Roy L. Erikson, Jr.

READING GUIDE

Essential to the study of impeachment, Watergate, executive privilege and related constitutional questions are two texts: Raoul Berger's definitive *Impeachment: the Constitutional Problems* (Harvard Univ. Press, 1973), and I. F. Stone's "Impeachment" *(New York Review of Books,* June 28, 1973). The Stone article, which includes a review of the Berger book and of Michael Les Benedict's *The Impeachment and Trial of Andrew Johnson,* is reprinted on page 21 of this issue of *Skeptic.*

One of the historical occurrences alluded to is the subpoenaing of Thomas Jefferson in 1802 in the battle over executive privilege and the extent of the rights of the American President in regard to accountability to courts, Congress, and the people. Professor Berger's book is essential to an understanding of this issue, but useful also is Gore Vidal's recent book on Aaron Burr entitled *Burr: A Novel* (Random House, 1973) which provides the historical backdrop. Pertinent also is an examination of *The Federalist Papers* (New American Library, 1961, ed. Clinton Rossiter) the classic series of essays by Alexander Hamilton, James Madison and John Jay in which the doctrine of separation of powers in American government is first clearly laid down.

In terms of the inevitable and necessary comparison to the privileges of the English kings, I recommend reading Chapter II, 13 of Pollock and Maitland's definitive *The History of English Law,* Vol. 1, pp. 512-526 (Cambridge University Press, 1968), entitled "The King and the Crown," in which the position of the English monarchs does not appear so absolute historically as we might have supposed. Also, the famed English constitutionalist Walter Bagehot's essay "The American Constitution at the Present Crisis" (written in 1861) is very rewarding. It appears in *Bagehot's Historical Essays* (Anchor, 1965) which is a selection from the *Collected Works,* ed. Norman St. John Stevas, Cambridge-New York, 1965). Bagehot prophetically warns against the American practice of giving cabinet offices to favorites. For an account of the first impeachment ever, see p. 22 of G. M. Trevelyan's *England in the Age of Wycliffe,* 1368-1520 (Harper Torchbook, 1963). I recommend reading the entire book as an inspired rendition of the political infighting of that age — and a fascinating parallel to our disturbed times.

Leaving constitutional analysis for the moment and moving forward in American history to the trial of Andrew Johnson, we note that in addition to the previously mentioned book by Michael Benedict, there is Milton Lomask's *Andrew Johnson: President on Trial,* (Farrar, Straus, 1960). Leonard Lurie's *The Impeachment of Nixon* makes us current in this context, and to bring us right up to the present, I recommend returning to I. F. Stone for his November 29, 1973, *New York Review of Books* analysis of "Why Nixon Fears to Resign."

Two seminal books on Watergate are, to my mind, *Watergate,* by the *London Sunday Times* Team, Lewis Chester, et al. (Ballantine, 1973) which provides an overview and background of actual events, and *The Watergate Hearings: Break-In and Cover-Up,* ed. by the staff of the *New York Times* (Bantam, 1973), which presents all the testimony, etc. Once these are digested, it is time to explore the idea that the institution of the Presidency is not standing the test of time, a thesis lucidly argued by George Reedy in *The Twilight of the Presidency* (New American Library, 1972). Arthur Schlesinger suggests in *The Imperial Presidency* that although the Presidency is workable, the office must be subject to more restraint than it has had imposed upon it recently. The best overall chronicle of the incredible events of the 60's — certainly the past of the gestalt of strain pulling at the Presidency — is William O'Neill's *Coming Apart: An Informal History of America in the 1960's* (Quadrangle, 1971).

Students of Richard Nixon (they are becoming legion) can avail themselves of a flurry of recent books. Among them are *Perfectly Clear: Nixon from Whittier to Watergate,* Frank Mankiewicz (Quadrangle, 1973), *Nixon Agonistes,* Garry Wills, (New American Library, 1971), *President Nixon's Psychiatric Profile,* Eli S. Chesen (Wyden, 1973) and the more academic *In Search of Nixon: A Psychohistorical Inquiry,* Bruce Mazlish, (Basic Books, 1972). Also relevant are Joe McGinniss's *The Selling of the President 1968* (Trident Press, 1969) and *The Running of Richard Nixon,* Leonard Lurie (Coward, McCann & Geohegan, 1972).

And finally, if Edward Gibbon wrote *The History of the Decline and Fall of the Roman Empire* (7 Vols., London & New York, 1896-1900, ed. John B. Bury)* in the belief that a general resemblance between the Rome of the Antonines and Britain of the Hanoverians was in order, as historian Alan Nevins suggests, then perhaps it is time we extended the analogy to the America of the Technocrats, and took a close look at that classic in its application to the present-day United States.

*as are most of the works referred to, *The History of the Decline and Fall of the Roman Empire* is available in a number of inexpensive editions. I recommend the Viking Portable edition.

