

'High Crimes and Misdemeanors'

"Treason" and "bribery" are crimes, whether committed by the President or by anyone else. Is the meaning of the phrase "high Crimes and Misdemeanors" limited to ordinary crimes? Can a President lawfully be impeached and removed *only* for conduct which would also be punishable crime for anybody?

Some have contended for this interpretation. It would be easeful to be able to adopt it, because the vague phrase "high Crimes and Misdemeanors," would thus be lent all the precision of the statute book; agonized attempts properly to limit it, while at the same time leaving it properly ample scope, would be avoided. But I cannot think it remotely possible that this interpretation is right

Suppose a President were to announce that he would under no circumstances appoint any Roman Catholic to office and were rigorously to stick to this plan. I am not sure that this conduct would be punishable as crime, though it would clearly violate the constitutional provision that "no religious test" may ever be required for holding federal office. I cannot believe that it would make any difference whether this conduct was criminal for general purposes; it would clearly be a gross and anticonstitutional abuse of power, going to the life of our national unity, and it would be absurd to think that a President might not properly be removed for it.

Suppose a President were to announce and follow a policy of granting full pardons, in advance of indictment or trial, to all federal agents or police who killed anybody in line of duty, in the District of Columbia, whatever the circumstances and however unnecessary the killing. This would not be a crime, and probably could not be made a crime under the Constitution. But could anybody doubt that such conduct would be impeachable?

These extreme examples test the overall validity of the proposition that impeachable offenses must be ordinary indictable crimes as well, and I think the proposition fails the test. But the rather extravagant character of the illustrations makes another point: most *actual* presidential misdeeds, of a seriousness sufficient to warrant impeachment, are likely to be ordinary crimes as well. It is somewhat strange, indeed, that the question here being examined has assumed such prominence in our days, because most of the wrongful acts that have been seriously charged against an incumbent President are regular crimes—bribery, obstruction of justice, income-tax fraud,

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To turn the coin around, it would be comforting to our desire for certainty to be able to conclude, at least, that all regular crimes are impeachable offenses. But a moment's reflection would show that this, too, would produce absurdities. Suppose a President transported a woman across a state line or even (so the Mann Act reads) from one point to another within the District of Columbia, for what is quaintly called an "immoral purpose." Or suppose a President did not immediately report to the nearest policeman that he had discovered that one of his aides was a practicing homosexual—thereby committing "misprision of a felony." Or suppose the President actively assisted a young White

House intern in concealing the latter's possession of three ounces of marijuana—thus himself becoming guilty of "obstruction of justice." Or suppose, to take a real instance, that the presidential ladies' wearing of the Saudi Arabian jewels technically constituted a criminal "conversion" and that the President could be shown to have been an "accomplice." Would it not be preposterous to think that any of this is what the Framers meant when they referred to "Treason, Bribery, and other high Crimes and Misdemeanors," or that any sensible constitutional plan would make a President removable on such grounds?

Let us test the power of this kind of thought by applying it to a far from fanciful set of facts. Suppose a President were shown by convincing evidence to have used the federal tax system consistently and massively as a means of harassing and punishing

his political opponents. As far as I know, this conduct is not criminal in the ordinary sense. But does such gross misuse of what is supposed to be a politically neutral arm of government not tend seriously to undermine and corrupt the political order? Is it not obviously wrong, to any man of ordinary honor? If these questions are answered "yes," then this offense, as lawyers might say, is *eiusdem generis*, of the same kind, with treason and bribery. If it is a crime under statute, then it is the kind of ordinary crime that ought to be held impeachable. If it is *not* a crime under statute, then

it is the kind of offense which ought to be held impeachable, though not criminal in the ordinary sense. In both cases, this is because such an offense is, in the relevant ways, of the same kind as treason and bribery. . . .

Now this has been a long pull, but we have our hands on a good first approximation to a rational definition of an impeachable "high Crime or Misdemeanor." Omitting qualifications, and recognizing that the definition is only an approximation, I think we can say that "high Crimes and Misdemeanors," in the constitutional sense ought to be held to be those offenses which are rather obviously wrong, whether or not "criminal," and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator. The fact that such an act is also

criminal helps, even if it is not essential, because a general societal view of wrongness, and sometimes of seriousness, is, in such a case, publicly and authoritatively recorded. . . .

As to each possible impeachable offense, the question may arise of the president's responsibility for his people's misdeeds.

Here I think we have to remember that it is the *President* who must be found guilty of "high Crimes and Misdemeanors." A simple attribution to him of everything done by persons working under him is totally incompatible with the flavor of criminality, of moral wrong, in the quoted phrase. No chief of any considerable enterprise could pass such a test.

At the other extreme, it goes without saying that the President (like anybody else) is totally responsible for what he commands, suggests, or ratifies.

The difficult area is in between, the area of "negligence." I would find it impossible to qualify simple carelessness in supervision as a "high Crime or Misdemeanor"; perfect freedom from negligence is for the angels. At this point, however, the general law furnishes us with a valuable concept. When carelessness is so gross and habitual as to be evidence of *indifference* to wrongdoing, it may be in effect equivalent to ratification of wrongdoing. If I drive my car in an utterly reckless manner,

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and so on—so that, as to these offenses, the issue under discussion here need not arise

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and someone is injured, the case is not merely that I have been guilty of “negligence,” but that I have so behaved as to show indifference to whether somebody got hurt or not. Gross and habitual indifference of this kind is more than mere negligence, and might well be held to amount to impeachable conduct.

Here, as in so many cases, everything depends on what the evidence in a case actually shows, but these are the right lines along which to sort out the evidence.

Good-Faith Belief in the Rightness of an Act—This concept has figured in this book at several points, in the discussion of particular offenses. Belief in the lawfulness or rightness of an action, in order to be a defense, must be such belief as a reasonable person could hold. A reasonable man could think selective impoundment of funds both lawful and right, but no reasonable man could think it right to use the tax system for partisan political purposes.

Here, again, Congress has an enormous role to play. A cleancut declaration, by Congress, that a given line of conduct is wrong, makes it much more difficult for a reasonable man to claim reliance on his own assessment of the matter. Congress has the power, within wide limits, to make presidential conduct criminal; where this was done, no subsequent President could be heard to say that he was not fully warned.

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