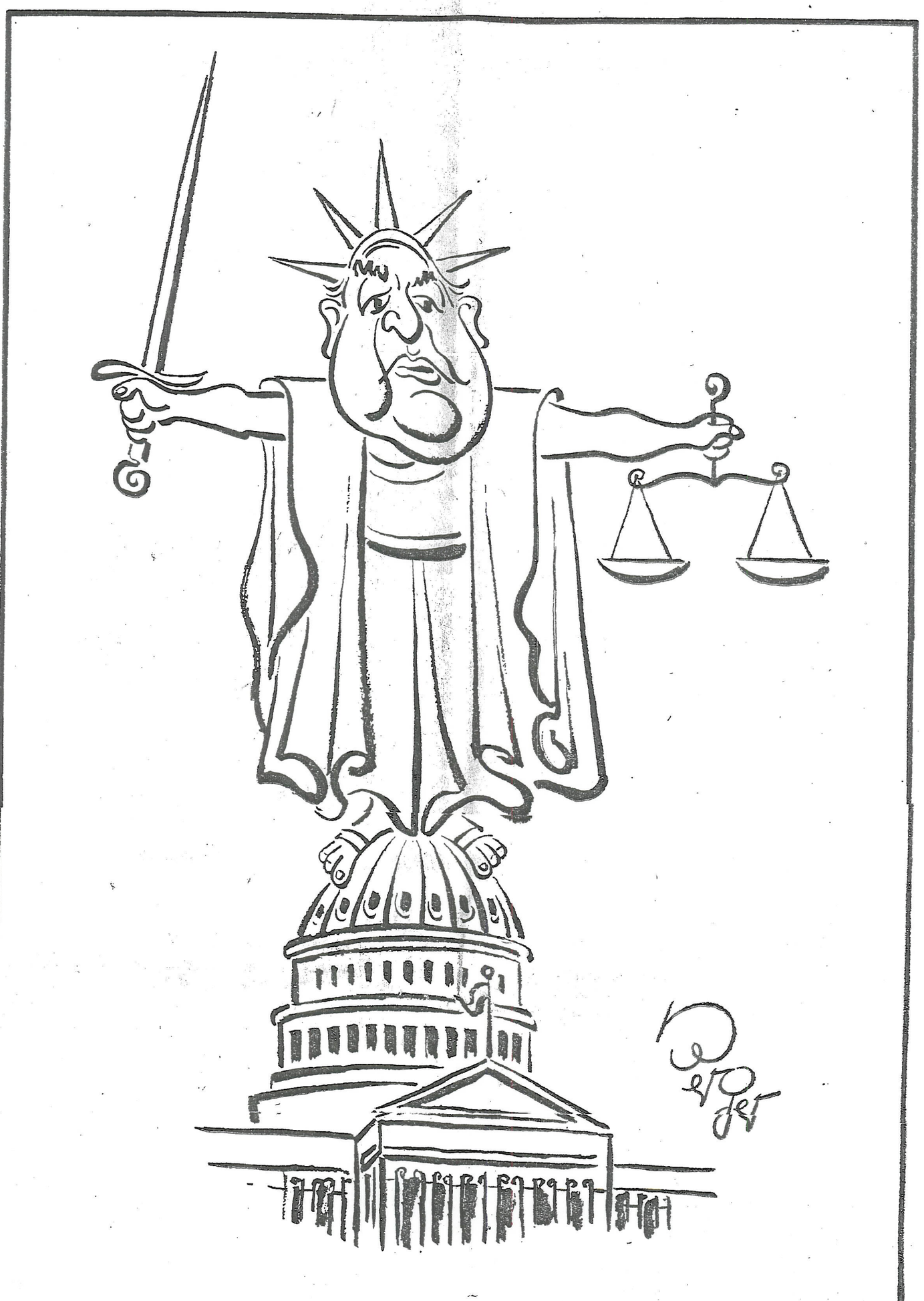
# Impeachment?



By Oscar Berger

WXPost - AUG 5 1973

# NO

*By Nelson W. Polsby*

*Polsby, author of "Congress and the Presidency," is a professor of political science at the University of California, Berkeley.*

IMPEACHMENT PROCEEDINGS have been contemplated or used so seldom in American history as to constitute a body of case law too thin and too ambiguous to yield clear guidelines for those who want to consider impeaching President Nixon under the present circumstances.