(I. F. Stone continued from page 24)
ting blood-curdling screams, yet somehow never come to blows. Jefferson's sweeping assertions of executive privilege were confined to private correspondence. Attorney General Rogers in 1958, during the Eisenhower Administration, nonetheless cited them as precedents in a memorandum which asserted — in more sweeping fashion than ever before — the President's power to withhold information from Congress. They will undoubtedly be cited again as precedents for withholding information from the courts should Nixon's testimony be sought, or White House documents subpoenaed, in prosecutions growing out of the Watergate scandal.[12]

The Rogers memorandum, in defense of the White House claim to "uncontrolled discretion" to withhold information, said Marshall ruled in the Burr case that "the President was free to keep from view such portions of the letter which the President deemed confidential in the public interest. The President alone was judge of what was confidential." A painstaking study by Raoul Berger for a forthcoming book on executive privilege has demonstrated that this completely overstates the case and the circumstances.[13]

Actually, on the document subpoenaed, as on the personal appearance of Jefferson, a confrontation was avoided. The prosecutor, George Hay, had objected that it was improper to subpoena the document because it was a private letter to Jefferson and "might contain state secrets, which could not be divulged without endangering the national safety." Jefferson nonetheless furnished it "voluntarily," so to speak, and left it to Hay "to withhold communication of any parts of the letter which are not *directly material* for the purposes of justice."[14] He made no claim that it contained state secrets.

Jefferson neither tried to exercise the absolute privilege he had claimed nor delegated it to Hay. On the contrary, as Berger points out, Hay emphasized that "he was willing to show the entire letter to the court to suppress so much of the letter as was not material to the case." Far from asserting absolute privilege, Berger shows, "the government was perfectly willing to leave it to the court to determine whether portions of the letter were in fact privileged. It insisted only that the portions so adjudged should be withheld from the defendant." More will be heard of this argument in the Burr case as similar issues arise in the trial of Watergate cases.

The trial of Burr was not only a struggle between him and Jefferson, but between Jefferson and [Chief Justice] Marshall, the radical Democrat and the conservative Federalist.

The issue in the Burr trials was complicated because the defense objected, as Berger relates, "that the court could not judge whether the confidential portions were relevant to the defense until that defense was fully disclosed, and that defendants were not required to make such disclosure until they had put in their case."[15] The issue was never resolved. Though Marshall issued at least one subpoena to Jefferson, and perhaps a second,[16] neither was actually served on the President and he succeeded in avoiding an appearance. As for the Wilkinson letter to Jefferson, it was never introduced into evidence, though Jefferson—as we have seen—supplied a copy to the prosecutor. A *subpoena duces tecum* was finally served on Hay.[17] But for some reason the defense never pressed the issue to a conclusion.[18] The battle ended in a draw; Marshall laid down the law, but was unable to enforce it against a recalcitrant President. That has been the pattern ever since.

What history shows is that any President who chooses to defy a subpoena, as Nixon has said he will, can get away with it, though the defiance may bring dismissals in criminal cases and lost verdicts by default in civil cases. But the President himself can go scot free. That leaves only impeachment. Even on impeachment a President cannot be compelled to testify before the Senate when the charges against him are tried, or even to answer by deposition if he chooses not to. But not to answer those charges would be to abandon a full defense and make his acquittal less likely.

II

Impeachment is a form of trial by legislature. Its roots go back to a dim

[12]The memorandum may be found at pp. 551-566 of Hearings by the Sub-committee on Separation of Powers, of the Senate Judiciary Committee, 92nd Congress, 1st Session, on Executive Privilege: The Withholding Information by the Executive, and S1125, July 27 to August 5, 1971, over which Senator Ervin presided. Privilege v. Congressional Inquiry," UCLA *Law Review*, vol. 12, No. 5, August, 1965. The memo is quoted on pp. 1109-1110.

[13]The preliminary results of his researches — drawn upon here — were published in "Executive Privilege v. Congressional Inquiry," UCLA *Law Review*, vol. 12, No. 5, August, 1965. The memo is quoted on pp. 1109-1110.

[14]Ibid., pp. 1107-1108. The italics seem to be Berger's.

[15]Ibid., p. 1108.

[16]Beveridge's surmise in his biography of Marshall, vol. 3, p. 522, based on a reference in a letter by Jefferson to the prosecutor.

[17]This, the most elusive fact amid all the complexities which bedevilled me in preparing this article, I finally pinned down on p. 520, vol. 3 of Beveridge's *Marshall*. Beveridge gives as his authority David Robertson *(Trials of Aaron Burr*, vol. 2, pp. 513-514), the reporter who covered Burr's trials and who published his account in 1808. I was unable to locate a copy.

[18]Beveridge's *Marshall*, vol. 3, p. 522.

past when parliaments in France and England were more courts than legislatures. As the political power of the English Parliament grew, it began to use impeachment against corrupt or tyrannical officers of the Crown. Charges were brought by the Commons and tried before the Lords. The first impeachment is usually given as the Earl of Suffolk's case in 1386. In the revolutionary seventeenth century, impeachment was used by the House of Commons to terrorize the King's ministers and finally to establish parliamentary supremacy. Once this was achieved, the use of impeachment for political purposes died out. The seven years it took the Commons to try Warren Hastings by impeachment (1788-1795) finally demonstrated that it was too cumbersome — and repugnant — a process for ordinary criminal prosecution. The last trial by impeachment in England was in 1806.

The Framers of the Constitution were well aware of the abuses which mark trial by legislature. They outlawed one form altogether: the bill of attainder by which earlier parliaments, with or without hearing evidence, simply found a man guilty by majority vote. This was a device much used by subservient Parliaments under Tudor despotism and again by a revolutionary Commons in the seventeenth century. The outstanding example was the famous Earl of Strafford case where — realizing that the House of Lords was not convinced by the evidence in his impeachment — the Commons dropped that procedure, voted the Earl guilty by bill of attainder, and had him executed. The Puritans, our spiritual ancestors, were often as ferocious as Bolsheviks.

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?

