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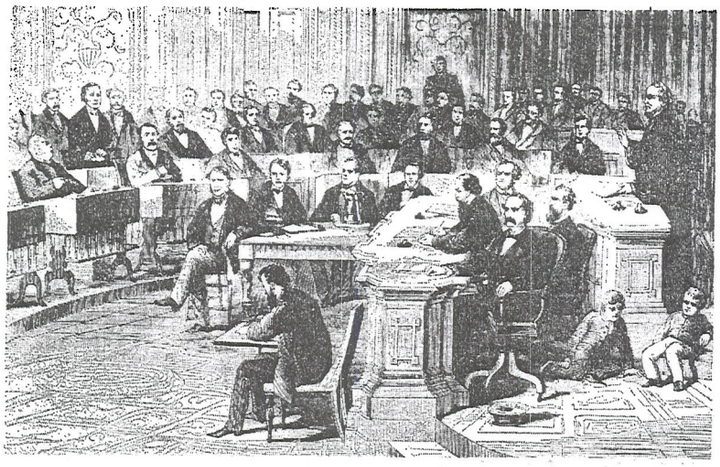

James E. Taylor, June 1868

Counting the vote in President Andrew Johnson's impeachment trial (left) and serving him with the summons, (below).

Frank Leslie's Illustrated Newspaper, March 28, 1868

Merlo J. Pusey

What Are Grounds For Impeachment?

The writer is a former associate editor of The Post.

Nearly two centuries have failed to produce any clear-cut definition of the offenses for which a President or other high government officials may be removed by impeachment. The founding fathers agreed in the Constitutional Convention that some means of removing the President was essential to their system of limited government, which divided power among executive, legislative and judicial branches. But, like so many other provisions in the Constitution, their final compromise could be widely interpreted. And since no President has ever been both impeached by the House and convicted by the Senate and only four of the other impeachments have resulted in convictions—all involving federal judges—the blank spaces in this area of constitutional law are extensive.

There are, however, some guidelines as to the broad purpose of the founders in adopting the impeachment provision. They were well informed as to the part impeachment had played in curbing the powers of British kings. They studied the various impeachment provisions then in effect in the American states. Their first, tentative decision on the subject was that the President would "be removable on impeachment and conviction of malpractice or neglect of duty."

There was a good deal of debate on the subject because Gouverneur Morris and other members of the convention feared that Congress might use the power of impeachment to destroy the independence of the President. At that time, the tentative draft of the Constitution called for election of the President by the legislature. Because of fear that Congress would be able to dominate any President thus beholden to it, the Committee on Detail reversed a previous vote of the convention and resolved that the President "shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery or corruption." After selection of the President by an electoral college was agreed upon, the Special Committee revised the impeachment provision so that the President might be removed upon "conviction by the Senate, for treason or bribery." As a safeguard against dismissal of the President "under the influence of heat and faction" a two-thirds vote of the Senate was required.

James Madison and Elbridge Gerry complained that impeachment should not be limited to the crimes of treason and bribery. Madison would not go along, however, with a proposal that Congress be allowed to impeach the President for "maladministration." Use of "so vague a term," he said, would mean "tenure during pleasure of the State." The convention accepted a proposal by George Mason that impeachment be extended to "other high crimes and misdemeanors against the State." This language, of course, was written into the final draft of the Constitution.

Mason made clear that he had borrowed the terms "high crimes and misdemeanors" from English law. He was striking, not at ordinary crimes, but at grave offenses against the state. This view appears to have been shared by both Madison and Alexander Hamilton. In expounding the work of the founders in The Federalist, Hamilton said that the impeachment provision was designed to reach "the misconduct of public men" and "abuse or violation of some public trust." Madison threw a good deal of light on his view when he argued, in the first Congress, that the President should have the power of removing other executive officials from office and that this power would "make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetuate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses."

Use of the impeachment power, which the convention had provided and the states had approved, got off to a poor start when the Jefferson administration seized it as a means of ousting Federalist judges. In 1805 the House impeached Supreme Court Justice Samuel Chase, and the Senate tried him in an atmosphere of furious partisan bickering. Chase had been indiscreet on the bench and was widely accused of allowing politics to color his decisions. A majority of the Senate (though less than the required two-thirds) found him guilty on three of five counts. He might have been convicted, except for the fear that such action would unloose an orgy of impeachments to serve political ends. Chief Justice John Marshall was said to be next on the Jeffersonians' list. The independence of the judiciary was clearly at stake.

In moving against Chase, the Jefferson administration stretched the impeachment power to the breaking point. As Edward S. Corwin points out in "President: Office and Powers," "the prosecution advanced the doctrine that impeachment is 'an inquest of office,' a political process for turning out of office any official whom a majority of the House and two-thirds of the Senate wished to be rid of." Similarly Charles Warren comments in "The Supreme Court in United States History":

> Its gravest aspect lay in the theory which the Republican leaders in the House had adopted, that impeachment was not a criminal proceeding but only a method of removal, the ground for which need not be a crime or misdemeanor as those terms were commonly understood.