This may be gratifying to the President's own often-expressed fondness for scoring historical "firsts," but observers who think that American politics is played with enough wild cards already will be further discomfited by talk of impeachment.

In 1970, after a review of the precedents — and there were only 12 in all American history, mostly concerning federal judges — House Minority Leader Gerald Ford concluded that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be." At the time, Ford was leading an attack on Supreme Court Justice William O. Douglas; today he might well argue for additional criteria. At bottom, however, Rep. Ford is undoubtedly right in implying that the decision to impeach is fundamentally a political decision.

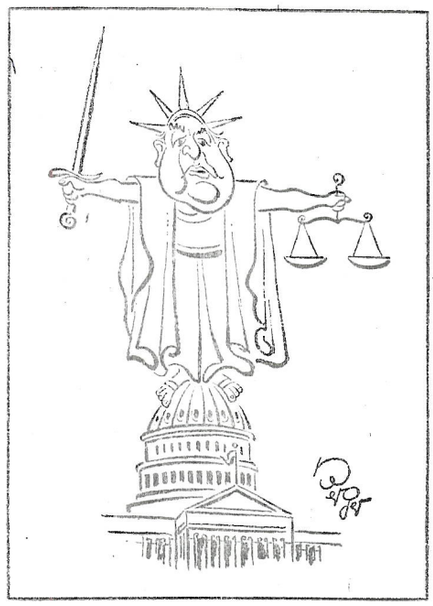
Because impeachment is such a severe sanction, one naturally wonders not merely if it is entirely merited, but also if less heroic means will provide adequate remedies. I am not yet fully prepared to concede the case against President Nixon on the merits, although each succeeding day of Watergate testimony makes a defense of the President harder and harder to sustain. In Mr. Ehrlichman's recent testimony, it is not alone the things denied, whether truthfully or not, which boggle the mind, but even more the things admitted to and defended: espionage, burglary, dirty tricks on political opponents. Even when these acts are blanketed under a flimsy theory of national security, they do not seem to me to be permissible or right.

How much of all this President Nixon personally knew of, or approved of, is and probably will remain in doubt. The difficulty is, as observers have already noted, that insofar as Mr. Nixon's former associates shield the President from charges of criminal complicity, they accuse him of utter incompetence in the execution of his office. Either way, citizens are entitled to call President Nixon strictly to account as the politically responsible head of the executive branch.

For this reason, I do not see much profit in making a defense against President Nixon's impeachment on the merits. At a minimum, those who favor impeachment can argue that the process itself provides for a full and fair ventilation of the facts, a prospect that no patriot presumably should want to resist. I find the prospect entirely resistible, however, on the ground that there are available less severe and more effective means for bringing the presidency back to its proper relationship with other parts of the political system. I believe this remedial goal should now be at the focus of attention, rather than the essentially retributive goal of ferretting out and punishing unwise or illegal presidential acts that may have already been committed.

See NO, Page C2

# WHY WE SHOULD NOT IMPEACH



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IT SEEMS TO ME that most of these presidential acts, whether alleged or proven, have been executed under a misconception of the nature of the presidential mandate. The essential mistake has been the widespread assumption among the President and his immediate staff that the political process in the United States is something that takes place only every four years—on Election Day — and that the right to exercise virtually unlimited discretion until the next election is conferred by success at the polls. This is simply wrong; politics in America was designed by the Founding Fathers to be a continuing process of mutual adjustment among officials variously situated and differently empowered — but all legitimate.

Congress in particular has within it the power to rebut the assumption of unlimited presidential discretion. The Senate can refuse to confirm presidential appointments, and both houses can refuse to appropriate money for pet presidential projects — as they recently did in the case of the White House discretionary fund. Congress also can demand more detailed reporting and accounting of presidential activity. On the whole, congressional responses to presidential self-aggrandizement have thus far been hesitant. On impoundment of appropriated funds, for example, Congress has been self-destructive, and has attempted to hobble and supersede the specialized committees, which are the repositories of congressional expertise and power.

The bureaucracies are less well situated to assert prerogatives against the President. Yet even here they are not utterly powerless, as the example of the late J. Edgar Hoover should remind us. This quintessential bureaucrat, it appears, successfully stymied a presidential plan to authorize certain expanded domestic intelligence activities, including breaking and entering, on the part of the regular intelligence agencies of the government.

