye

*By Alan Barth*

*Barth was a Washington Post editorial writer for 30 years until his retirement last year. His latest book, "Prophets With Honor," will be published in June.*

LET US TAKE at face value—whatever that may mean—Mr. Nixon's bold, confident assertion that he is not a crook. No previous President has ever made that claim. And perhaps none will again. But Mr. Nixon's guilt or innocence in terms of criminal conduct is not now the crucial question. The question before the country is whether he ought to continue in the presidency.

If it should turn out that he overstated the case in assuring the country that he is not a crook and that this statement has become inoperative, indictment and prosecution in a criminal court might become appropriate. The standard does not in itself, however, wholly satisfy the requirements of the presidency.

While it is clearly preferable to have a President who is not a crook, even more is customarily asked by the American people of the person they designate as their national leader. Traditionally, as Mr. Nixon himself so felicitously phrased it, quoting President Franklin D. Roosevelt, they consider the presidency "pre-eminently a place of moral leadership." When that leadership fails because the President himself has abused his authority and lost the respect and trust of the people, it is imperative for the operation of the American political system that the President be replaced.

Impeachment is the constitutional process by which such replacement is achieved, when the country concludes that a President is unfit for office and that it cannot wait until the next regular election to replace him. The men who wrote the Constitution were realists. Aware of the fallibility and weakness of human nature, they foresaw—and provided for—the possibility that a particular President would have to be removed during his elected term of office, not for criminal offenses but for ethical inadequacy—or for gross injuries to the Constitution and the country.

They vested the power of impeachment in the legislative branch of the government as one of the indispensable elements in the system of checks and balances they contrived to keep official power within appropriate boundaries. To disregard this vital element in the constitutional system—to treat the provisions for impeachment as though they were mere surplusage or empty rhetoric—is to demean the Constitution and throw its countervailing forces out of balance.

The constitutional provision that the President "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors" was intended to compensate for the rigidity, or stability, of a fixed term for the presidency.

In his authoritative study of impeachment, Raoul Berger of the Harvard Law School stated it succinctly: "It was because the separation of powers left no room for removal by a vote of no confidence that impeachment was adopted as a safety valve, a security against an oppressive or corrupt President and his sheltered ministers."

Impeachment is not indictment, and the two should not be confused. They are analogous only in the respect that both involve the filing of formal charges preliminary to a trial. But impeachment was not intended primarily to deal with indictable offenses or to impose punishment for crimes. Rather, in the words of Mr. Justice Story, it is "a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity."

Indeed, the Constitution explicitly declares: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

Impeachment, in short, is a power indispensable to the legislative branch in counterbalancing the power of the executive branch. It is designed as a safeguard not only against bribery or treason but against "high crimes and misdemeanors"—a term familiar to the authors of the Constitution as embracing, in the words of George Mason, himself one of those authors, "great and dangerous offenses" and "attempts to subvert the Constitution."

