

On Formulating an Ap

By Archibald Cox

The impeachment process now under way poses novel and unusually difficult challenges to lawyers, to men in government and other forms of public life, indeed to all of us. We write upon an almost clean slate. Little law or political precedent is available to guide the hard decisions. Yet, regardless of the outcome, the value of the proceeding will depend on whether the process is so conducted that the country perceives it as a fair and legitimate measure for restoring integrity to government.

If President Nixon should be impeached and convicted, the question of legitimacy will be paramount. If Mr. Nixon is acquitted, the country will still need assurance about the integrity of that conclusion. Whatever the event, we may fairly ask that the leadership build better for the future than its predecessors at the impeachment of Andrew Johnson.

The central challenge is to formulate the principles, the general standards of conduct, by which a President is to be judged in a proceeding that vacates, without direct expression of the popular will, a choice made by the people — in this case overwhelmingly made by the people—in the regular election only a few years before.

Too much discussion, public and private, has been concerned either with loose generalities about the ultimate question of impeachment or with the excitement and speculation stirred by particular disclosures. Too little hard debate has focused upon what should be impeachable offenses—upon why some wrongdoing should be grounds for impeachment while other misconduct is left to popular judgment at the polls.

I am convinced that the legitimacy of the final conclusion in the view of the American people will depend upon the success of counsel and other public men in formulating general standards of conduct fairly applicable to any President, and in educating the public upon their meaning and legal and moral base. For Democratic Senators and Representatives to keep silent upon the ground that impeachment is a Republican problem and for Republicans to keep silent while they test the

political winds is to deny the country the debate necessary to educated self-government and the development of governmental institutions.

We might give two polar meanings to the "high crimes and misdemeanors" for which a President, a judge or any other civil officer may be impeached: anything that satisfies the Congress of the day, or at the other extreme only violations of the criminal law. Convincing historical materials exclude both these poles and leave us with a third view: that the phrase "high crimes and misdemeanors" covers some but surely not all political offenses—"political" in the sense of governmental.

Reaching this conclusion moves us along, but it is only the beginning of the challenge. What are the wrongs against the people, the body politic, for which a President may properly be impeached?

The Gallup poll and like measures of public opinion report that a very large majority believes that President Nixon is guilty of covering up wrongdoing, but of those expressing an opinion a majority opposes removal by impeachment. The difference, in my opinion, is attributable to a fear of impeachment not unlike the fear of regicide and the horror of the regicide once accomplished during the time of Cromwell and King Charles I.

Of course, impeachment cannot be wholly illegitimate—the Constitution provides for it—but I think that the country has a deep, intuitive understanding that impeachment is extraordinary, radical surgery, legitimate only upon some equally fundamental wrong, doing such grave injury to the nation as to make any incumbent's further continuance in office unacceptable even though his previous entitlement was based upon popular election.

Surely any wrong so fundamental as to require setting aside the results of one election without holding another must be one that can be stated in general terms plainly applicable to any President at any time. The need is to quiet the fear that impeachment may be or become a partisan substitute for a premature election. Political opposition, emotion, dislike, distrust and lack of public confidence (which may be temporary even when mixed with suspicion of some kind of wrongdoing) are not enough.

Equally surely, in my opinion, any

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general standard of political conduct the violation of which would support impeachment must have a broad and generally accepted moral base, understood by the country, so that again the same rule would apply to any President, so that we should not be resolving questions of public policy by impeachment. Nor should we be making up new rules of conduct as we go along. Of course, it is unnecessary to draw up a complete code of Presidential conduct. Mixing pragmatism with principle is one source of much of the creativity in Anglo-American law and government.

We work eclectically up to a point, passing judgment upon particular sets of facts, but we also test our judgment by asking whether it rests upon reasons that we can articulate and apply to other situations having the same essential elements, with enough generality both in scope and continuity to give guarantees against caprice, prejudice, self-interest or unreasoned emotion.

So here, the articulation of minimum acceptable standards of conduct for any President or high executive officer can begin with facts proved or assumed.

It is fair to say that evidence may be available to show that President Nixon's lawyers and accountants, without deliberate misrepresentation, zealously sought every loophole and cut every corner in an effort to avoid or minimize the payment of taxes; to show that others acting on his behalf likewise stretched every possible point to add to the convenience and comfort of Key Biscayne and San Clemente at public expense; and, finally, to show that in some cases they claimed more than the law allows.

Bad taste? Surely. Avariciousness? Yes. Bad leadership? Again, surely. Morally shabby? I think so, even though the same shabbiness infects thousands of tax returns and expense accounts. Grounds for impeachment? I wonder.

We are hardly prepared to say that any officer of the United States who, without concealing or misrepresenting material facts, claims a tax deduction not due should be removed from office. If not, does my phrasing omit some essential element in President Nixon's situation? Would convincing proof of material misrepresentation make a decisive difference?

Let us try again. Is it tolerable or a high offense against the liberty and security of a whole people for a President to approve in principle electronic surveillance, mail covers and burglaries for the purpose of gathering domestic intelligence, over the objection of the established agencies to set in motion a small force of his own irregulars—the Caulfields, Ulasewiczes, Liddys and Hunts—who will operate from the executive office outside all the regularizing rules and procedures of the established agencies in order to effectuate Administration policy and political objectives and to hamper inquiry into their activities?

Move to a third area. The President's duty is to see that the laws are faithfully executed. Is it an impeachable violation of this responsibility for him to refrain for months from any form of personal intervention when there is, first, suspicion and later at least some evidence that his highest personal aides and party officials are obstructing justice by covering up criminal misconduct, for him to withhold disclosure and refuse evidence when investigation leads to papers taken into his files, and for his aides, apparently with his approval, to cooperate with those seeking to avoid indictment and conviction?

I do not imply answers to these questions, nor do I suggest that my factual predicates represent the actual facts. The evidence may show more, or less.

The point I wish to emphasize is that it is past the time for all those deeply concerned with our Government to bend some of their time and effort away from the excitement of factual disclosures to the very arduous task of formulating and thus creating a substantive law of impeachment where now there is none. Whether the present proceedings help to rebuild confidence in our system of government or push us further down the slope to cynicism and despair will depend upon the ability of the House Judiciary Committee to sense the as-yet-unstated moral intuition of the country and articulate it in operative principles by which President Nixon's conduct can be judged.

Archibald Cox, the former special Watergate prosecutor, adapted this article from a speech at Amherst College.