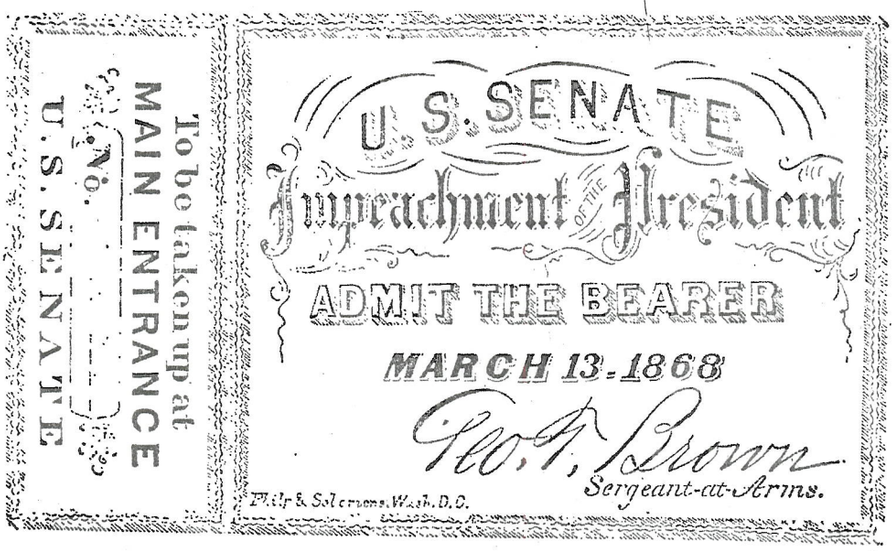
As to the courts, their central duty is to assert not their own rights and prerogatives, but those of ordinary citizens insofar as the Constitution protects them. Already one criminal trial, that of Daniel Ellsberg and Anthony Russo, has been abruptly terminated with prejudice to the government's case because of Watergate-related revelations. These instances illustrate that a constitutional imbalance according too much arbitrary power to the President can be redressed by routine decisions of government officials without recourse to impeachment.

## In the President's Hands

IN THE END, however, it is up to President Nixon more than anyone else to restore comity between the branches of government. Thus far, he has made little effort in this direction. Instead, the White House is leaking from every pore with noises about "toughing it out," with plans to "counterattack," with attempts to rattle alleged skeletons in the closets of senators on the Ervin committee.

To outsiders, especially those of us who are clinging to the presumption that President Nixon is largely innocent of serious wrongdoing, this seems manifestly to be a self-destructive course for the White House to pursue. If, on the other hand, President Nixon has good reason to fear the kinds of disclosures that a thorough and unhampered investigation — by Sen. Sam Ervin or by Special Prosecutor Archibald Cox — might reveal, his posture of recalcitrance makes much more sense. Thus, in a very large measure the extent to which a decision to impeach becomes appropriate lies in President Nixon's own hands.

Persons who value the proper working of American political institutions, and who see in their proper working a marvelous instrument of democratic self-government, are bound to view the unfolding events of recent months with increasing distress. It is precisely because we Americans are so num-




*A ticket to the Senate trial of President Andrew Johnson.*

erous, so diverse, so liable to disagree, that a government of men subservient to law, hedged by custom, protected from arbitrary and impulsive acts by inner restraints and by institutionalized rules, is absolutely essential for the general well-being. If, as is increasingly apparent, these decencies of our political life have been abused, the proper and most urgent remedy is their restoration. For some, this may mean impeachment; we must consider, however, whether such a course of action may further open the wound in our body politic rather than cleanse it.

## A Last Resort

SUPPOSE, FOR EXAMPLE, formal debate on impeachment is begun in the House, but impeachment is not voted. Or suppose impeachment is voted, a trial is held, but less than the required two-thirds of the Senate votes to convict. All the hard words that such a debate must engender would hang in the air like a miasma poisoning the remaining three years of President Nixon's term of office — not only on Capitol Hill, but also downtown, all across the country, and in foreign capitals.

Impeachment is unquestionably available as a remedy when all else fails, but it should be invoked only under the direst circumstances and when it is itself unlikely also to fail. Bad as President Nixon's relations are with those on whom he is constitutionally dependent, they are surely not now bad enough to make a successful impeachment likely.