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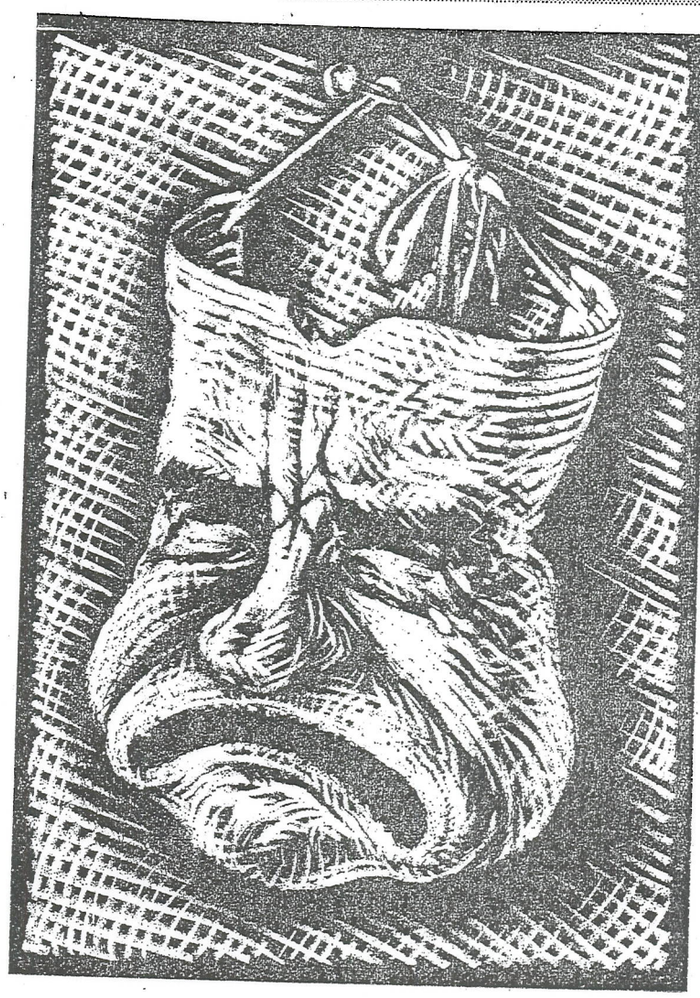

# IMPEACHMENT

# Aye

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Manifestly impeachment should not be lightly or carelessly invoked. But neither should it be lightly or carelessly discarded when gross abuses of power call for its use to restore balance and decency to the American polity.

ARE THERE substantial grounds for charging President Nixon with "high crimes and misdemeanors" and, if so, what are they? To this critic—or "enemy"—of the President, there appear to be four categories of offenses warranting impeachment—leaving entirely out of account allegations of low crimes and common misdemeanors or questions of propriety and taste such as income tax writeoffs, improvements to private property at public expense and benefactions from rich and philanthropic friends. The categories can be summarized briefly:

1. The campaign by which Mr. Nixon was re-elected to the presidency in 1972 was marked by excesses and frauds that went far beyond the customary roughness and robustness of American politics. It was marked also by money-raising on a scale and of a nature that warped the political process.

Mr. Nixon may not have known and approved of all the "dirty tricks" and the arm-twisting. Nevertheless, it was he who removed the conduct of the campaign from the Republican National Committee and placed it in the hands of such men as John Mitchell, Maurice Stans, Jeb Magruder and Herbert Kalmbach. He is marked indelibly by what was done in his name and on his behalf. Moreover, his claim to his office is ineradicably stained by the means employed to purchase it. erode the very foundations of the American political system.

It has been said in defense of the President — by himself as well as numerous apologists — that all that he and his aides have done in collecting campaign contributions, in utilizing federal agencies to harass their enemies and in waging their political warfare has been done before by others and amounts to no more than normal politics in America. There are two things wrong with this defense. First, it is untrue. Second, it adds up to a total abdication of morality in political life.

Worse, it may be self-fulfilling, may make itself come true. For if people expect no more than this from their government, they are likely to get no more than they expect. If they tolerate government law-breaking and corner-cutting on the pretext of fostering order and security, they will cease to have a government of laws. Justice Louis Brandeis issued a clarion warning on this point nearly half a century ago:

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution."

Is that retribution already upon us? The notion that politics is inevitably a "dirty business," that politicians are all crooks, anyway, that the government is an enemy rather than a protector has become dangerously pervasive.

What is the country saying to its youth about public service as a career? Who will make the sacrifices that may be necessary for the general welfare at the call of a government that is not trusted? Who will pay taxes with any degree of cheerfulness, or even honesty, when he believes that the very heads of government are chiseling and taking advantage of every legal loophole on their own tax returns? Who will follow the leadership of a President who seems bent upon feathering his own nest? We are on the edge of a breakdown of the natural trust that is the cement of any society.