In writing the power of impeachment into the Constitution, the Framers sought to shut the door firmly on such excesses. The Constitution forbids trial by impeachment for ordinary citizens and ordinary crimes. The impeachment procedure was limited to trials of the President, the Vice President, "and all civil officers of the United States." In case of conviction the penalty may not be more than "removal from office and disqualification to hold any office of honor, trust or profit under the United States." Any other punishment for any crime involved can be imposed only after separate trial in a court of law. Impeachment was to be a weapon for policing conduct in office.

The Framers were principally concerned with providing a check on the President. The other officers were added to the impeachment clause in the final days of the Convention as a last-minute afterthought and were accepted without debate. During earlier discussion of the impeachment clause, George Mason of Virginia — more responsible than any other statesman for the Bill of Rights — spoke of impeachment as a necessary weapon to deal with "attempts to subvert the Constitution."[19] The words seem to fit the revelations being generated by Watergate. When Senator Ervin, who has seen them, says the domestic espionage plans in the as yet unpublished Dean documents display "the same mentality employed by the Gestapo in Nazi Germany," [20] the words Colonel Mason used are not too strong to be applied today.

[19] In Madison's "Notes" in *Documents Illustrative of the Formation of the Union* (Government Printing Office, 1927), p. 691.

[20] *Washington Post*, June 1, p. 1, in an interview the Senator gave in Winston-Salem, North Carolina.

Much fresh material for an exploration of the impeachment process and its history is provided by Raoul Berger and Michael Les Benedict. Benedict offers a new view of the politics in Andrew Johnson's trials, the only impeachment of a President. Berger's book brings together a fascinating collection of his law review articles on the tantalizing legal problems involved in impeachment. Both books began long before Watergate as recondite studies into long forgotten questions, but they come off the press as urgent and controversial, though neither foresaw, or could have foreseen, how rapidly unexpected developments like the burglary of Watergate would make impeachment a live issue again.

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Berger — after a lifetime in government and private practice — has had an extraordinary second career since his retirement. Zest for controversy and love of learning shine through the pages of his law review articles and books. Now at seventy-two, he is writing a book on executive privilege, a topic of even more immediacy than impeachment, and one on which he has testified brilliantly before several congressional investigations.[21]

[21] His two-part study, "Executive Privilege v. Congressional Inquiry," in the UCLA *Law Review* in 1965 (referred to above), is already indispensable for serious consideration of the problem.

He strongly opposes the inflated claims of executive privilege made in recent years, notably by then Attorney General Rogers under Eisenhower. Berger is also a strong opponent of the expansion in presidential war powers, a subject on which he published a law review article of first importance last year.[22] Those two studies and a major law review article on impeachment[23] which is embodied in his new book seem to have drawn their motivation from opposition to the Indochina war.

Berger's basic position might be described as that of a radical traditionalist, seeking to strip away false, distorted, or mythological precedents by a return to the Constitution, its sources, and its Framers, and fashion new conceptual weapons against current governmental usurpations. In this sense, he is like the late Justice Black and Senator Ervin a fundamentalist in constitutional law.

In two chapters of this new book on impeachment Berger considers the possibility of using impeachment to deal with the continuing Indochina war. In the first of these he discusses the impeachment of Andrew Johnson. "His impeachment," Berger writes, "poses an issue which may again confront us: is the President impeachable for violating a statute for example, an act that prohibits the use of appropriated funds for maintenance of ground troops in Cambodia if in his judgment it violates his constitutional prerogatives?"

The restriction on ground troops in Cambodia was passed by Congress in 1971, and not openly flouted by the executive. But the question has again become urgent with passage by the Senate, and debate in the House, of the Eagleton amendment which would bar the use of *any* funds for continued bombing over Cambodia.

The parallel with the impeachment a century ago is this: The immediate precipitant of President Andrew Johnson's trial was his attempt to remove Secretary of War Stanton in defiance of the newly passed Tenure of Office Act. Johnson claimed he had a right to ignore the act because he considered it an unconstitutional interference with the President's right to remove his cabinet officers as he pleased. Nixon, similarly, has taken the position that a cutoff of war funds while combat of any kind is in progress would be an unconstitutional interference with his powers as Commander-in-Chief. Whether Nixon will dare cling to so extreme a position in a crunch, against the background noises of Watergate, remains to be seen.

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Berger, who takes a rather conventional view of Johnson's impeachment, believes such a constitutional crisis should be resolved by an appeal to the Supreme Court rather than by impeachment, as happened in Johnson's case. But in his concluding chapter Berger advocates impeachment as a last resort when the President takes the country into war without congressional consent.

Berger ends his book with a plea that we not deduce from the failure — and the legal clumsiness — of the Johnson impeachment that impeachment has proven "its unfitness as an instrument of government." But he favors its use only "as a last resort" and "with extreme caution." The Framers, he writes,

> foresaw that impeachment might be subject to superheated partisanship, that it might threaten presidential independence; but recalling Stuart oppression they chose what seemed the lesser of evils. In our time the impeachment of President Truman, apparently for his conduct of the Korean War, was suggested by his staff to the Republican high command. There have been reiterated demands for the impeachment of President Nixon arising out of dissatisfaction with his program for disengagement from the war in Vietnam . . . Those who are unwilling to concede that the President, without a congressional declaration of war, may commit us to a full-scale war with all its ghastly consequences may yet turn to impeachment as a curb on such presidential adventures.

Benedict's book on Johnson's impeachment devotes itself to rebutting the conventional view that it was the work of a radical Republican minority. His exhaustive analysis of the events which precipitated

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[22] "War Making by the President" in *The University of Pennsylvania Law Review*, November, 1972.

