

Are the Articles Sound?

How well drawn are the charges that the House Judiciary Committee leveled against Richard Nixon?

The debate will go on for years, but most constitutional-law experts and trial lawyers questioned by NEWSWEEK agreed last week that the three articles of impeachment presented to the House were both constitutionally valid and designed for an effective prosecution. "The articles are squarely within the Constitution," said Harvard's Raoul Berger, a leading authority on impeachment. "The committee has done an admirable job."

For all the committee's "perfecting" amendments, however, some lawyers saw technical flaws. Yale Law School's Charles Black complained that the first article, which accuses the President of

IRS, for example, or illegal wiretapping.

In practice, however, charging "one or more" offenses is merely the "standard legal language of an indictment," in the view of Robert Morgenthau, former U.S. attorney for the Southern District of New York. Placing several items under one category "might not have been done with an indictment," Morgenthau added, but "in an impeachment proceeding, it's a logical way to organize debate." In fact, said trial lawyer Louis Nizer, who personally opposes Mr. Nixon's impeachment, the "articles derive strength from stressing the cumulative." And Berger maintained that, far from being

charges, according to legal experts.

If there was one weak article in the bunch, some lawyers thought, it was the third, which cites Mr. Nixon for failing to comply with the committee's subpoenas for his tapes and documents. "There could be an honest difference of opinion between the President and the committee on what kind of information constitutionally must be provided," said Black, who substantively supports Mr. Nixon's claims of Executive privilege. In light of the recent Supreme Court decision requiring Mr. Nixon to hand over his tapes to the special prosecutor, Black continued, the committee should have given the President another chance to comply before accusing him of bad faith.

Yale's Alexander Bickel, who agrees with Black that Article III does not state an impeachable offense, said that the committee should have tested its sub-



Robert R. McElroy—Newsweek

Nizer: 'Mr. Nixon knows darn well'

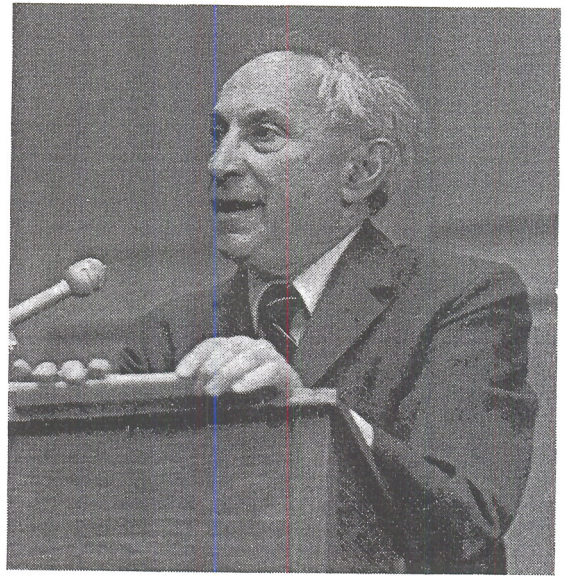


UPI

Black: Bad faith?



Jeff Lowenthal



E.B. Boatner

Berger: A job well done

Kurland: Enough leeway?

obstruction of justice, "straddles the question" of Mr. Nixon's direct role in the Watergate cover-up. The charge that he committed "one or more" of the offenses, Black added, is similarly ambiguous. Rep. Charles Wiggins charged in the committee's debate that the "abuse of power" rubric for the second article is vague and subjective, and a briefing paper being circulated by Mr. Nixon's defenders in Congress last week borrowed a line from Presidential counsel James St. Clair to attack the article for "duplication"—the legal term for incorrect grouping of two or more distinct charges in a single legal action.

In criminal law, the brief argued, a unanimous jury would have to find a defendant guilty of each specific act under the umbrella charge in order to convict him. It would be unfair, the paper said, if Mr. Nixon were convicted by a coalition of minorities in the Senate, each of which agreed on only one count of the abuse-of-power article—misuse of the

vague, "the abuse of power is a familiar rubric in English law for high crimes and misdemeanors."

Most lawyers gave even shorter shrift to the argument by some committee Republicans that the articles lacked "specificity," thus making it impossible for Mr. Nixon to defend himself. "Legalities are not the ground on which to fight this," said Nizer bluntly. "Mr. Nixon knows darn well what the charges are." The articles, said Philip Kurland of the University of Chicago Law School, give the prosecution "sufficient leeway to introduce all the evidence it has as well as provide the President with enough information to enable him to prepare an adequate defense." While indictments often specify more names and dates, Morgenthau said that he has seen some that are as general as the committee's articles. It is the bill of particulars being drawn up by the committee counsel, not the articles themselves, that must supply details about the

poena in court long ago. An analogous situation, Bickel said, was the impeachment of President Andrew Johnson for violating the Tenure of Office Act—legislation that the Supreme Court later held to be unconstitutional.

Most of those interviewed, however, disputed Bickel and Black. "It is essential that impeachment be seen as a Congressional remedy and one that Congress must be allowed to pursue," asserted Stanford's Gerald Gunther. "Article III goes to the right of Congress to get information. In a sense, it is the strongest of the lot because it preserves the integrity of the impeachment process." While Executive privilege must yield to an impeachment inquiry, Gunther added, Mr. Nixon could in fact have claimed the Fifth Amendment guarantee against self-incrimination as a means to withhold his records—and the committee could not infer guilt. But in a constitutional Catch-22, Gunther added, Mr. Nixon could then be impeached for thus

placing himself under a "cloud of distrust." Other experts, however, say that only Mr. Nixon's personal testimony—and not his White House tapes—would be covered by the Fifth.

There is less debate over the constitutional aptness of the first two articles, but some experts foresee controversy in the charges that Mr. Nixon not only acted directly but also "through his sub-

ordinates and agents" to violate his oath of office. The allegations thus raise the question of a superior's accountability for his aides, an issue for which standards have been set in both criminal and civil law—but not in an impeachment proceeding. "You can't argue that the President should know everything that happens in the executive branch," Gunther observed. "The test is: How much mis-

conduct was there? How close was it to Mr. Nixon? There is a point where ignorance becomes wanton indifference—and a high crime or misdemeanor." Berger agreed, citing the original intentions of the framers of the Constitution. "James Madison said that a President may be impeached if he neglects to supervise the excesses of his aides," he said. "Who knows better—Madison or St. Clair?"