We have heard a lot about "national honor" in the past year or two—as though national honor grew out of military prowess. It grows, rather, out of a reciprocity of respect between the governors and the governed. It finds its nourishment in a general trust in the government's fairness, its integrity and its regard for the rights and the dignity of free citizens.

It is a restoration of such a sense of national honor that this country now desperately needs. Impeachment is a prerequisite. For impeachment is

***"Impeachment is a prerequisite. For impeachment is the one way in which the American people can say to themselves and to the world that they care enough . . . to purge from the presidency anyone who has dishonored that office."***

2. Mr. Nixon has enunciated and practiced a doctrine of presidential power fundamentally at odds with the Constitution and the whole idea of a government of limited powers.

His concealed bombing of Cambodia usurped the war-making powers of Congress. His system of domestic political surveillance (specifically approved in the Huston plan), including wiretapping, burglary, mail covers and spying on newsmen as well as other critics, operated directly to suppress dissent and to infringe the rights of free expression guaranteed by the First Amendment. His assumption of a power to conduct electronic searches without a warrant or court order was an outright defiance of the Fourth Amendment. His sweeping assertions of "executive privilege" placed him above the law in a country where equality before the law is a fundamental principle.

3. The President's prolonged resistance to efforts by Congress and the courts to uncover the truth about the Watergate affair—carried on until vital evidence was destroyed or lost—impel suspicions so serious that only a formal trial by the Senate can resolve them.

4. Through bad luck or bad judgment, Mr. Nixon staffed his ship of state with a singularly unfastidious crew. His first Vice President, his first Attorney General, his first Secretary of Commerce, his first White House chief of staff, his first chief assistant for domestic affairs, at least two of his innumerable White House counsels, all had to be thrown overboard as the storm clouds gathered.

It is relatively unimportant to determine whether Mr. Nixon himself broke any law or at precisely what point in time he first learned about the Watergate coverup. He has said that he accepts full responsibility for the conduct of his subordinates. Since he is still in office, one wonders what he can mean by this. The responsibility is, in any case, inescapable. It was he who picked the crew and gave them power. And what they did, they did as his surrogates.

How else than by a public trial in the Senate — a trial in which his supporters will have a full, fair chance to defend him — can the President be judged? He deserves to be exonerated or condemned—not to be left twisting slowly, slowly in the wind.

IT IS SAID that impeachment would cause bitterness and divisions among Americans, leaving the presidency immobilized while it ran its course. And it is urged also that a trial in the Senate resulting in acquittal by slightly more than one-third of the senators would further diminish the President's already gravely impaired power to govern.

These are heavy costs and they are real. It is necessary to weigh against them, however, the inescapable costs of a failure to impeach. And these may

the one way in which the American people can say to themselves and to the world that they care enough about their own institutions, their own freedom, their own claim to self-government—their own national honor—to purge from the presidency anyone who has dishonored that office.

IT HAS BEEN frequently reported of late that the members of the House of Representatives went home for their winter recess with the intention of holding a moistened finger aloft to test the political wind regarding impeachment. But congressmen owe their constituents something more than this. They have an obligation to assert some sort of leadership—at least to tell the people that an acute crisis confronts them.