[23] "Impeachment for 'High Crimes and Misdemeanors,'" *Southern California Law Review*, XLIV (1971), already cited in Benedict's book on Johnson.

impeachment and of key votes during the trial shows that in fact Johnson's unwise and stubborn tactics drove the moderate Republicans into an alliance with the radicals though the former were lukewarm about any thorough Reconstruction of the South.

This is useful corrective but it does not go far enough. The deeper issues were racial and class issues which disguised themselves in constitutional form. Basically the war was fought between contending white men; slavery was a moral and burning issue only for a minority of them. Otherwise the North would have imposed a thoroughgoing land reform on the South — as we did on a defeated Japan — and taken other basic steps to make a free landowning yeomanry of the blacks. To feel the agony of those issues for the newly emancipated and for great Republican radicals like Sumner and Stevens one must still go to the pages of DuBois's *Black Reconstruction* however one feels about his political proposals. These deeper realities do not obtrude into Benedict's useful but sedate pages.

But Benedict does touch in his conclusion on a basic constitutional point, though he writes in a mood of what may be premature defeatism. He tries to rebut those historians who have seen in the Johnson impeachment an attempt to convert the American presidential system into one of parliamentary supremacy:

> But in fact it had not been Congress but the President who had been claiming broad new powers. It was Andrew Johnson who had appointed provisional governors of vast territories without the advice and consent of the Senate, who had nullified Congressional legislation, who claimed inherent quasi-legislative powers over Reconstruction. *In many ways, Johnson was a very modern President, holding a view of Presidential authority that has only recently been established* [italics added]. Impeachment was Congress's defensive weapon; it proved a dull blade, and the end result is that the only effective recourse against a President who ignores the will of Congress or exceeds his powers is democratic removal at the polls.

But what if the President uses his power to pervert the electoral process itself? What if he casts a pall on free discussion by setting up a secret network to buy and burglarize the opposition? These are new questions raised in the wake of Watergate.

In one respect, which would be crucial in any attempt to impeach Nixon, the events of Watergate, and its aftermath, have dated both books. To understand this change one must begin by observing that until now the central issue in impeachment has revolved around a famous phrase in the Constitution. Article II, which deals with the Presidency, says in its final section 4, that the President "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

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What are high crimes and misdemeanors? This question has embroiled every impeachment trial in American history whether of a President or of judges. No phrase in the Constitution is more Delphic. A glance at its history is necessary to understand its ambiguities.

In the framing of the Constitution, Madison thought it "indispensable that some provision should be made for defending the community against the incapacity, negligence of perfidy of the Chief Executive," The impeachment clause, as reported out for debate by the Special Committee, provided for the President's removal from office by conviction on impeachment only for "treason or bribery," though an earlier version included "or corruption."[24]

The Framers had already written special clauses on treason into the new Constitution to narrow its meaning and regulate its mode of proof and trial. Their purpose was to avoid the abuse of the treason charge in English law and in English impeachments. All kinds of retrospective and "constructive," i.e., inferential, treasons were used to suppress opposition and restrict fundamental liberties in both common law prosecutions and in impeachments by Parliament.[25]

So in the debate on the impeachment clause, as reported in

[24] *The Making of the Constitution,* by Charles Warren (Barnes & Noble, 1967), pp. 660-661.

[25] Indeed Hamilton in the Federalist Papers (No. LXXIV), answering the objection that the new Constitution as first presented contained no Bill of Rights, pointed to the treason clause as evidence of the Framers' concern for civil liberty. And Madison in No. XLIII explained that the purpose of the clause was to outlaw those "new-fangled and artificial treasons...by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other."

It is again timely to recall that the Framers, in dealing with treason, the greatest danger to national security, were concerned with protecting the individual from the abuse of this charge by the state, and therefore made its prosecution more difficult than that of ordinary crimes. They did not provide that, where national security was involved, normal constitutional and legal safeguards might be suspended. The Constitution does not, in this as in many other respects, embody the jurisprudence of Richard Nixon or of the late Joseph McCarthy.

Madison's notes, Colonel Mason wanted to know why this was limited "to treason and bribery only." He said, "Treason as defined in the Constitution will not reach many great and dangerous offenses." He added, "Attempts to subvert the Constitution may not be treason as above defined." He therefore proposed to add "or maladministration." Madison objected, "So vague a term will be equivalent to a tenure during pleasure of the Senate," which sits as a court to judge a bill of impeachment when brought by the House. So Colonel Mason withdrew "maladministration" and substituted "other high crimes and misdemeanors."

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But just what are "high crimes and misdemeanors"? If the Framers were thinking of the Warren Hastings trial which had just begun in London when they wrote the phrase into the Constitution, the confusion was further confounded by the trial. The phrase may have been used in the bill of impeachment[26] as an over-all rubric, but no less an authority than the magisterial English legal historian Holdsworth tells us that the specific charges against Hastings were "serious breaches of the criminal law" and that in his trial the House of Lords rejected the view that it was not bound by the ordinary rules of evidence,[27] as might well be the case in the trial of a nonindictable offense. This seems to demonstrate that by the time our Constitution was being written, English usage had already turned "high crimes and misdemeanors" into an empty phrase, making impeachable crimes no different from indictable crimes.

