Impeachment

I. F. Stone

The Federalist Papers explained that the new Constitution allowed for an exception to the doctrine of separation of powers. It provided for "a partial intermixture" in certain cases. This was defended as "necessary to the mutual defense of the several members of the government against each other." So the President was given a veto over the legislature and the Congress the judicial power of impeachment as "an essential check . . . upon the encroachments of the executive." Impeachment was to be a "method of National Inquest into the conduct of public men," a way to try "the abuse or violation of some public trust."[1]

There are two reasons for seriously considering the impeachment of Richard Nixon. One is that this may prove the only kind of legal proceeding in which the President's complicity in the unfolding Watergate and related scandals may be fully and fairly determined. The other is that only so grave a step may deter a future President from the abuses charged against the Nixon White House. Presidential power has grown so enormously, especially since the Korean War in 1950, and the temptations this offers an incumbent and his associates are now so great that impeachment and removal from office if convicted may be the only constitutional sanction to stem the trend toward Caesarism in the White House. And Caesarism, Gibbon may remind us, was the establishment of one-man rule *without outward disturbance to the constitutional forms of the old Republic.*

The first reason for considering trial by impeachment arises from the difficulty of ensuring a President's appearance as a witness in any ordinary court of law, much less before a grand jury. Even as the special prosecutor Cox takes over, there are already half a dozen criminal proceedings under way at different stages in various parts of the country, as outgrowths of Watergate and the related affair of the Pentagon Papers. The President, if he were a private person, would normally be sought as a witness in several or all of them; they take on more and more the aspect of a far-flung conspiracy; the filaments lead unquestionably into the White House, and to the Oval Office door. It may not be possible to arrive at a judgment of Nixon's responsibility without a chance to question him under oath, either as a witness or by interrogatories. Indeed it is possible that some indicted officials may go free when tried for lack of Presidential testimony, or because the White House, on the blanket ground of national security, has withheld documents subpoenaed in their defense.

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As this is being written the White House has burst into fury because an unnamed "Justice Department source" and "another knowledgeable source" dared to say aloud to the *Washington Post*[2] what is obvious to anyone following the news at all: First, that "there is an evidentiary pattern" which raises questions about the President's role in the whole affair, and second, that "the President should be given an opportunity to explain himself."

The *Post* reported that the prosecutors have therefore told the Justice Department there is justification for calling the President before the Watergate grand jury, but they are baffled about how and whether they can do it. Next day Ziegler said that Mr. Nixon would answer the questions of the prosecution neither orally nor in writing. This seems to bar not only submission to a subpoena but a voluntary appearance, or even a voluntary deposition. When asked why, Ziegler said it would be "constitutionally inappropriate." This seems to make impeachment the only way to get at the truth.

There is nothing in the Constitution, in the debates on its framing and ratification, or in its exposition in the Federalist Papers, that puts the President above the law, nor is there anything that says that serving him with a subpoena would be "constitutionally inappropriate" or that exempts him in any way from normal legal processes. There is much that suggests otherwise. The Framers of the Constitution encountered a widespread fear that the President might become a king; the impeachment

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[1]Nos. LXIV and LXVI, Everyman's Library, pp 333, 337, and 338.

[2]The May 29 story was by the redoubtable team of Carl Bernstein and Bob Woodward, who have made journalistic history in the Watergate affair.

power was intended to block the way. In England it could be used only against the King's ministers, never the King; here its chief object was the President himself.

The Federalist Papers said that while in England the King "is unaccountable for his administration, and his person sacred," the American President would be in no such untouchable category. They explained that a single instead of a plural executive was decided upon in order to make the Executive more accountable to public opinion and to make it easier to determine misconduct in order to remove him from office or to impose "actual punishment in cases which admit of it."[3]

But short of impeachment, can the President be compelled to appear in a court of law for misconduct in or out of office, or to testify in regard to the misconduct of his aides? This old constitutional controversy was freshly ventilated by a footnote to the Supreme Court's decision in the Earl Caldwell case last year. That footnote is being cited by lawyers who think the President can be made subject to court proceedings and that the impeachment process is not necessary to get at the whole truth of all the dubious activities which come under the general heading of "Watergate."