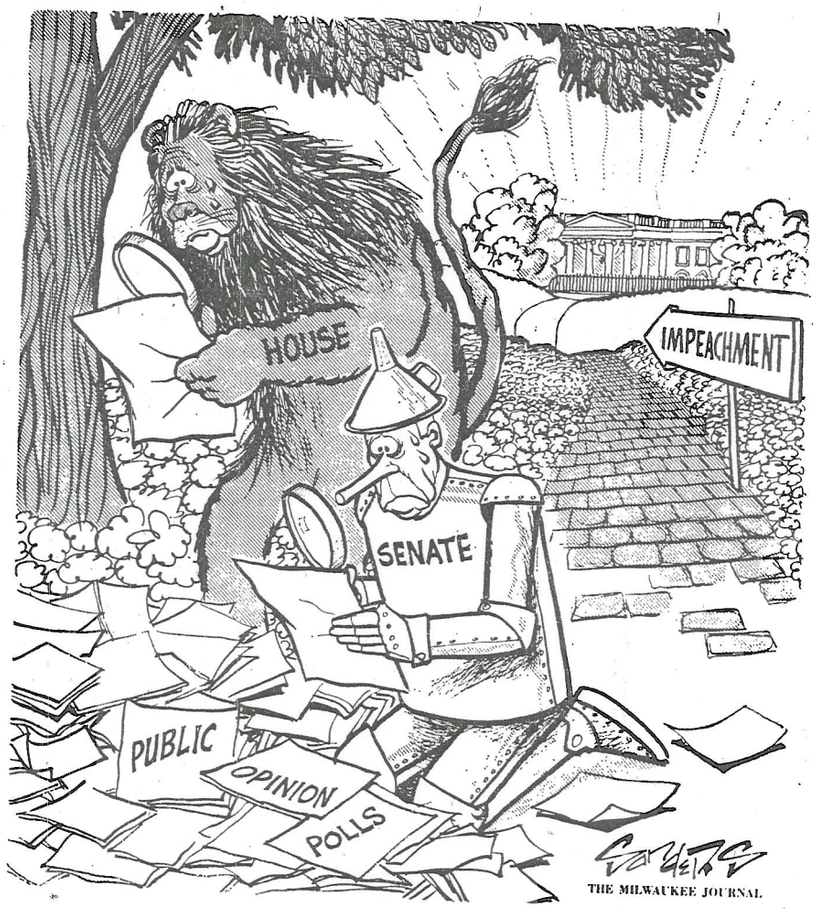
If congressmen themselves display a phlegmatic indifference to offenses that should shock every conscience, can they then blame the people for a moral torpor that may end in national disaster? The country's calm is more terrifying than clamor, for it suggests a rejection of traditional values, an acceptance of the philosophy that "anything goes." Someone, somehow, must rouse it from its apathy.

And someone, somehow, must arrest the country's rush toward authoritarianism. People in power who will not stop—or are not stopped—at breaking and entering or forging cables will not stop at military rule or control of the press or even at concentration camps, if these are deemed necessary to national security. To forget constitutional limits is to invite them to be forgotten.

It is true that the ordeal of an impeachment proceeding is painful. Yet he who shrinks from the surgeon's knife when surgery is imperative may lose his life as the cost of cowardice.

Much more than the fate of a particular President is in the balance with the decision on impeachment. It may mean nothing less than the survival of self-government.

# *Impeachment?*




93D CONGRESS
1ST SESSION

# H. RES. 513

IN THE HOUSE OF REPRESENTATIVES

JULY 31, 1973

Mr. DRINAN submitted the following resolution; which was referred to the Committee on the Judiciary

## RESOLUTION

*Resolved*, That Richard M. Nixon, President of the United States, is impeached of high crimes and misdemeanors.

## Nay

*By Eugene V. Rostow*

*Rostow is professor of law and a former dean at the Yale Law School. He was under secretary of state for political affairs in the Johnson administration.*

THE ASTUTE and worldly men who started the nation on its way were idealists, possessed of great dream, but they were idealists without illusion. They knew that men are not angels and never will be angels.

They expected a certain amount of treason, bribery and other high crimes and misdemeanors to crop up from time to time among those who would staff the new government, and a good deal more of hypocrisy, meanness of spirit, greed, petty rascality, cowardice and paranoic ambition. Within the system of overlapping authority we generally call "the separation of powers," they made provision for dealing with the lapses from grace they knew were inevitable.

Justice Brandeis put the case for the separation of powers in its classic form. "The doctrine of the separation of powers was adopted by the Convention of 1787," he wrote, "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction; but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy."

The separation of powers is not a prescription for perpetual warfare among the three branches of government. The government cannot function at all unless all three departments cooperate in essentials, pursuant to their shared understanding of the nature of our society. But it does establish a process of tension, of mutual surveillance, which prevents one branch, or one man, from monopolizing the powers of government.