Is this what the Framers intended? What are impeachable offenses under this clause in the American Constitution? Unfortunately this question has never been conclusively answered. The standard authority for the House of Representatives, *Hinds' Precedents,* devotes thirty-eight closely printed pages to the question without arriving at any definite answer.[28] "The meaning of the phrase, 'high crimes and *misdemeanors*'" says Cooley in a footnote to Blackstone, "underwent much discussion in the case of President Johnson, who was tried on articles of impeachment in 1868, but the result of the case was not such that any authoritative rule can be derived from it."[29]

So when Nixon met Judge Byrne on April 5, the President knew but the judge did not that there had been a break-in

The answer lies somewhere in a murky area bounded by two definitions, one usually put forward by those who desire to impeach, the other by the defenders of those whose impeachment is being sought.

The first definition was bluntly expressed in the aborted effort by the Republicans to impeach Mr. Justice Douglas, the most recent attempt at impeachment. This began April 15, 1970, in a speech in the House by Republican Leader Gerald Ford. "The only honest answer," he said, sounding like a Jacobin, "is that an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history [and] ...conviction results from whatever offense or offenses two-thirds of the other body [the Senate] considers to be sufficiently serious to require removal of the accused from office."[30] These are constitutional opinions he must regret as the possibility of a Nixon impeachment looms up. They embody exactly the same view taken by those who impeached President Andrew Johnson, but failed in the Seante by one vote of the two-thirds required to convict.

The other equally classic definition, almost invariably put forward by the defense, was formulated by former Judge Simon H. Rifkind of New York as counsel for Mr. Justice Douglas. In a memorandum of law submitted to the House committee early in the proceedings, Judge Rifkind argued that only indictable offenses were impeachable, i.e., offenses against federal law. "There is nothing in the Constitution or in the uniform practice

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[26]*The Encyclopaedia Britannica* (14th ed.) in its article on Hastings says he was tried for "high crimes and misdemeanors."

[27]Holdsworth's *History of English Law* (London, 7th ed., 1956), vol. 1, p. 384.

[28]See Sections 2008 to 2023, *Precedents of the House of Representatives,* Asher C. Hinds, ed. (Government Printing Office, 1907), vol. 3, pp. 321-359.

[29]Quoted in the *American and English Encyclopaedia of Law* (New York and London, 1900), vol. 8, p. 249, citing 4 Cooley's Blackstone 5, note.

[30]Associate Justice William O. Douglas, Final Report by the Special Subcommittee on H. Res. 920 of the Committee of the Judiciary, House of Representatives, 91st Congress, 2nd Session, September 17, 1970, p. 36.

under the Constitution," he argued, "to suggest that Federal judges may be impeached for anything short of *criminal* conduct [emphasis in original]. And the prohibition against *ex post facto* laws, the notice requirement of due process, the protection of the First Amendment, and considerations of 'separation of powers' prevent any other standard."[31]

It is ironic — but not really strange — that this argument on behalf of one of the greatest liberal Justices in our history is identical in substance with that put forward in defense of one of the most hated illiberals — Supreme Court Justice Samuel Chase, whose removal by impeachment was sought — also unsuccessfully — for his conduct of trials under the Alien and Sedition Acts and the common law of seditious and criminal libel.

The House committee in its final report on the Douglas impeachment resolution concluded that it did not have to "take a position" on either of these two conflicting concepts of impeachment because "intensive investigation" had "not disclosed credible evidence that would warrant preparation of charges on any acceptable concept of an impeachable offense."[32] The House accepted this verdict, clearing Mr. Justice Douglas.

But earlier in its report the House committee did take a position, and it was somewhere — though just where was not at all clear — between the prosecution's and the defense's interpretation of what constitutes an impeachable offense. It said the precedents showed "that the House of Representatives, particularly in the arguments made by its Managers [i.e., prosecutors] in the Senate trials [of impeachments], favors the conclusion that the phrase 'high crimes and misdemeanors' encompasses activity which is not necessarily criminal in nature."[33] This is precise as description but inconclusive as doctrine.

Berger is critical of Johnson's impeachment and is downright effusive in praise of Johnson's defenders. But when it comes to the theory underlying the impeachment he agrees with Johnson's prosecutors. On the basis of a formidable inquiry into four centuries of English precedents, he concludes that "the test of an impeachable offense in England was not an indictable, common law crime." The Framers, Berger argues, separated impeachment from criminal process when they "withheld from Congress the power to inflict criminal punishment" by impeachment and limited the penalty on conviction by impeachment to removal and disqualification from office. His final argument is that the Constitution specifically provides that an official convicted on impeachment "shall nevertheless be subject to Indictment, Trial, Judgment and Punishment according to Law." Were impeachment a criminal process, this would be a violation of the double jeopardy clause.

There are additional arguments for this in the Federalist Papers. One of the arguments in the Federalist Papers for making the Senate rather than the Supreme Court the final judge of impeachments is that this would prevent an official convicted on impeachment from having to come before the same court if he were later prosecuted "in the ordinary course of law."[34] The same Federalist Paper also shows that the Framers were not thinking of impeachment as a criminal process when it said that the Senate, sitting as the court on impeachment charges, "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of the courts in favor of personal security."[35] It is clear that impeachable offenses were not intended to be limited only to indictable crimes.

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III

This question will loom up as a crucial point if it turns out that *political* as distinct from *criminal* charges play their part in any effort to impeach Nixon. There are three kinds of political offenses which might be alleged. One might be that Nixon's failure properly to control secret agencies he had himself set up — *and the establishment of such agencies without statutory authority* — constituted a malfeasance of such magnitude and so dangerous to constitutional government as to warrant removal by impeachment even if it could not be proven beyond reasonable doubt that he was personally culpable for the burglaries and their attempted cover-up.

