Due Process for the President: The History and the Issues

Gaddis Smith

The word "impeachment" is in the air; with all the talk, it behooves us to examine the origin, nature and disputed meaning of this constitutional procedure.

Impeachment is the act of bringing formal charges, usually of a criminal nature, against a public official by the lower house of a legislature. It is an accusation equivalent to an indictment handed down by a grand jury. The upper house receives the charge and sits as a judicial tribunal, voting to acquit or convict. In Federal proceedings in the United States, the House of Representatives impeaches by majority vote and prosecutes the case before the Senate, with a two-thirds vote required to convict. The accused may defend himself, be represented by counsel or choose not to appear. Under the Constitution, the only punishment for conviction is "removal from office, and disqualification to hold and enjoy an office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law" (Article I, Section 3). By custom, the President is exempt from ordinary criminal proceedings. Thus, a President would have to be removed from office before he could be charged with crimes in the regular courts. This immunity does not apply to judges and other officers.

All delegates to the Constitutional Convention in 1787 agreed that some procedure for removal of officeholders was necessary. But before settling on a procedure, the convention examined and rejected a variety of schemes. John Dickinson of Delaware proposed that the President be removable by the Congress upon request of the majority of the legislatures of the individual states. Roger Sherman of Connecticut suggested that the President simply be removed by the Congress at its pleasure. Both ideas were overwhelmingly defeated. The majority wanted an executive branch powerful enough to resist the factious whim of the states or the Congress.

At another stage in the convention, it was proposed that the Supreme Court be the tribunal to decide charges of impeachment. This idea was rejected for two reasons: the judges were too few in number and might easily be corrupted; and it was improper for judges who might have to decide in a criminal proceeding after removal of the accused to decide in the first instance on removal. A proposal by Alexander Hamilton to convene a special tribunal composed of the chief judges of the courts of the separate states also found little favor. The argument in favor of the Senate as the court prevailed because the delegates decided that the upper house was sufficiently large and diverse to rise above prejudice — especially since the votes of two-thirds of those present were necessary for conviction.

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Not every delegate accepted the idea that the President should be subject to impeachment. The conservative Charles Pinckney of South Carolina was opposed altogether to making the President impeachable. If Congress could impeach, he said, it would destroy the President's independence. If the President opposed the opinions of Congress, "the two houses will combine against him, and under the influence of heat and faction throw him out of office." Governor Morris of Pennsylvania, another conservative, also doubted the wisdom of making the President impeachable. Morris argued that no President could commit crimes without accomplices. It would be sufficient, he said, to remove the accomplices and let the President's fitness be judged by the electors at the next election. If they wanted him removed they could elect another. If they returned him to office, that would be presumption of innocence.

Madison disagreed. He believed that the President's ability to do harm was too great to permit the nation to wait until a term of office expired. The President "might pervert his Administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." The results "might be fatal to the republic." Even Morris was swayed by Madison's arguments.

Should the President and other officers be suspended from their duties while awaiting trial? The delegates could see both sides of that question. If the President were not suspended, "the mischief will go on." But if he were suspended, impeachment — the simple bringing of char-

Gaddis Smith is a Professor of American History at Yale University. *His article, which traces the history of impeachment in America, is from* The New York Times Magazine, *May 27, 1973.*

ges — would be "equivalent to a displacement." The President then would, in effect, become subservient to a majority of the House of Representatives. The convention decided against suspension.

A trial of the President by the Senate would have created an awkward situation for the Senate's ordinary presiding officer, the Vice President. He would have been in a position to influence the outcome of a trial to determine whether he became President himself. To prevent this situation, the delegates provided that when the President was on trial, the Vice President would be replaced as the presiding officer by the Chief Justice of the Supreme Court.

The most extensive discussion in the Constitutional Convention on the question of impeachment dealt with the definition of impeachable offenses. Could an officer be impeached simply because a majority of the House objected to the cut of his jib and voted to bring charges? Could he be removed if two-thirds of the Senate agreed with the opinion of the House? Or did he have to be charged with specific criminal acts and removed only when convicted of them? The delegates could not agree. The ambiguity which they left in the Constitution has kept the issue unresolved down to the present.

At one end of the spectrum were those who wished the President, judges and other officers removed for simple maladministration — which could mean whatever Congress chose to make it mean. This view has had many exponents since 1787. As recently as April, 1973, Attorney General Richard G. Kleindienst told a Senate hearing that if Congress didn't like the way the President was invoking executive privilege to prevent his aides from testifying, Congress could remove the President through impeachment. Would executive-branch personnel be able to appear as witnesses? No, said Kleindienst. "You don't need evidence to impeach a President," he said, only votes. House Republican Leader Gerald R. Ford stated the same doctrine in 1970, when he was leading the unsuccessful effort to impeach Associate Justice William O. Douglas. He said that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."