The footnote is in Mr. Justice White's opinion for the court. It is appended to his reiteration of the "long standing principle that 'the public has a right to every man's evidence,' except for those persons protected by a constitutional common law of statutory privilege." The footnote seems to imply that even the President has no such privilege for it says,

> In US v. Burr, 25 F.Cas. 30, 34 (Cir. Ct. D. Va. 1807 (No. 14,692d), Chief Justice Marshall sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.[4]

The Burr trial in 1807 was the only occasion on which a subpoena to a President was ever issued. Chief Justice Marshall's opinion in that case — where he presided over the trial on circuit, as Supreme Court justices did in those days — is the only "law" bearing directly and precisely on the question. Aaron Burr was on trial for treason. A scant few months earlier the President of the United States, Thomas Jefferson, in a special message to Congress had declared Burr's guilt "placed beyond question." This message was based on a letter to Jefferson from a most unsavory character, General James Wilkinson,[5] who had turned informer. Burr's lawyers asked that the President and the letter be subpoenaed.

It is hard to imagine circumstances that could more overwhelmingly justify a subpoena. Jefferson and Burr were old party rivals and bitter enemies, a tie vote between them in the electoral college in 1800 threw the election into the House of Representatives and almost cost Jefferson the Presidency. To declare Burr guilty in advance of trial was a gross abuse of power. The President, according to Leonard W. Levy's *Jefferson and Civil Liberties: The Darker Side* (Belknap Press, Harvard, 1963), "acted himself as prosecutor, superintending the gathering of evidence, locating witnesses, taking depositions, directing trial tactics, and shaping public opinions as if judge and juror for the nation." There is ample evidence for that harsh verdict.

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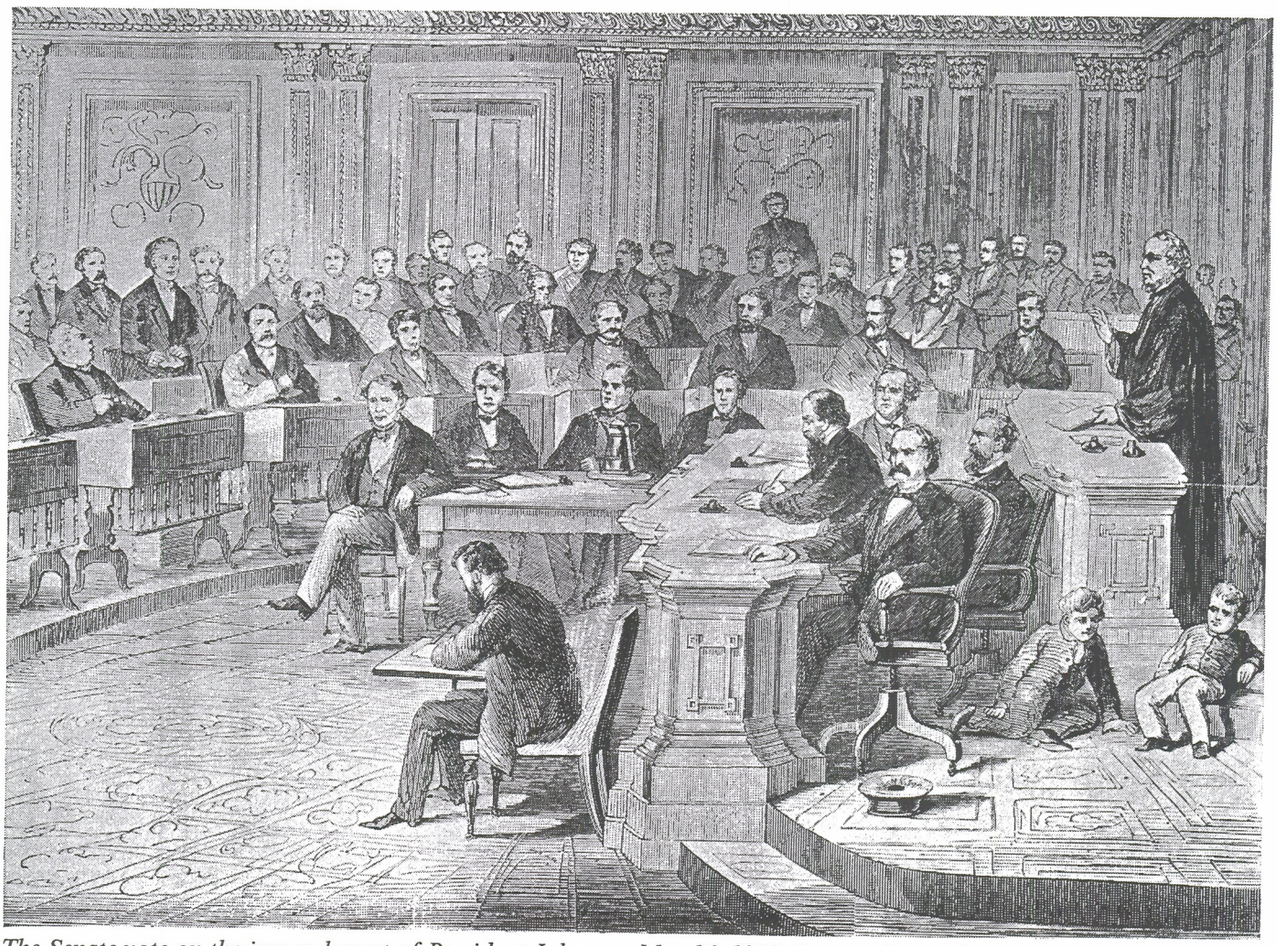
The trial of Burr was not only a struggle between him and Jefferson, but between Jefferson and Marshall, the radical Democrat and the conservative Federalist. The Chief Justice, in deciding that a *"subpoena duces tecum"* could be issued — requesting Jefferson to appear with documents, based his reasoning on a principle which had been dear to the Jeffersonian Democrats. It was they who always insisted that the President was no king, and had constantly accused the Federalists of trying to make him an uncrowned monarch. In the unsuccessful impeachment of Supreme Court Justice Chase in 1804-1805 for his intemperate conduct in the Alien and Sedition Law cases in 1798-1800, one of their complaints was his refusal to subpoena President John Adams in the trial of Jefferson's friend, Thomas Cooper, for seditious libel.