It is within the President's own power to make things a great deal better — at a minimum by giving his wholehearted cooperation to his own special prosecutor and to the Ervin committee and letting the chips fall where they may. Until this course of action is definitively rejected by the President, and until more senators and congressmen conclude that there are no other alternatives left, I believe that talk of impeachment is premature.

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# YES

***By Roger D. Masters***

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THE QUESTION has been looming over the country for months now: Should President Nixon be impeached because of the Watergate scandal? The problem is that it is the wrong question.

It is certainly true that we are facing the gravest constitutional crisis since the Civil War; then the issue was the preservation of the Union, while today it is the future of constitutional government itself—whether we can still say, with a straight face, that we are a "government of laws, not men."

But this crisis does not stem fundamentally from the series of White House deceptions and crimes known collectively as Watergate. Watergate, while indelibly stamping the crisis on the public consciousness, is merely the culmination of earlier abuses of power by President Nixon which have been allowed to go unchecked. Indeed, if we re-read the Constitution, it becomes apparent that the President has violated at least seven of its provisions in both foreign and domestic affairs. And these violations are not a matter of uncorroborated evidence, as is the case at present with Watergate. They are almost entirely a matter of public record.

The question, then, is: When viewed as a whole, are these abuses of power sufficiently ominous for us to speak, however reluctantly, of a constitutional crisis which can only be resolved legally by impeachment?

## Article I Section 8

ARTICLE I, SECTION 8 of the Constitution provides that "The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Considering the uproar over the invasion of Cambodia in the spring of 1970, it is astonishing that so little has been said about the illegality of our continued bombing of Cambodia. Since Mr. Nixon has asserted several times that the United States is now at peace, the bombing is apparently an unconstitutional act of war.

Moreover, if our continued military engagement in Indochina does not constitute a *de facto* state of war, the bombing violates another clause of Article I, Section 8, which specifies that "The Congress shall have power . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." (In contemporary terms, "offenses against the law of nations" are violations of international law). The Cambodia bombing usually has been justified as a response to North Vietnamese "aggression." But since aggression as such violates international rather than American law, only the Congress would have the authority to commit our military forces to action.

Such an interpretation is reinforced by the discussion of this clause at the Constitutional Convention. Originally this clause read: "The legislature of the United States shall have the power . . . to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations."

See YES, Page C5

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Thus, the original draft limited Congress' role to a definition of offenses against international law that the executive could punish. Mindful that a President could use this provision to conduct an undeclared war, the Founding Fathers revised the text, specifying that Congress both "define" (make the law) and "punish" (authorize execution of the law) in violations of international law.

If continued military action in Indochina violates Article I, Section 8 of the Constitution, it also violates 18 U.S. Code, Sections 956, 960 and 962. Section 956 provides that no "persons" within the jurisdiction of the

If continued military action in Indochina violates Article I, Section 8 of the Constitution, it also violates 18 U.S. Code, Sections 956, 960 and 962. Section 956 provides that no "persons" within the jurisdiction of the United States shall "conspire to injure or destroy specific property situated within a foreign country or belonging to a foreign government . . . with which the United States is at peace . . ." Sections 960 and 962 have similar provisions concerning "any military or naval expedition or enterprise" and the furnishing, fitting out, or arming of "any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state" in "hostilities against the subjects, citizens, or property of any foreign prince or state . . . with whom the United States is at peace."

Some might claim that congressional action to cut off all bombing in Cambodia by Aug. 15 constitutes a retroactive endorsement of all military actions up to that date. While dubious, such an argument could not possibly legitimize the secret bombing of Cambodia in 1969-70. Mr. Nixon personally approved these acts of war, and his administration consistently lied to both the Congress and the American people in covering them up. Nor can these acts be justified on the ground, denied by Prince Sihanouk, that the then-Cambodian government authorized them; 18 U.S. Code 962, again, forbids the use of American military forces "in the service of any foreign prince or state . . . with whom the United States is at peace."

