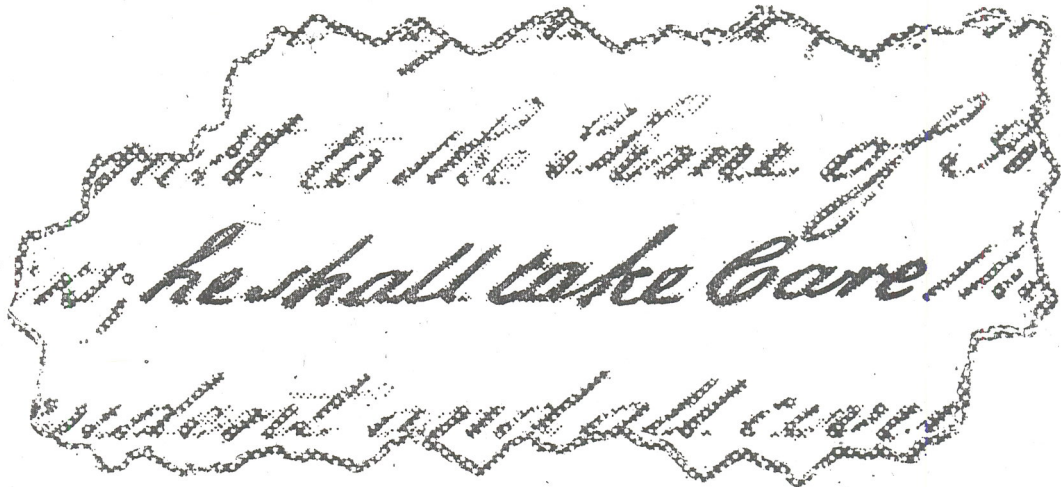


'The Issue for History'



Given the sheer volume of written material that has been generated by Watergate and related matters and proceedings, some of the most trenchant dispositions on the issues involved have received inadequate public notice. We would include in this category the separate statement, excerpted below, by Rep. Hamilton Fish Jr. (R-N.Y.), which was appended to the House Judiciary Committee's final report on the aborted impeachment proceedings against Richard Nixon. In it he analyzes the significance of the "take care" clause of the Constitution, with particular respect to Impeachment Article II. This article principally deals with abuses of power as distinct from indictable crimes. Because it therefore does not bear on the current question of whether Mr. Nixon should be criminally prosecuted, it has been largely lost sight of in the ongoing debate over how to dispose of the unfinished business of Watergate. And yet, Article II of the impeachment resolution, which rests upon Article II of the Constitution, does indeed pose "the issue for history," as Mr. Fish contends. For it has to do directly with "the constitutional standard by which this President, or any future President, shall be held to account for his own acts or omissions and those of his immediate subordinates."

Article II of the United States Constitution sets forth the power and the responsibilities of the President. It opens with majestic simplicity: "The executive Power shall be vested in a President of the United States of America." The standard of conduct required of all Presidents appears in Section 3 of that Article which commands that the President "shall take care that the laws be faithfully executed." Section I of the same Article requires that the President acknowledge the "take care" duty when assuming office by affirming under oath that he will "preserve, protect and defend the Constitution of the United States."

The "take care" clause "is a comprehensive description of the duty of the executive to watch with vigilance over all the public interests" . . . President Benjamin Harrison described the duty to "take care that the laws are faithfully executed" as "the central idea of the office." Justice Frankfurter observed that apart from the responsibility for conducting foreign affairs, "the embracing function of the President is that 'he shall take care that the laws be faithfully executed.'" The Supreme Court has made it clear that the "laws" to which the "take care" clause refers are not limited solely to "the . . . Acts of Congress or treaties of the United States"; rather, the "laws" also include those "rights, duties and obligations growing out of the Constitution itself . . . and all the protections implied by the nature of the government under the Constitution."

The impeachment clause is the sole exception to the system of separation of governmental powers provided by the Constitution. It is the ultimate check on a President's abuse of the powers of his office. The duty to "take care that the laws be faithfully executed" circumscribes the President's authority with respect to overall conduct of the executive department and the administration of justice and is central to the exercise of the impeachment power.

The three Articles of Impeachment recommended to the full House of Representatives charge that the great powers of the presidential office have been seriously abused. In words repeated in the preamble to each Article it is charged that the President, "in violation of his constitutional oath faithfully to execute the office of President of the United States and to the best of his ability preserve, protect and defend the Constitution of the United States, and in violation (or 'disregard,' in Article II) of his constitutional duty to take care that the laws be faithfully executed," performed acts therein specified. All three Articles thus frame the issue in constitutional terms.

Much attention has been given, and properly, to the specific charges against the President; but there are also larger considerations involved. The issue for history is the constitutional standard by which this President, or any future President, shall be held to account for his own acts or omissions and those of his immediate subordinates. . . .

The "take care" clause imposes on a President a personal obligation faithfully to honor, respect, obey and execute the laws. At the very least he is bound not to violate the law; not to order others to violate the law; and not to participate in the concealment (of evidence respecting violations of law of which he is made aware. This is scarcely novel: the same could be said of any citizen, whether or not bound by oath of office. Unlike the misconduct of an ordinary citizen, of course, presidential actions which contravene an Act of Congress may raise fundamental constitutional issues involving the overreach of the President's powers. . . . In such case, since the President's action can be effectively tested in the courts, resort to the extraordinary remedy of impeachment is not necessary. Impeachment is appropriate only where the President's action involves an undermining of the integrity of office, an arrogation of power, a disregard of constitutional duties, or otherwise has a substantial adverse impact on the system of government.

