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The History Of Impeachment

By Telford Taylor

Does the Constitution authorize impeachment of a President only for conduct constituting an offense punishable by the criminal law? The press has been full of conflicting answers in briefs and articles by the lawyers for the President, lawyers for the House Judiciary Committee and legal academics. The confusion that has resulted is not warranted by either the history or policy of impeachment.

Before the adoption of the Constitution, impeachment in England was not limited to judicially punishable crimes. Impeachments, some of them teasingly anticipatory of the issues today, were brought in 1450 against the Duke of Suffolk for "procuring offices for persons who were unfit and unworthy," in 1624 against the Lord Treasurer for "allowing the office of Ordnance to go unrepaired though money was appropriated for that purpose," and in 1668 against the Naval Commissioner for "negligent preparation for the Dutch invasion."

The Constitution took over the phrase "high crimes and misdemeanors" used in England to comprehend charges such as these. The discussion of impeachment by Franklin, Randolph, Hamilton, Madison and other Founding Fathers uniformly attests to their conception of impeachment as a device not intended to punish crime but to remove a President who was abusing his office to the detriment of the national interest.

It is as certain as the answer to any question of late eighteenth-century history can be that they did not mean to confine impeachment to indictable offenses.

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Congressional practice under the Constitution has been in accordance with the original conception. Some impeachment charges have been explicitly criminal but many, if not most, have not. President Andrew Johnson was impeached for dismissing an official in violation of the Tenure of Office Act and making speeches tending to bring Congress into ridicule—charges plainly not criminal.

Against this record, James D. St. Clair's effort to confine impeachment to criminal offenses is from a strictly legal standpoint a hopeless failure. Why does he do it? Raoul Berger, the legal scholar, whose recent article on the subject was front-page news, accuses Mr. St. Clair of violating professional standards by resorting to "propaganda whose sole purpose is to influence public opinion in favor of a client who is under grave suspicion."

If this be sin, Mr. St. Clair is not the first sinner. A few years ago, when Justice William O. Douglas was threatened with impeachment, his counsel, former Federal Judge Simon Rifkind, took the same position that Mr. St. Clair has been espousing. A century earlier, when opposing Andrew Johnson's impeachment, Theodore W. Dwight, founder of the Columbia Law School, wrote that criminal conduct was the only valid basis of impeachment.

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The reason why these eminent legal gentlemen have taken a wholly untenable position is plain. Impeachment is not tried to a jury, shielded from outside influence and instructed by a judge. It is tried in the Congressional arena, in the blaze of intense nationwide publicity, to which elected Congressmen are highly responsive. It is tried before a very vocal national audience. "After all, he's not accused of any crime" is a simple and effective argument in the public forum, and a handy crutch for supporters of an unpopular official.

But though Mr. St. Clair's motives are understandable, we should not let him take us in. Not all crimes are grave misconduct; not all grave misconduct is criminal. It would undermine the essential purpose of impeachment to make its applicability turn on the question of criminality.

Presidential stability is an important value. Impeachment should not be used for good-faith errors of judgment, or for conduct, criminal or not, that does not closely affect the President's discharge of his office. It is to be hoped that judgment on the present incumbent will not turn on the (expletive deleted); foul language is a failing to which better men than he are subject.

It is even more important that Congress not trip over the question of criminality. A President might use his vast powers in many ways, not criminal under Federal or state law, to intimidate or otherwise distort the official behavior of judges and legislators. He might surround himself with individuals of such character as to make the orderly conduct of executive business difficult or impossible; he might neglect his duties as Commander in Chief by being unavailable or incapacitated in emergencies.

It needs no ghost to tell us that such conduct would be far more dangerous to the nation than many crimes. In the present crisis, the task of Congress is to determine whether the President's conduct has been such as to subvert the orderly processes of government, or bring his high office into disrepute.

Telford Taylor, professor of law at Columbia University, served as chief prosecutor at the Nuremberg trials.