At the other end of the spectrum stand those who maintain that an official can be convicted in an impeachment proceeding only for criminal offenses indictable in the courts. The intent of the authors of the Constitution lies somewhere in between. A proposal to make officials liable to impeachment and removal from office for "neglect of duty" was debated and rejected. Another proposal made "maladministration" ground for impeachment. "So vague a term will be equivalent to tenure during the pleasure of the Senate," Madison said in rebuttal. Madison's views in this, as in so many aspects of the Constitution, won wide acceptance. The final draft (Article II, Section 4) provides that the "President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of, treason, bribery, or other high crimes and misdemeanors."

And what were these other crimes and misdemeanors? The Constitution does not say.* Depending on which remarks one quotes from the debates in 1787, it is possible to prove almost anything. Most of Madison's comments point in the direction of well-defined, precisely specified criminal acts. Morris stressed bribery, treachery and corrupting elections. But Madison also spoke of the necessity "for defending the community against the incapacity, negligence, or perfidy of the chief magistrate." And who defines incapacity and negligence? Following that question could lead to the position of

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THE CASE THE FOUNDING FATHERS FOLLOWED — The longest (1786-95) and most famous impeachment in British history — that of Warren Hastings, first Governor-General of India — was in progress when the Constitutional Convention met in Philadelphia. Edmund Burke, principal accuser, charged Hastings with, among other crimes, waging aggressive war without authority and surrounding himself with a corrupt administration. Most Americans following the case in newspapers and pamphlets agreed with Burke. They could not know in 1787 that the House of Lords, eight years later, would vote acquittal.

The Hastings case had a direct influence on the wording of the Constitution. George Mason, delegate from Virginia, arguing against limiting impeachable crimes to treason and bribery, said: "Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason." Mason suggested adding the phrase "high crimes and misdemeanors" to treason and bribery as grounds for impeachment. It was done. The delegates were also aware of two abuses in the British practice of impeachment — trial of private citizens by Parliament and the inflicting of heavy punishment — and avoided both in the Constitution — G.S.

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*The prevailing assumption is that "misdemeanors" in impeachment cases refers to crimes connected with the conduct of office. Authorities disagree over whether or not the adjective "high" in the constitutional clause modifies misdemeanors as well as crimes. If it does, no one knows what a "high misdemeanor" is.

Kleindienst and Ford.

Most authorities on constitutional law and history argue for the strict definition of impeachable offenses. They condemn the Kleindienst-Ford position as an invitation to legislative tyranny over the executive and the judiciary. James Bryce in his classic "American Commonwealth" (1888) stated that "one does not impeach for mere incompetence or laxity, as one does not use steam hammers to crack nuts." And in 1972 the constitutional historian Irving Brant, appalled by the attempt to impeach Justice Douglas, wrote an entire book deploring what he considered the degradation of constitutional purity on impeachments. Brant suggested that Congress at least apply the same standards to the other two branches as it applied to its own members. He asked Congress to resolve that: "No President, Vice President or civil officer of the United States shall ever be impeached for conduct which would not cause a Senator or Representative to be expelled from his seat."

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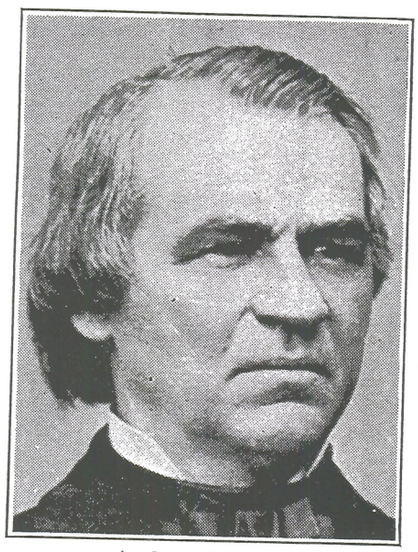
Who besides the President and Vice President can be impeached? The Constitution says "all civil officers." This clearly excludes military officers, but includes Cabinet members, Federal judges, ambassadors and all others whose appointments are subject to the advice and consent of the Senate. Can employees whose appointments are not subject to Senate approval be impeached? Probably not, although the question has never been tested.