The foes of Chase further undermined their cause by trying to pass a constitutional amendment that would have given the President and a majority in Congress authority to dismiss any federal judge without trial. That move also failed, and the political branches had to accommodate themselves to a system under which they could not ride rough-shod over the courts. The shadow of the Chase case undoubtedly prejudiced many later efforts to use impeachment against official lawlessness and corruption.

The only serious attempt to use impeachment against the President came in the Andrew Johnson case after the Civil War. In this case, too, the forces pressing for impeachment overplayed their hand with the result that Johnson was acquitted by the Senate, although by only one vote. The country was close to being torn apart by the fanaticism of the Reconstruction. The Radical majority in the House seemed

Harper's Weekly, March 21, 1868

A lengthy debate.

determined to force its will upon the country, with little regard for the methods used or for the consequences. President Johnson was much alarmed by rumors that his enemies in the House planned to put him under arrest or suspend him from office while the impeachment trial was pending.

Once more the offenses punishable by impeachment were defined in very broad terms. At Johnson's trial the manager for the House commented:

> The result is, that an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper course.

This brought an equally sweeping rejoinder from Johnson's defenders. Former Justice Benjamin R. Curtis, one of Johnson's counsels, told the Senate:

> My first position is, that when the Constitution speaks of "treason, bribery, and other high crimes and misdemeanors," it refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done, and I say this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.

Corwin concludes that the Curtis view must be regarded as having prevailed, "not only on account of the failure of the impeachment, but because of the emphasis given by the House managers themselves to the contention that Johnson was guilty of a breach of the law, the Tenure of Office Act." But this is far from being conclusive. It is more reasonable to conclude that the House lost its case against President Johnson because of the inherent weakness of that case.

The basic charge against Johnson was that he refused to comply with an act of Congress which prevented him from dismissing appointed officials without the consent of the Senate. The act was a flagrant invasion of presidential power, as the courts ultimately recognized. It was Congress that was out of step with the Constitution, and there is not much force to the argument that Johnson should have accepted the congressional mandate in spite of his misgivings about it, because restoration of the dismissed Secretary of War to his former post would have removed the grounds on which a test case in the courts could have been based.

As in the Chase impeachment case, moreover, the assault upon Johnson was accompanied by another outrageous coup that discredited the Radical cause. While the impeachment trial was still under way, the Radicals slipped through both houses an act taking away the jurisdiction of the Supreme Court to hear the *McCardle Case*, because of fear that the Court was about to strike down some of the Reconstruction laws on grounds of unconstitutionality. This gave rise to fears that the impeachment trial was but one act of a drama designed, as Gideon Welles said, "to overthrow not only the President but the Government." Johnson made his relations with Congress worse by vetoing this bill. Congress passed it over his veto, which alarmed many moderates who feared that Representative Thaddeus Stevens and his colleagues were on a power binge that would endanger personal liberties as well as constitutional government.

There is very little in either the Chase impeachment or the Johnson case to guide Congress in 1974. The charges against President Nixon are much broader than the charges against either Chase or Johnson. If the House decides to bring in a bill of impeachment against the President, it could rest its case on basic constitutional principles without relying on either narrow technicalities or sweeping generalities.

The founding fathers avoided any narrow definition of impeachment for the same reason that they avoided excessive detail in other sections. To paraphrase Marshall, it was a Constitution they were creating. Certainly there was purpose in treating impeachable offenses differently from other crimes. They assigned the impeachment power to the House and Senate rather than the courts because it involves no question of punishment for crime: the only penalty on conviction is removal from office. The underlying object was not to punish a criminal but to save the country from officials whose conduct has been so treasonable, subversive, illegal, or otherwise outrageous as to imperil the welfare of the nation or its people.

For this reason, it is impossible for anyone to determine in advance whether any particular offense or series of offenses is impeachable. The Senate has to judge each impeachment on the evidence presented and the circumstances surrounding the alleged offenses.

Very little in these records of the past is worthy of emulation. What does stand out is a potent warning that, if the course of impeachment is to be taken, the charges to be pressed should be grave and substantial, the trial of such cases should be disentangled from politics so far as that is humanly possible, and Congress should not use the crisis resulting from an impeachment effort to enhance its own power at the expense of the legitimate responsibilities of the executive branch.

At the same time, Congress must be aware of the dangers of inaction. Some observers believe that, if Congress should fail to proceed against President Nixon in the face of mounting evidence that he has bungled and mismanaged his office, thwarted the processes of justice and twisted his credibility, it will lose its power to check any future presidential corruption or grab for power, however flagrant it may be. Despite the failures and abuses associated with the power of impeachment, it has always been a potentially vital factor in the relations between Capitol Hill and the White House. Congress cannot rationally allow it to become a dead letter.

Logic thus calls for a candid and thorough examination of the President's fitness to continue in office, without partisan brawling and without any power-play designed to shift legitimate executive responsibilities to Capitol Hill. The Democrats might well take a hint from the Republicans in Congress in 1937 who fell into the background and let dissenting Democrats take the lead in the fight against President Roosevelt's court-packing bill. The current grave situation calls for an exhaustive examination of the facts and a judicious trial in the Senate if the House decides that impeachment is warranted. It is a critical time for the President, but no one should forget for a moment that Congress too is on trial, against a background of shabby performance in somewhat similar circumstances of the past.