A second type of political allegation would arise if Congress finally passes the Eagleton bill to shut off all funds for continued warfare in Indochina, and passes it again over a Presidential veto, and the President still insists that he can divert funds from other purposes and continue the bombing because he and he alone is the judge of his own war powers as Commander in

[31]Legal Materials on Impeachment, Special Subcommittee on H. Res. 920 of the Committee of the Judiciary, as above, August 11, 1970, p. 24.

[32]Final Report cited in footnote 30, p. 349.

[33]Ibid., p. 37.

[34]No. LSV at page 335. Everyman's Library.

[35]Ibid., p. 334.

Chief. Unless he stated a readiness to abide by the results of an appeal to the Supreme Court, impeachment would be the only resort left to enforce war powers of Congress and its power of the purse.

A third type of political allegation might arise from the sweeping assertion by Nixon of such so-called "inherent" powers as executive privilege and impoundment of funds whose social purpose he disapproves. No other President has ever dared to exercise these powers as broadly as Nixon has. They represent a threat to a government of equal and separate powers, a big step toward Presidential dictatorship.

This last category of possible political charges is the most difficult of all and serves to emphasize in the clearest form the wisdom of a broad consensus before resort to a weapon so grave as the removal of a President. The Constitution wisely requires a two-thirds vote of the Senate rather than a mere majority for conviction. Republicans as far right as Goldwater and as far left as McCloskey should be persuaded of the need for trial by impeachment before it is even begun, though that only requires a majority vote of the House. Otherwise the country will be torn apart by controversy, polarized in an atmosphere which will make reasoned debate and equitable judgment impossible. The clearest evidence that so broad a consensus was beginning to take shape came in the joint letter on May 18 by Senators Goldwater and Cranston, usually on opposite sides of the fence, calling on Elliott Richardson before his confirmation as Attorney General to give a special prosecutor power to reach into the White House itself in his investigation not only of Watergate but of the Ellsberg-Russo trial.

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IT ALL DEPENDS ON WHO'S HIGHER UP

"...The Attorney General has concluded that new weapons and tools are needed to enable the Federal government to strike both at the Cosa Nostra hierarchy and the sources of revenue that feed the coffers of organized crime.... First, we need a new broad general witness immunity law.... With this new law, government should be better able to gather evidence to strike at the leadership of organized crime and not just the rank and file."

Nixon's Message to Congress on Organized Crime, April 23, 1969

"I have expressed to the appropriate authorities my view that no individual holding, in the past or at present, a position of major importance in the Administration should be given immunity from prosecution."

Nixon's Watergate statement of April 17, 1973

—IFS

To be honest about it, how one feels about the "inherent" powers of the Presidency has been generally determined throughout our history by how one feels about the use to which they are put and the pressing needs of the time. The Presidency is a great office precisely because of its flexibility in emergency. People on the left like myself applauded when Truman and Eisenhower invoked executive privilege to shield government officials against the witch hunt, as waged first by Nixon on the House Un-American Activities Committee in the late Forties and then by McCarthy in the Fifties. We applauded when, in conflicts with the military-industrial complex, Truman, Eisenhower, and Kennedy in turn impounded, i.e., refused to spend, money voted for arms race purposes, including such projects as the 70-group air force and the Nike-Zeus antimissile.

These are but a few of many examples of a double standard which must be faced before one can reasonably decide that abuse of "inherent" powers has grown so serious that it is a clear violation of the Constitution and a danger to the Republic.

But 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. The main offenses coming to light in the various investigations of Watergate involve a wide range of indictable crimes, all impeachable even under the strictest definition of "high crimes and misdemeanors." These would provide the second and easiest category of charges for a bill of impeachment as more evidence accumulates. Even breaking and entering, normally a crime only under state law, is covered because the original burglary of the Democratic National Committee headquarters took place in the District of Columbia where breaking and entering is a federal offense.

The revelations piling up include violations of federal electoral campaign, banking, and securities laws; federal statutes making it a crime to obstruct justice or conceal evidence of crime; infractions of the laws guaranteeing free trial and of the statutes limiting the jurisdictions and regulating the activities of the CIA and the FBI and possibly also the less well known but equally powerful Defense

Intelligence Agency (DIA) and the supersnooper electronic agency, the National Security Administration (NSA).

Also involved are the laws which make it a crime to conspire to violate any of these laws, whether or not the crime itself was finally committed. In prosecutions for conspiracy, circumstantial evidence is usually and necessarily relied upon. So are conspirators ready to turn state's evidence in hope of mitigated sentences. The conspiracy charges beginning to take shape against high officials of the Administration may or may not end by involving Nixon himself. If they do, this would prepare for trial by impeachment in a most far-reaching form.

A third major category of possible charges for impeachment has been almost entirely overlooked, though it consists of one of the two crimes specifically mentioned in the impeachment clause of the Constitution. This is bribery (the other, of course, is treason). This was touched on so lightly in the Goldwater-Cranston letter to Richardson, on May 18, that its significance has not been appreciated.

That letter cited eleven questions arising from the Ellsberg-Russo trial which called for extensive investigation by the Special Prosecutor. The eleventh was "The communication to the trial judge by Mr. Ehrlichman." That communication, made on April 5 at San Clemente and discussed again on April 7 at Santa Monica, was the offer of a high post in the government, the directorship of the FBI, to the trial judge while he was presiding over a trial in which the government's good name was at stake.

Any comparable offer by a private plaintiff would have been regarded as a bribe, and the Ellsberg-Russo defense so characterized it. The offer was made by Ehrlichman, Nixon's top aide for domestic affairs. When it was first broached at the summer White House in San Clemente, Nixon himself according to Judge Byrne — entered the room briefly and ostensibly only to meet the judge.