The constitutional separation of powers makes our polity unusually sensitive to lapses from grace. It is a feature of the system of exceptional importance in protecting the nation from abuses of power and the risk of tyranny. Congress is naturally zealous in pursuing the trespasses of the executive and judicial branches; the executive branch is correspondingly more interested in the shortcomings of congressmen, senators and judges. In principle, at least, the press keeps close watch on all three branches, and impartially follows every spoor.

Impeachment is, of course, among the remedies the Constitution provides for handling situations of this kind—necessarily the first remedy when the President himself is under suspicion and an alternative remedy when charges are directed against other officials of the government. Congress can remove members of the Cabinet and other high officials of the executive branch only by impeachment. Removal of such officials by statute would be an interference with the separate consitutional realm of the President, who must have control of his administration, the courts have ruled, in order to be capable of carrying out his constitutional duty to see to it that the laws are faithfully executed.

Impeachment is an ancient remedy of English law, which has fallen into disuse in modern times. It is a form of legislative trial—in substance a trial, but a trial conducted before a legislative body. When the Senate, on the impeachment (i.e., "indictment" or accusation) of the House, must consider whether the President should be convicted and removed from office, each senator must take an oath or affirmation and the Chief Justice presides. But, as we discovered during the disastrous proceedings to remove President Andrew Johnson in 1868, even these formal safeguards cannot convert legislators into judges, nor the Senate into a court.

Legislative trials are inherently unsatisfactory, and have nearly disappeared in ordinary life, both here and in Great Britain. Legislative punishments—bills of attainder—are flatly prohibited by the Constitution, and impeachment itself, as a procedure for removing judges and federal officials from office, has given way in practice to resignation after indictment for or conviction of crime.

Nonetheless, impeachment remains an indispensably important feature of the Constitution, as the only constitutional way to remove an errant President from office

In his leading opinions, John Marshall invariably took as his major premise the Grand Design of our society, and what he took to be its fundamental political principles. I should argue that the Grand Design of our constitutional order requires the grounds for impeaching and convicting a President to be strictly confined to those specified in the Constitution—Treason, Bribery, or other high Crimes and Misdemeanors.

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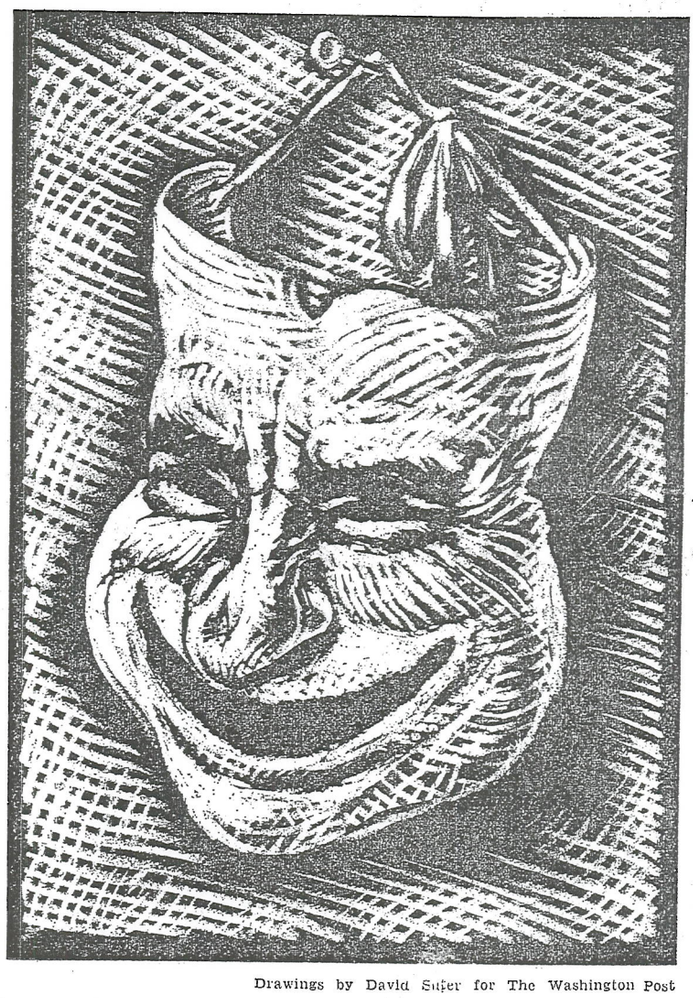