There have been 12 impeachments in American history, the first in 1797 and the most recent in 1936. Eleven went to trial. Seven of the accused were acquitted and four convicted. The proceedings, viewed as a whole, present a shabby picture of political prejudice, disregard for the probable meaning of the Constitution and a negligent attitude toward due process. The Founding Fathers devised the impeachment and removal process as a safeguard of the nation's freedoms. The instigators of the actual impeachments, with few exceptions, made a travesty of the Constitution. The result is that a proper and essential part of the constitutional system lies in ill repute. A quick review of history will show why.

The first impeachment (1797) was voted by the House, with little regard for the meaning of "civil officers," against Senator William Blount of Tennessee, for attempting to organize an invasion of Spanish Florida by Indians and frontiersmen with British backing. The Senate dismissed the charges on the grounds that a Senator was not liable to impeachment. Blount, however, was expelled from the Senate.



Andrew Johnson

The first conviction (1804) was against a senile Federal district judge in New Hampshire, John Pickering. The judge was charged with drunkenness, blasphemy and rendering improper decisions. Drunkenness and blasphemy were scarcely "high crimes and misdemeanors," and the improper decisions ought to have been appealed to a higher court where they could have been overturned. But Pickering was an unpopular Federalist, and the Jeffersonian majority in the House and Senate were looking for victims.

Congress was after bigger game than old Pickering. In 1805, Associate Justice Samuel Chase, an able jurist but an outspoken Federalist, was impeached for intemperate, arbitrary and unjudicial conduct in trials involving violation of the Sedition Act of 1798. If Chase could be brought down, Chief Justice John Marshall was in all probability next on the list. Fortunately for the principles of separation of powers and the independence of the judiciary, Chase was acquitted.

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Number four was another district judge, James H. Peck, impeached for arbitrary conduct and acquitted (1830). West H. Humphreys, a Federal judge in Tennessee, was charged and convicted of abandoning his position and becoming a judge for the Confederate States of America (1862).

Next came the only impeachment of a President — Andrew Johnson (1868). Johnson, a Democrat from Tennessee, ran as the Vice-Presidential candidate on the Union ticket with Lincoln in 1864. When Lincoln was assassinated several weeks into the new term, Johnson became President. Soon, a bitter struggle

developed between Johnson and Congress over the nature of Reconstruction. The Radical Republicans, who gained full control of Congress after the 1866 election, saw Johnson as giving aid and comfort to recent traitors and as little concerned with the rights and political status of the newly freed former slaves. On the second point they were right. They contrived a trap.

Johnson intended to dismiss Secretary of War Edwin M. Stanton because of differences over policy. Congress, in anticipation, passed the Tenure-of-Office Act (and repassed it over Johnson's veto), making it illegal for the President to remove an official appointed with the advice and consent of the Senate until the Senate had approved that official's successor. Johnson correctly believed the act unconstitutional. In 1789, when Congress was first making provision for Cabinet officers, James Madison gave the reason. The President's power to remove officers was "absolutely necessary," he said. "It will make him in a peculiar manner responsible for their conduct, and subject him to impeachment himself if he suffers them to perpetrate . . . crimes . . . or neglects to superintend their conduct so as to check their excesses."

Ignoring the Tenure-of-Office Act, Johnson fired Stanton. The House of Representatives quickly voted, 126-to-47, to impeach the President for violation of the act and for his criticism of Congress in public. Trial began March 5 and ended May 16, 1868. Chief Justice Salmon P. Chase presided with dignity and instilled a respect for proper courtroom procedure. The Senate came within a single vote of the two-thirds necessary to convict and remove the President from office. Some Senators hesitated to convict less on principle than out of distaste for Johnson's potential successor, Benjamin F. Wade, the President pro tem of the Senate and a high-tariff, soft-money man — almost an agrarian radical in the eyes of some. By ascending to the Presidency, even for the 10 remaining months of Johnson's term, he would have attained great power and might have been able to win the Presidency in his own right that year.

Most historians and authorities on the Constitution agree that the removal of President Johnson would have tipped the balance of governing power decisively, and rendered precarious the tenure of all future Presidents. This consideration weighed heavily in the minds of Johnson's contemporaries. Senator Edmund G. Ross, who voted for acquittal, said: "The independence of the executive office as a coordinate branch of the Government was on trial." James G. Blaine, who voted for conviction, decided in later years that removal "would have resulted in greater injury to free institutions than Andrew Johnson in his utmost endeavor was able to inflict." During most of the present century — when the ideal of an activist, independent President has been so widely acclaimed — few Americans would have liked the consequences of Johnson's removal.