It had always been the Federalists who argued that the President was answerable to no judicial process but impeachment. Now in the Burr trial Chief Justice Marshall ruled that the law of evidence, i.e., the law as it was developed in the mother country, allowed for only one exception to the persons who might be summoned for the defense in criminal trials, and that was the King. "It is a principle of the English constitution," he said, "that the King can do no wrong," and "although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the

[3]No. LXX, Everyman's Library, p. 362.

[4]*Branzburg v. Hayes* (June 29, 1972), Footnote 26 to the majority opinion.

[5]Described in Samuel Eliot Morison and Henry Steele Commager, *Growth of the American Republic* (Oxford, 1962), vol. I, pp. 389-390, as a man "still in Spanish pay while Governor of Louisiana Territory and ranking General of the US Army" who had already discussed with Burr a wild scheme to "liberate" Mexico from Spain. He then decided Burr was "worth more to betray than to befriend" and sent Jefferson "a lurid letter" denouncing what he termed a "conspiracy to dismember the union."



The Senate vote on the impeachment of President Johnson, May 16, 1868. Senator Ross of Kansas casting the decisive vote of "not guilty".

process of the court." But the Chief Justice said one of the differences between a president and a king was that the former "may be impeached, and may be removed from office on high crimes and misdemeanors." He also said the first magistrate of the Union was no different, in so far as judicial process is concerned, from the chief magistrates of the States under the Articles of Confederation, and they were all subject to subpoena.[6]

This was good Jeffersonian doctrine and no doubt explains why counsel for the government at least twice admitted this during the trials — for there were actually two trials of Burr, one for treason and then, after his acquittal, another for misdemeanor. "A subpoena may issue for him [the President]," Alexander MacRae of the government's staff admitted, "as against any other man." But he argued that the President was not bound to disclose "confidential communications."[7] The prosecutors of Burr agreed on two occasions that the President was subject to a general subpoena, i.e., an order to appear and to testify. But they insisted that he was not subject to a *subpoena duces tecum,* i.e., an order not only to appear but to bring with him documents he considered confidential.

Marshall ruled to the contrary. The real obstacle he confronted was not in the realm of constitutional theory but in that of power. What was the Chief Justice to do if the President declined to obey? Have federal marshals arrest the President for contempt? Put him in jail until he agreed to testify?