Drawings by David Suter for The Washington Post

# Nay

**ROSTOW, From Page C1**

The reasons for this conclusion are fundamental. The presidency is an independent office, defined by nearly 200 years of constitutional usage. Its authority derives from a national election. The President is elected for four years—not on good behavior, as Congress may judge good behavior. Every President has been subjected to vehement, and often violent, criticism. Many have left office out of public favor. The powers and duties of the presidency have been forged in the crucible of searching experience. They embody the necessities of function, at home and abroad, and little more.

OUR TRIPARTITE constitution did not establish a parliamentary system. The President is not a prime minister and should never be transformed into a prime minister. It would be the greatest possible error, constitutionally and politically, for us to move toward a system in which the ultimate authority of the presidency depended not on a national election, but on the majority of the moment in Congress.

Of course, no President can function long or well without the sustained cooperation of Congress. And, of course, every President should spend much of his time consulting with members of Congress. But this is a very different matter from the theory that the President should in all respects be under the control of Congress.

The Constitution, as it has evolved since 1789, is much more than the great document struck off by the mind of the Philadelphia Convention. It is the mirror of our history, shaped by the political genius and the political instincts of our people. It suits our society, and our nature, and has served us supremely well. The relative independence of the presidency is an essential feature of the American Constitution. It should never be compromised, or diluted, by expanding a bill of impeachment into a vote of no confidence.

Some argue, as Vice President Ford once did, that under the Constitution, officials can be impeached, and, after trial and conviction, removed from office on any grounds Congress determines to be sufficient. His comment came in the course of an effort to remove Justice Douglas from the Supreme Court.

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I disagree with the constitutional view the Vice President put forward on that occasion. If the effort to remove Justice Douglas had succeeded on the grounds mentioned at the time, the independence of the judiciary—and the separation of powers more generally—would have been in peril, and we should have taken a long step towards parliamentary government, based on the supremacy of Congress.

Others, who disagree with the position the Vice President once took, now contend that in bringing impeachment proceedings against the President, Congress should not be narrowly confined to "Treason, Bribery, or other high Crimes and Misdemeanors" in a technical sense.

Prof. Archibald Cox, among others, has recently suggested that while "impeachment is extraordinary, radical surgery, legitimate only upon some equally fundamental wrong," the grounds for impeachment need not be criminal in character, but could properly include political offenses "doing such grave injury to the nation as to make any incumbent's further continuance in office unacceptable." An impeachable offense, he suggests, should be any line of conduct, or a failure to act, which Congress would regard as "a high offense against the liberty and security" of the people.

I do not agree. Prof. Cox's standard would give a Congress consumed by political passion almost as much leeway as Vice President Ford's test. Stripped of its rhetoric, it would reinstate the grounds for the impeachment of Andrew Johnson, repudiated by history, and indeed by the Supreme Court.

The debate over the constitutional scope of impeachment is not a question to be resolved only by Congress, by public opinion or by political means. The courts may well step in, as the umpire of the Constitution, and insist that impeachment proceedings be brought only on one or more of the grounds specified in the Constitution.