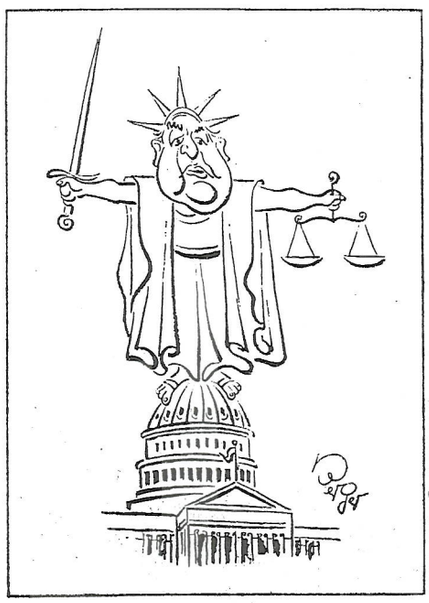
Unlike Watergate, the continuation of the fighting in Indochina and the bombing of Cambodia are explicit acts for which Mr. Nixon does not deny responsibility. Nor does he deny responsibility for other abuses of his power.

## Article II, Section 3

CONSIDER ARTICLE II, Section 3 of the Constitution, which provides that the President "shall take care that the laws have been faithfully executed." Instead of "faithfully executing" the laws establishing the Office of Economic Opportunity, for example, Mr. Nixon gave Howard Phillips — who was illegally appointed OEO head without Senate consent — an explicit mandate to dismantle the OEO in violation of those laws.

A more pervasive — and more dangerous — illustration of this attitude is Mr. Nixon's doctrine of "impoundment." This strategy was first revealed in August, 1972, in an off-the-record speech by Charls Walker, then deputy secretary of the Treasury. In explaining to the executive committee of the American Bankers Association how the President intended to enforce a spending ceiling, Walker indicated that expenditures would not be reduced across the board. Rather, from the outset it was intended to discontinue those programs "on the statute books" which Mr. Nixon found useless or ineffective.

As Walker was reported by The New York



Times to have admitted candidly, this approach represented a "retroactive item veto." Needless to say, the Constitution does not give such power to the President. Nor does Thomas Jefferson's so-called impoundment provide a valid precedent. Jefferson delayed building gunboats; he did not permanently cancel broad programs enacted and funded by the Congress.

It should not be surprising, therefore, that U.S. District Court Judge Oliver Gasch ruled, on May 8, that the Environmental Protection Agency illegally failed to execute the Federal Water Pollution Control Act by refusing to spend $6 billion in appropriated funds. Other court decisions have since reinforced the conclusion that Mr. Nixon's impoundments were illegal.

## Article II, Section 1

MR. NIXON'S DISREGARD for the Constitution does not end there. Article II, Section 1, for example, declares that "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

In flat violation of this clause, President Nixon has received emoluments in the form of improvements to his private residences in San Clemente and Key Biscayne. While some of the $2.2 million expended on the Nixon estates could be justified in terms of "national security," it is hard to class a $2,800 swimming pool heater in this category. And, while the old furnace at San Clemente may well have been a hazard, a new $13,500 electrical heating system is a capital improvement to a private residence, an "emolument" in the constitutional sense.

The money involved in these unconstitutional expenditures is relatively small. But the concept of equating a swimming pool heater or a new heating system in Mr. Nixon's private residence with "national security" is shocking. In monarchies the personal comfort of the king may be a matter of national security. Under the U.S. Constitution it is not.

## The First Amendment

THE FIRST AMENDMENT, in the Bill of Rights, also has been violated. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition for a redress of grievances." Although directed to Congress, the First Amendment applies to the executive as well, especially in the light of the Ninth and Tenth Amendments, which reserve rights not enumerated in the Constitution "to the states respectively, or to the people."

Yet Mr. Nixon's administration has tried, through arbitrary bureaucratic means, to limit free speech that could not be punished by law. Journalists have been subjected to harassment, in the form of FBI investigations and tax audits, in retaliation for criticism of Mr. Nixon and his friends. Even more dangerous is the evidence that Mr. Nixon personally sought to use the Internal Revenue Service to silence hostile political groups.

According to a memo by Tom Charles Huston, "Nearly 18 months ago the President indicated a desire to move against leftist organizations taking advantage of tax shelters . . . What we cannot do in a courtroom via criminal prosecutions to curtail the activities of some of these groups, IRS could do by administrative action."

This frank statement of Mr. Nixon's desire to harass political enemies by bureaucratic means would be disquieting under any circumstances. But the IRS has also been given broad authority to police Mr. Nixon's economic controls. Combined with lists of "enemies," high-pressure tactics for campaign gifts, and threats of punishment to those unfriendly to the White House, the potential for abolishing free speech by what Huston blandly called "administrative action" is frightening.