Both Marshall and Jefferson backed away from a confrontation. In this, as in other instances, Marshall was careful not to push assertions of judicial power so far as to undermine the principles he was trying to establish. For his part, Jefferson was not anxious publicly to put himself in a

[6]US v. Burr (Case No. 14,692d) 25 Fed. Cas., p. 34.

[7]Albert J. Beveridge, *Marshall* (Houghton, Mifflin, 1919), vol. 3, p. 438. Chief Prosecutor Hay also made the same admission and argued the same distinction when motion for the subpoena was first argued.

position where he would be flouting his own democratic principles; in this case, in putting the Presidency above the law. Marshall issued the *subpoena duces tecum* but it was never served on Jefferson.[8] Even had it been served, Marshall's opinion left Jefferson a face-saving way out. The loophole was pointed out by the late Supreme Court Justice Burton, in an essay on Marshall's conduct at the trial of Burr.[9] "The Chief Justice," he wrote, "stated that, while this [the issuance of the subpoena at the request of the defense] was the court's inescapable duty, it remained for the President to indicate in the return whether his executive duties would constitute a sufficient reason for not obeying it."

Jefferson for his part was prepared to use just such a loophole. Before receiving Marshall's decision on the subpoena, Jefferson pointed out in a letter to Burr's prosecutor that Burr was the central figure in an alleged conspiracy. Other trials linked with Burr's were being held "in St. Louis and other places on the western waters." To comply with calls for personal appearance at these various trials "would leave the nation without an executive branch," while the executive "is so constantly necessary, that it is the sole branch which the Constitution requires to be always in function." Jefferson said the Constitution "could not then mean that it [the executive] should be withdrawn from its station by any coordinate authority." But he did offer to give testimony by deposition, an offer which was never taken up by the defense.

In a second letter to the prosecutor two days later, after seeing Marshall's opinion, Jefferson took a stronger line, though only in this private letter and not in a public declaration to the court. "The leading principle" of the Constitution, he insisted, was the independence from each other of the three branches of government. "But would the executive be independent of the judiciary," he went on, "if he were subject to the *commands* [italics in original] of the latter, and to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?" This was hyperbole of Nixonian proportions. Marshall was certainly not trying to "bandy him from pillar to post."

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Jefferson indicated that he was prepared to resist a subpoena for his personal appearance by force, and that the Constitution had given him more force than the Chief Justice with this very purpose in mind! "The intention of the Constitution," as Jefferson put it, in stately but fallacious language, "that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive."[10] Jefferson had an army and navy, the Chief Justice only a handful of marshals. The corollary would be that the President could override the Supreme Court because he had more battalions than the Chief Justice. This was on a par with Jefferson's conduct generally in the Burr case, which remains a blemish on his libertarian record.

But after all these bold, though private, affirmations of defiant power, Jefferson hedged by supplying the desired document to the prosecutor. The prosecutor — to quote Mr. Justice Burton's account again — "later announced that he had the requested letter in his possession and was ready to produce it." The submission of the letter by the President was thus voluntary — in form at least. But with it Jefferson made sweeping claims of executive privilege which Nixon can also use. "All nations," Jefferson wrote the prosecutor, forgetting that most of the nations he referred to were hardly models of freedom for our young Republic, "have found it necessary for the advantageous conduct of their affairs, [that] some of these executive proceedings, at least should remain known to their executive functionary only. He, of course, from the nature of his case, must be the sole judge of which of them the public interests will permit publication."[11] Such was the heady effect on the Presidency even on Jefferson when he set out to wreak vengeance on a hated rival.

. . . it has yet to be widely realized that the facts coming out in the affairs of Watergate and the Pentagon Papers have short-circuited the old controversy over whether impeachable offenses need be indictable.

But the battle between Jefferson and Marshall was like one of those bouts in which the antagonists make the most devastating faces at each other, emit-

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[8]For this bit of information in a murky situation I am indebted to Professor Julian P. Boyd of Princeton who is now editing what will be the definitive edition of Jefferson's works.

[9]See his *Occasional Papers* (Bowdoin College, 1969), p. 52.

[10]The letters may be found in Randall's *Life of Jefferson* (New York, 1858), vol. 3, pp. 210-212.

[11]Ibid., p. 211.