The whole affair and the President's involvement might have been more fully disclosed if the defense had had time to file a motion for appeal with the Ninth Circuit after Judge Byrne refused to dismiss the case on the ground that the secret offer was improper and an interference with the right to free and impartial trial. But this was forclosed when Judge Byrne dismissed the indictment on other grounds four days later, on May 11.

The circumstances under which Judge Byrne's secret visits with Ehrlichman took place and the circumstances under which news of these visits leaked out have yet to be adequately explored. But enough is now known to demonstrate that this covert attempt to interfere with impartial trial ought not to go unexamined and unpunished.

The sequence of events is itself eloquent. On April 26, after a still unexplained delay, Judge Byrne was given documentary evidence that Hunt and Liddy, working directly under the supervision of Ehrlichman, had burglarized the safe of Ellsberg's psychiatrist in Los Angeles. The judge seems to have angered the government when he read the memorandum about the burglary in open court. Shortly afterward, as if in retaliation, someone leaked the news of the judge's visit to the San Clemente White House. It appeared in the *Washington Star-News* April 30, just four days after the news of the burglary was made public.

The leak must have come from the White House itself. It was made to the only one of Washington's two newspapers with which the Administration was still on speaking terms, though the conservative *Star-News* and its staff columnists had been as critical as the *Washington Post* of the Watergate affair. The reporter who wrote the story, Jeremiah O'Leary, is a veteran capitol journalist. The visit by Byrne to San Clemente seems to have been entirely a White House affair. "The *Star-News* learned," O'Leary wrote, "that Judge Byrne was brought to the San Clemente White House by the Secret Service from Los Angeles with instructions to take care that the press not learn of the visit."

No mention was made in the story of Ehrlichman. The way it was written, if not the way it was leaked, pointed the finger directly at the President. Indeed the story speculated on Nixon's impropriety. "The secret meeting with Nixon," as O'Leary wrote, "also prompted some question about the propriety of the judge in the Ellsberg-Russo case conferring while the trial was underway with a President who made little secret of his distaste for the turning over of the Pentagon Papers to several newspapers for publication."

The day that story appeared in the *Star-News* happened also to be the day on which the White House announced it had accepted the resignations of Haldeman and Ehrlichman. If the leak was Ehrlichman's, it would have been one of his last acts as the President's top aid for domestic affairs.

The repercussions at the trial were immediate. The first edition of the *Star-News,* an evening paper, hits the streets about 9:30 a.m., or 6:30 a.m., Los Angeles time. Someone must have called defense counsel about it well before 10:00 a.m. Los Angeles (or 1:00 p.m. Washington) time when court was scheduled to open. Defense Counsel Charles Nesson phoned Judge Byrne that morning to let the judge know that questions would be asked him about the story in the *Star-News.* The judge arrived twenty minutes late with a prepared statement which he read as soon as court convened. He said he was doing so in response to a telephone inquiry to his chambers from Defense Attorney Nesson. With the jury out of the courtroom, the judge said he was reading the statement because he wanted "no

misunderstanding" about the meeting.

Judge Byrne said the meeting took place on April 5 as the result of a phone call from Ehrlichman at the Western White House. He said the latter asked "me to talk with him regarding a subject he said had nothing remotely to do with the Pentagon Papers case." Byrne said Ehrlichman "suggested the possibility of a future assignment in government. During this meeting I was briefly introduced to the President, for one minute or less. We merely exchanged greetings." Byrne said his "initial reaction" to Ehrlichman's offer "was that I could not and would not give consideration to any future position" while the case was pending.

The judge went on to say that he estimated at the time that the trial would last another month. Why make the estimate if the job offer was not left open for consideration later? And was it in accord with judicial ethics to preside over a trial while secretly harboring the possibility of an attractive offer from one of the contestants? Byrne added that he had another brief conversation with Ehrlichman in which he confirmed his initial reaction.[36] Where, when, and how this second conversation took place was not then disclosed.

Not until two days later, and then only in response to a question from defense counsel, did Byrne reveal that he had had not one but two meetings with Ehrlichman about the job offer. This is how the second disclosure came about. On May 1, the day after the San Clemente meeting was admitted by the judge, the defense moved for dismissal, in part because the job offer could be interpreted as a bribe. Defense Counsel Leonard Boudin put the matter with the utmost tact:

> Given the extraordinary interest the White House has shown in this case we would, were we to use blunt language, characterize this as an attempt to offer a bribe to the court — an event made in the virtual presence of the President of the United States — which was frustrated only because the Judge refused to listen to the offer.

To be less tactful but more accurate, the offer was *not* frustrated. It was only postponed. *The judge did not "refuse to listen." He only refused to answer until the trial was over.* A cynical observer might conclude that this put the White House in the advantageous position of not having to deliver on the offer if the judge's performance in the Pentagon Papers case should prove unsatisfactory, as it did.

The judge seems to have felt uneasy. When court opened next morning and before the jury was brought in he made a further revelation. He said, "Having gone through your motion yesterday . . . there are a couple of areas . . . that I want the record to be clear on." He then disclosed that the job discussed was the head of the FBI. The second conversation took place on April 7, and "it was at that *conversation* [italics added] that I confirmed my initial reaction." Then the judge began to bring in the jury. But Defense Counsel Leonard Weinglass stood up and asked:

Q. Was that [conversation] personal or by telephone?

Judge Byrne: That was a direct conversation.

That was how defense counsel and the press first learned that there had been a second meeting with Ehrlichman. It was later learned that this took place in Santa Monica, but how or where or why was never disclosed.