No sane assessment of the American political scene since 1968 could indicate a "clear and present danger" justifying these actions. A President has the right to banish debate within his own administration, if he is foolish enough to do so. But the President's documented attempts to restrain free speech challenge our basic constitutional rights.

## The Fourth Amendment

THE AREA WHERE Mr. Nixon's concrete actions seem most clearly implicated thus far by the Watergate investigation concerns the Fourth Amendment, also in the Bill of Rights. This Amendment declares that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It has been shown that the President, in July, 1970, personally approved a domestic surveillance operation — subsequently vetoed by J. Edgar Hoover — that violated this provision. According to the recommendation concerning "surreptitious entry," for example, the White House document admitted that "use of this technique is clearly illegal: It amounts to burglary." Similarly, "covert coverage" of mail was to be authorized because "the advantages to be derived from its use outweigh the risks," even though the practice was explicitly described as "illegal."

This pernicious doctrine that the ends justify the means was not confined to White House memoranda. Evidence also has been introduced that illegal wiretapping and surveillance of journalists was personally ordered by Mr. Nixon. And, before the Ervin committee, John Ehrlichman coldly defended the break-in of Daniel Ellsberg's psy-

chiatrist, placing a vague and implicit doctrine of "national security" above the explicit provisions of the Fourth Amendment.

## Article II, Sections 4 and 1

THE IMPEACHMENT SECTION itself, Article II, Section, 4 provides that "The President . . . shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." A good case can be made—and I. F. Stone has convincingly argued it in The New York Review of Books — that the President has violated the bribery provision.

By "late March," according to Elliot Richardson's testimony during hearings on his confirmation as attorney general, the President knew that the office of Daniel Ellsberg's psychiatrist had been burglarized. And on April 5, Judge Matthew Byrne, presiding at that trial, was sounded out about the directorship of the FBI at a secret meeting with John Ehrlichman in San Clemente. During this meeting, Mr. Nixon briefly entered the room, ostensibly to greet Judge Byrne.

As Stone points out, "When Nixon met Judge Byrne on April 5, the President knew but the judge did not that there had been a break-in, that its disclosure might lead to a mistrial and dismissal of the case, and that if the judge disclosed the break-in in open court it would be another black eye for the administration." It is difficult to believe that the President's presence at a meeting of this sort was not a tacit endorsement of Ehrlichman's feeler to Byrne.

Finally, there is Article II, Section 1, in which the President's oath of office is prescribed as follows: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

The question here is simply whether the foregoing instances of unconstitutional action amount to violations by the President of his oath.

To be sure, for each example a legal defense could be made. But when the pattern of stretching the law becomes far-reaching enough, these arguments begin to ring hollow. A man found with a smoking gun in his hand and a dead body at his feet can claim self-defense. But after a number of such occasions, the jury would have good reason not to believe him anymore.

## A "National Inquest"

THE REMAINING QUESTION is whether the extreme step of impeachment is prudent. Many politicians, and most Americans, would prefer to avoid impeachment if at all possible. But the American system has always depended upon a notion of constitution law based on checks and balances between the three branches of government. Only by a return to these principles can free government as we have known it for nearly two centuries survive.