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The facts in the Johnson case were never hidden or in dispute. He violated a law of dubious constitutionality and one which, even on its face might not have applied to him. The draftsmanship of the law was so poor that it was unclear whether a President was barred from removing an officer appointed by another President — and Stanton was a Lincoln appointee.* But Congress has few scruples. A majority of the House and two-thirds less one of the Senate wanted to get rid of the President. They almost succeeded.

Congressman Benjamin F. Butler, one of the "managers" — i.e. prosecutors — of the impeachment, showed himself a true doctrinal forerunner of Congressman Ford in 1970 and Attorney General Kleindienst in 1973. He defined an impeachable offense as something "prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, or 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 any improper purpose." By such doctrine, no President who dared struggle with Congress would be safe.

Recently, Michael Les Benedict, a historian at Ohio State, has challenged the negative view of the Johnson impeachment. In his book *The Impeachment and Trial of Andrew Johnson,* he points out that Johnson appointed military governors in the occupied South without the advice and consent of the Senate, and also refused to execute laws duly passed by Congress because they represented a policy on Reconstruction with which he disagreed. Benedict argues that these were legitimate grounds on which Johnson could have been convicted by unbiased Senators. Given the present climate of opinion on the Presidency, Benedict's provocative thesis will enjoy more support than at any time in the last 80 years.

*The Tenure-of-Office Act was subsequently repealed without being tested in the courts for constitutionality, but in 1926, in connection with another law, the Supreme Court did vindicate Johnson. Congress, it said, could not prevent the President from removing officers.

There have been six impeachments since Johnson's acquittal. William W. Belknap, Secretary of War under Grant in 1876, was tried, even though he had resigned, and acquitted. A Federal judge, George W. English, was impeached in 1926, but the trial was canceled after he resigned. (The Constitution is silent on the question of whether an officeholder can avoid impeachment, removal and disqualification by resigning.) Four other judges were impeached and tried — two being convicted and two acquitted.

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The relationship of the President to the Congress in the Douglas case is of interest. Chairman Emanuel Celler of the Judiciary Committee asked President Nixon for access to documents bearing on the conduct of Justice Douglas. President Nixon replied that "the executive branch is clearly obligated, both by precedent and by the necessity of the House of Representatives having all the facts before reaching its decision, to supply relevant information to the legislative branch . . . to the extent compatible with the public interest." The Celler committee received Justice Douglas's tax returns from the Internal Revenue Service, as well as information from the F.B.I. and the State Department.

The effort to impeach Douglas, the most liberal and outspoken member of the Court, was an unmitigated power play obviously connected with Administration frustration over the rejection by the Senate of the nominations to the Court of Clement Haynsworth and G. Harrold Carswell. The would-be managers of the Douglas impeachment wanted him out because his place could be filled by a judge with a different philosophy. The charges, never precisely spelled out, dealt mainly with the content of Douglas's writing and personal opinions. He has, said one accuser, "continued advocacy of the recognition of Red China, [and] has publicly criticized the military posture of the United States."

None of the impeachments or attempted impeachments in American history are free from abuses, and yet out of this sorry record there does emerge a set of procedures to govern a proper impeachment and trial.

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The impeachment resolution should specify exactly what high crimes and misdemeanors are charged. The charges should be carefully investigated, preferably by the Judiciary Committee, before the resolution is put to a vote. The managers of the prosecution before the Senate should be selected in an unbiased way and should represent both parties. An impeached officer, like an indicted defendant in a criminal proceeding, should be presumed innocent until proven guilty. The presiding officer at the trial (the Chief Justice when a President is impeached) should rule on points of law and must scrupulously avoid partisanship if he is to hold the respect of the Senate.

Senator Hiram W. Johnson, dissenting from the conviction of Judge Halsted L. Ritter in 1936, said "the High Court of Impeachment is a court bound by rules of evidence and judicial decision. It is not a haphazard tribunal to be swayed by suspicion or moved by vengeance." Senator Johnson's words should be engraved on a tablet and brought out whenever an impeachment is contemplated. Only if those words are heeded can impeachment be used, as intended, as a necessary part of the system of checks and balances in the Constitution and as a protection against human frailty.

"But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

The provision for impeachment and removal from office is one of those auxiliary precautions. The difficulty, as Madison saw, is to know how to use that precaution properly — refraining, on the one hand, from unfounded impeachments destructive of the legitimate need of the governor to govern; and, on the other hand, not shrinking from impeachment when evidence of possible "high crimes and misdemeanors" is present and when the safety of the constitutional system itself appears threatened.