Who asked for the second meeting? What led the judge at the meeting to "confirm" his "initial reaction"? Was the rejection at the first meeting less than firm? Why was the offer left open for later consideration?

As Leonard Weinglass pointed out to the press, defense counsel would be in jail if it had offered a prize job to the judge during the trial. Had Ehrlichman been a private party instead of the President's top domestic aide, it would have been obvious to the judge that the offer had the earmarks of a bribe and that his duty was not just to turn it down but to turn Ehrlichman in.

In the court on May 1, Defense Counsel Boudin, arguing the formal motion to dismiss, put the matter directly on the White House doorstep, as an impeachment inquiry would do:

> We do not see how the effect of the San Clemente incident can be mitigated. The conduct of the President (who made it clear yesterday that he takes responsibility for the actions of his subordinates) has compromised the judiciary to the point where a fair trial is impossible now or in the future. It would have been infinitely wiser if the Judge had refused to visit San Clemente in the midst of what may be the most important political trial in our time . . .
>
> That no disclosure was made before the issue was raised by the defense is perhaps an indication that judges, like the rest of us, have human failings. But it is these very human failings which make it improper for this case to proceed. No human being can possibly erase from his consciousness past events which may influence future conduct. The White House, by initiating this meeting, has irretrievably compromised the court.

On May 4, the defense submitted a memorandum of points and authorities to support the argument that the San Clemente visit and the job offer alone were enough for dismissal, but Judge Byrne ruled that same day against this part of the motion. He sim-

[36] *Los Angeles Times*, May 1, 1973.

ply claimed that he had not been biased by the offer.

On May 7, newspaper accounts from Los Angeles carried the news that the defense was preparing to challenge the judge's decision by an appeal on mandamus to the Ninth Circuit Court of Appeals. The Ninth Circuit, if favorable to such a motion, could have ordered a hearing on the San Clemente visit and the job offer. It might have ruled that these cast such a cloud over the Ellsberg-Russo trial that it must be suspended for an immediate hearing on this issue. Ehrlichman could have been called as a witness. The President might have been asked for a deposition, or even been subpoenaed.

Such action was rendered moot when Judge Byrne, on May 11, dismissed the case. But he did not cite his visits to San Clemente and Santa Monica to discuss the offer of the top job in the FBI among "the bizarre events" which the judge said in his final ruling had "incurably infected the prosecution." Byrne as a judge and Nixon as a lawyer could hardly have been unaware of the professional ethics the offer violated.

But the fuller significance of these two secret meetings with the judge did not become apparent until several weeks after the trial was over. On May 22, then Secretary Richardson, at the Senate Judiciary Committee hearings on his nomination to be Attorney General, stated that the President had been informed about the Ellsberg break-in "in late March."

It was also "in late March" when the roof began to cave in on the White House. It was on March 20 that McCord sent a letter to Judge Sirica informing him that perjury was committed at the first Watergate trial, and that pressure had been applied to him to remain silent. Dean on that same day asked Nixon for a private interview and next day told him that he, Haldeman, and Ehrlichman had to "tell all" in order to save the Presidency. It was on March 21 that Nixon says he began his own investigation.

By the end of March, therefore, Nixon was on notice that news of the Ellsberg break-in might soon be disclosed either by McCord or Dean, or by both, and that this information might have to be produced in Judge Byrne's court in Los Angeles. (Indeed, Dean told the story to Federal Prosecutor Silbert on April 15, confronting Nixon with the alternative of ordering the submission of this information to Judge Byrne or suppressing evidence. It was the latter course that Nixon seemed to favor, until pressure was applied by Kleindienst and Peterson.)

Secretly to dangle the offer of a high post before the trial judge while all these decisions were pending was to taint justice irremediably.

So 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 to the judge 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.

Secretly to dangle the offer of a high post before the trail judge while all these decisions were pending was to taint justice irremediably. When the Goldwater-Cranston letter included Ehrlichman's communication to the judge among the "serious questions" left by the Ellsberg-Russo trial, it called for them "to be viewed and uncovered as a totality from start to finish." Such an investigation would have to determine whether the offer to the judge by Ehrlichman constituted an attempt to bribe the judge and obstruct justice.[37] Such an investigation would inescapably confront the question of whether Ehrlichman could take such serious steps without Nixon's approval.

Had so sharp a lawyer and crafty a politician as Nixon, running the most centralized and closely controlled Administration in history, watchful over the slightest delegation of authority, so suddenly become an absentee landlord in the White House? Was he so stratospherically elevated beyond all mundane matters that at the summer White House on April 5 he could find Ehrlichman in conference with the presiding judge of the Pentagon Papers trial, shake hands with the judge, and not know, *not ask,* what was going on? Could he have been so unaware, so incurious? Only an idiot could believe it. But in this as in other aspects of Watergate only trial by impeachment is likely to be able to get at the truth of the President's complicity.

[37] *American Jurisprudence* (1964), vol. 12, p. 752: "It seems that a bribe must involve something of value that is used to influence action or nonaction. Value, though, is determined by the application of a subjective, rather than an objective, test, and the requirement of value is satisfied if the thing has sufficient value in the mind of the person concerned so that his actions are influenced. A bribe need not be anything of a pecuniary or intrinsic value"; and on page 755: "The difference between an attempt to bribe and the actual passage of money or property as a bribe is of little practical significance where the definition of the crime includes an attempt to commit it. This was true at common law...." Since "bribery" is written into the Constitution without further qualification, it must be read in the light of the common law at the time.