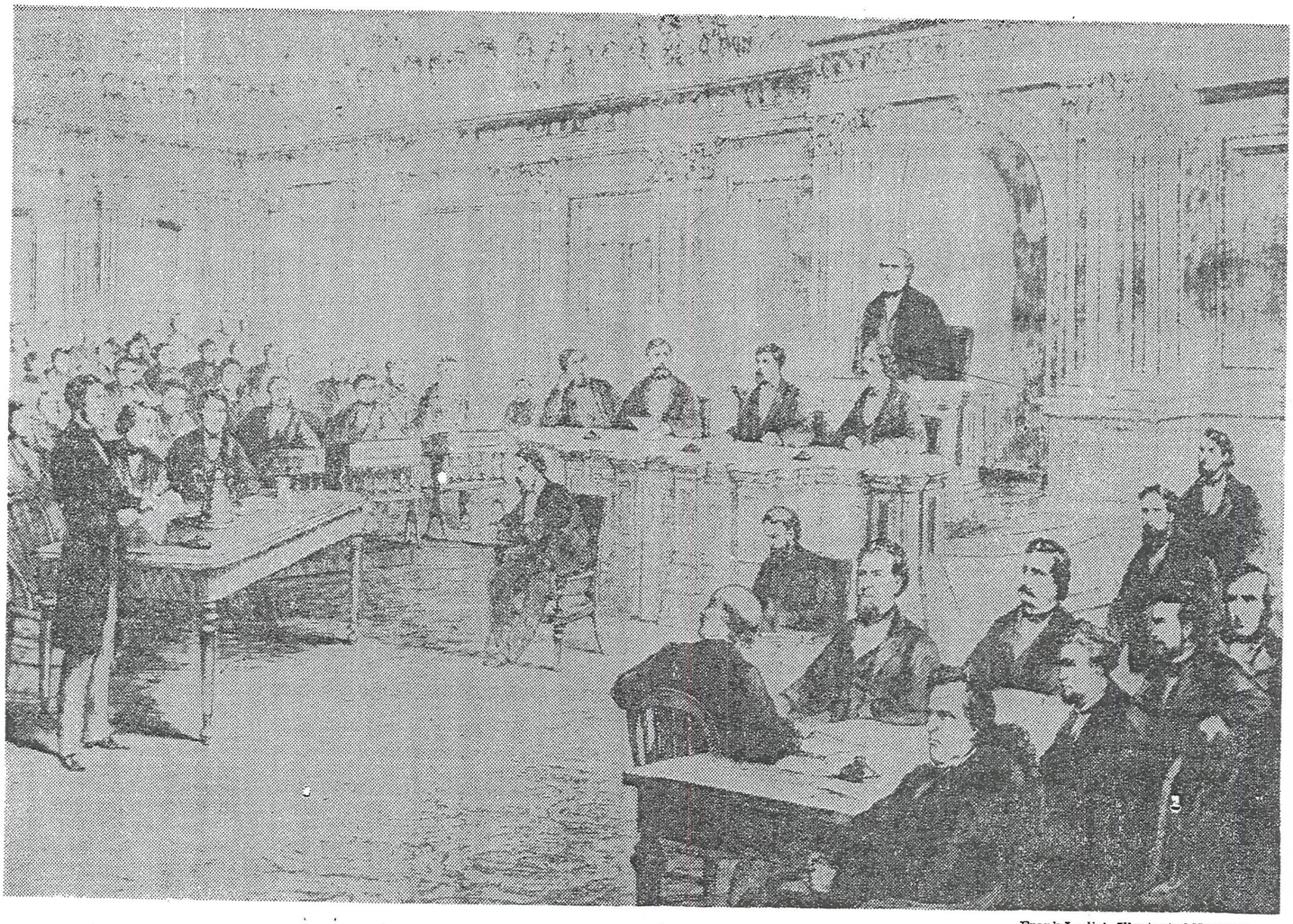
The wisdom of Mr. Nixon's policies is not at issue. I personally believe this administration's basic foreign policy to be more coherent than that of its predecessors. Others may favor his domestic programs. But even good policies become tainted if implemented illegally.

For the Founding Fathers, impeachment was a necessary component in their conception of a limited government. As James Madison put it in Federalist Paper 51, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself." To this end, the possiblity of a "national inquest into the conduct of public men," as Alexander Hamilton called impeachment in Federalist Paper 65, was viewed as necessary in cases of "the abuse or violation of some public trust."

In concluding his examination of the executive branch in Federalist Paper 77, Hamilton asked whether the constitutional powers given the President combined "the requisites to safety, in a republican sense — a due dependence on the people, a due responsibility." He concluded that it did because the President would be elected every four years *and* because he would be "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law."

It has been said that impeachment would produce chaos. Such a view implies that the United States has become an elective monarchy. Quite the contrary, we must consider the consequences of *not* impeaching President Nixon. How long can our system function with a President who is afraid to have a free and open news conference? Would failure to impeach Mr. Nixon create a precedent for even more outrageous violations of the law in the name of "national security," "executive privilege," or the implied powers of the presidency?

Mr. Nixon has violated both the spirit and the letter of the Constitution. Impeachment is the only constitutional provision for removing a President from office who has acted in this manner. Resort to this procedure, while grave and momentous, would be the most salutary demonstration of the strength and vitality of our republican form of government. Mr. Nixon should be impeached.



Frank Leslie's Illustrated Newspaper

*The start of the Senate's trial of President Andrew Johnson on March 13, 1868, with Chief Justice Salmon P. Chase presiding.*