The President's constitutional duties extend beyond his personal obligation. The "take care" clause includes the President's superintendency of the vast bureaucracy of the executive branch, including all departments, agencies, commissions, and of course the immediate White House staff. The President's general obligation in this regard was described by Attorney General William Wirt in advice he gave in

1823 to President John Quincy Adams: "(The President) is not to perform the duty but to see that the officer assigned by law performs his duty faithfully—that is, honestly; not with perfect correctness of judgement, but honestly." . . .

The President's duty to supervise his principal subordinates is further emphasized by other provisions of the Constitution. Considered in conjunction with the President's constitutional power to "require the opinion in writing, of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices," Article II, Section 2, the "take care" clause implies an affirmative duty to be informed about the conduct of executive officers. Likewise, when considered in the light of the President's power to appoint and remove executive officers, the intention of the framers of the Constitution that there be a single, responsible executive, and the provision of Article II, Section 1, vesting the executive power solely in the President, the "take care" clause imposes a duty to oversee the conduct of executive officers.

This general duty of supervision is necessarily subject to certain practical limits. . . . Clearly he cannot exercise direct supervision over any substantial segment of the executive branch. He should not be held responsible under the "take care" clause for acts of individual wrongdoing by executive officers in the performance of their

official capacity on the part of any agency or executive official within the executive establishment. Furthermore, whatever may be the responsibility of the President for the conduct of those executive officers in the various agencies of government, his responsibility for the conduct of his immediate subordinates in the White House is even more compelling. All members of the White House staff are selected by the President and are directly responsible to him alone. No member of the White House staff is subject to Senate scrutiny or approval on appointment; and of course, discharge is also within the sole discretion of the President. It is not unreasonable to suggest that the closer the relationship to the President, the greater is his responsibility for the misconduct of a particular subordinate in the discharge of his duties.

Although the clause does not require day-to-day supervisory responsibility for each executive department or agency, neither does the size and complexity of the executive branch excuse the President's failure to take reasonable steps calculated to ensure that his subordinates have faithfully carried out his responsibility of faithful execution of the laws. The President must

exercise due diligence in overseeing the acts of his immediate subordinates. He can neither mislead them by offering ambiguous instructions and then fail to police their actions, nor can he with impunity simply ignore available facts bearing on their wrongful official conduct. He must remain always alert for any hint or suggestion of improper official conduct on their part. If the President has knowledge that the laws are being violated or improperly executed, he is under a duty to take appropriate steps to remedy these wrongs. Among other things, he must bring the matter to the attention of authorized law enforcement officials. Furthermore, a President may not deliberately position or arrange to screen himself with intent to avoid such knowledge or notice of such actions. And if the President permits or directly or indirectly stimulates a course of activities on the part of his immediate subordinates which amounts to serious abridgement of the "take care" clause, he is accountable for that conduct in an impeachment proceeding directed against him, whether or not he has knowledge of its actual occurrence.

The failure of a President to discharge his duty by disregarding or knowingly tolerating official dishonesty in the executive department or the faithless execution of the laws by his subordinates or executive department officials, may well, as President Andrew Jackson stated, subject a President to the same liability as his subordinates—removal from office. . . .

The President, in short, may not use any department of the executive branch or any person within the executive establishment, to subvert the Constitution or the laws, or to serve the President's personal or political advantage in an unlawful manner. This is what Article II of the Constitution is all about. It puts the President upon his oath to preserve, protect and defend the Constitution and to take care that the laws will be faithfully executed.

This is also what Impeachment Articles I and II are all about. Article I charges obstruction of justice by interfering with federal investigating agencies and concealing from them critical information. Paragraphs 1, 2 and 5 of Article I charge abuse of office by directing unlawful activities to be undertaken by the Internal Revenue Service, the Federal Bureau of Investigation, the Secret Service, the Criminal Division of the Department of Justice, the office of Watergate Special Prosecutor and the Central Intelligence Agency. Paragraphs 3 and 4 charge other illegal acts of the President, done "personally and through his subordinates and agents," in subversion of the political process; in derogation of individual liberty; and in the development of a plan to prevent discovery of illegal activities.

And furthermore, the offenses charged in Article II are peculiarly presidential offenses, for the President is in a unique position to subvert and abuse the federal investigative and law enforcement agencies. Under the Constitution the President may properly exercise broad discretionary powers to see that the Department of Justice and other agencies serve the needs of law enforcement, but those powers are circumscribed by his corresponding duty to uphold the integrity of the administration of justice. The President has special obligations in the even-handed enforcement of the criminal laws of the land. Article II charges at the very least a gross disregard for those special obligations, and a total dereliction of the duty to take care that the laws be faithfully executed.



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duties, in which he is not in any way involved. He and his party may have to respond to the electorate for instances of revealed corruption at any level of the executive establishment, but unless the corruption serves to subvert the system of government, impeachment is not warranted.

Under the "take care" clause, however, the President may not knowingly countenance—let alone authorize or direct—serious unlawful conduct in an