The Supreme Court's decision in *Powell v. McCormack* suggests the pattern. There the court ruled that Congress should seat Adam Clayton Powell, since its grounds for excluding him had no relation to the three possible grounds for exclusion stated in the Constitution: age, residence and election. Until *Powell v. McCormack* was decided, it was widely believed that Congress was the final judge in deciding whether prospective members should be seated. Indeed, the shape of American politics during the Reconstruction years was determined by the refusal of Congress to seat many men who had in fact been elected in the Southern states.

IN BROAD OUTLINE, what happened in the Watergate affair is now clear. The government became concerned about the implications for security of a series of disturbing events—the riot at the Democratic convention in 1968, and a number of later episodes evoking the same possibilities: the mass demonstrations "to stop the government" in Washington, and bombings and lesser disturbances in other parts of the country. And there were, as there often are, disquieting leaks of government secrets to the press.

Surely the concern of the government was altogether legitimate. Its first duty, after all, is to preserve the nation, as Lincoln taught us. But it is now clear that the government went too far in planning how to meet what it considered to be a threat to security.

A bureaucratic mixup concerning the Federal Bureau of Investigation may explain why certain procedures were employed. It does not excuse them. The government seriously considered using methods which would be intolerable in our constitutional universe, and actually did use some. There were abuses of power which re-

call those of Fascist or Communist states. It is beyond the possibility of defense to have government officials stir up income tax troubles for their political opponents, degrade the political process and collect campaign contributions in cash.

The nation reacted to these abuses with immense force. The courts, the press, Congress and the public at large have participated in the process. The constitutional instincts of the nation were stirred — today and always the strongest power in our public life. They are in control of events—sober, cautious and, above all, principled.

There is almost no party politics in the Watergate affair, little demagoguery. It is nearly impossible to tell who is a Republican, and who is a Democrat, from the way in which the participants treat the issues. Our handling of the controversy is far more responsible, and far more constitutional in spirit, than that regarding Andrew Johnson a century ago.

For reasons fundamental to the nature of American society, the abuses which came to light in the Watergate investigation must be purged. Those who have been guilty of crimes and have otherwise abused their authority should be punished.

During the last 6 or 7 years, in the universities, on the streets and in the courts, the American people have had to learn once again the wisdom of the ancient rule that virtuous ends do not justify the use of improper means. They should not and will not concede that principle to public officials, who should surely be required to turn especially sharp corners in the discharge of their fiduciary responsiblities.

In cleaning house, however, we should not violate basic constitutional standards of fairness in any proceeding that may result in judgments of guilt, in the imposition of penalties or in determinations of wrongdoing more generally. And we should not, above all, weaken or qualify the powers of the presidency, indispensable to the health and effectiveness of our constitutional order.

The President should be impeached only if it should appear that he has in fact participated in criminal activities. In our system of law, criminal responsibility is and must remain personal. The nation understands President Nixon's personality and habits of work. No one would imagine for a moment that President Johnson would not have known for long what was going on in the White House, or indeed in the Bureau of Reclamation. President Nixon, it is clear, has altogether different methods.

AN EXTENDED period of active inquiry has thus far failed to convince many people, in or out of Congress, that the President has in fact committed an impeachable offense, as I have defined the term here. If the President has, in fact, refused to obey a court order, he would have been impeached, and impeached quickly. But the evidence thus far brought out against him is inconclusive.

As Sen. Aiken has said, the process of inquiry must soon come to an end. The highest values of our society require us to purge the offenses revealed in the Watergate affair. But we live in a dangerous world which will not abide the outcome of our constitutional agony.

Difficult problems of foreign and of domestic policy demand sustained and well-considered action by the government of the United States, action in which the President must be free to take his full share of responsibility. The nation must have a government. It cannot afford to have the Watergate investigation go on forever.

The President and the presidency have been weakened by the wounds of Watergate. Whether President Nixon survives, or not, the nation and the President together must find a way to regenerate and restore the Presidency.

We should not take the risks of trying to function with an impaired Presidency for the next 3 years. A strong bipartisan administration of a national unity could change the climate quickly. It would be an administration of men and women of both parties, and of men and women above party.