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No point is of more importance than that the right of impeachment should be continued. Shall any man be above justice?—George Mason of Virginia during debate at the Constitutional Convention, 1787.

FOR good reasons, the American public is uneasy about the prospect of impeaching the president. Impeachment leads to the most drastic political sanction our constitutional system provides. To impeach and convict the president is to remove from office our highest public official elected by popular vote. An impeachment proceeding, it is feared, may produce bitter divisions in the country and shatter confidence in our institutions and ourselves.

The men who framed our Constitution were aware of the enormity of the impeachment sanction and recognized the potentially disruptive effects of an impeachment proceeding.[1] But they also recognized that it would be more dangerous for the country to have no remedy against betrayal of the public trust than to have the impeachment procedure.[2]

We must not, if the circumstances warrant, abjure the use of the sanction the Framers provided. But precisely because the stakes are so high for all of us, we must assure that the impeachment process is, in fact, a fair and principled one, legitimate in the eyes of the peo-

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1. Alexander Hamilton wrote in THE FEDERALIST No. 65 at 424 (modern Library ed. 1941) that "The prosecution of [impeachment] . . . will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on the one side or on the other." *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION 612-613 (M. Farrand ed. 1911) [hereinafter cited as Farrand]. A motion "that persons impeached be suspended from their office until they be tried and acquitted" was defeated by a vote of eight states to three states.

2. 2 Farrand, *supra* note 1, at 64-69. A motion that "the Executive be removeable on impeachments" was approved by a vote of eight states to two states.

ple. That responsibility, at least for now, rests with the Judiciary Committee of the House of Representatives.[3]

The most basic question the Committee must decide is also the most difficult one: What is an impeachable offense? Article II, section four of the Constitution 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." The first two are well-recognized criminal offenses.[4] But the term "high Crimes and Misdemeanors" is not defined, and other constitutional references to impeachment are ambiguous on the question whether "high Crimes and Misdemeanors" was meant to encompass more than criminal offenses.[5]

However, in its historical context, the term had particular meaning for the Framers. "High Crimes and Misdemeanors" is first encountered in a series of political impeachments through which the English Parliament fought the absolutist claims of the Crown.[6] Impeachment was a political process employed to check what Parliament felt were abuses of power committed by the king or his ministers.[7]

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3. By a vote of 410 to four, the House of Representatives on Feb. 6, 1974, "authorized and directed" the House Judiciary Committee "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America." H.R. Res. 803, 93d Cong., 2d Sess., 120 CONG. REC. H526 (daily ed. Feb. 6, 1974).

4. Treason against the United States is defined in the U.S. CONST. art. III, § 3 as "levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." This language has been statutorily adopted in 18 U.S.C. § 2381 (1970) which provides "[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States." Bribery is not defined in the Constitution, and in fact was not made a federal crime until 1790 for judges (Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117), 1853 for members of Congress (Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171), and 1864 for other civil officers (Act of Mar. 3, 1863, ch. 76, § 6, 12 Stat. 740). The relevant statutory provisions are now contained in 18 U.S.C. § 201(c) and (g) (1970).

5. U.S. CONST. art. I, § 3 (judgment shall not extend further than removal from office and disqualification to hold office, but does not provide immunity from criminal prosecution); U.S. CONST. art. III, § 2 (no right to trial by jury); and U.S. CONST. art. II, § 2 (exempt from power of pardon).

6. *See generally* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 67-72 (1973) [hereinafter referred to as BERGER]. The phrase first appears in 1386 during the impeachment of the Earl of Suffolk, the King's Chancellor.

7. BERGER, *supra* note 6, at 67-72.

As the Framers inherited "high Crimes and Misdemeanors," the phrase was not tied to violations of the criminal law.[8] But it did involve grave abuses of official power and serious attempts or acts to subvert the Constitution. Several of the Framers assured delegates to state ratifying conventions that a president could be impeached only upon the commission of "great offenses" or "acts of great injury to the community."[9] Alexander Hamilton wrote in *The Federalist* that impeachment would arise out of the "abuse or violation of some public trust."[10] George Mason referred to "attempts to subvert the Constitution."[11] What emerges from the history of this vaguely-defined phrase is the conclusion that impeachment proceedings against a president are suitable only for great offenses against the state which, while not necessarily criminal in nature, constitute a betrayal of the public trust undermining the integrity of the government and the Constitution. I agree therefore with the conclusion reached by the distinguished counsel of the House Judiciary Committee[12] that the president may be impeached for offenses which are not necessarily crimes under the criminal codes.

To assign responsibility for such offenses, however, personal involvement on the part of the president is necessary. For example, if the president is involved in the commission or cover-up of his subordinates' serious criminal acts or attempts to subvert the Constitution —if, in James Madison's words, he is "connected, in any suspicious manner with any person, and there be grounds to believe that he will

8. Significant is the impeachment of Warren Hastings, first Governor-General of India, pending before Parliament during the Constitutional Convention. Hastings was charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office and cruelty toward the people of India. *See generally* MARSHALL, THE IMPEACHMENT OF WARREN HASTINGS (1965). George Mason, who proposed the inclusion of "high crimes and misdemeanors" in the impeachment clause, directly referred to the Hastings impeachment during the Convention debates. 2 Farrand, *supra* note 1, at 550. Alexander Hamilton later stated that Great Britain was "[t]he model from which [impeachment] has been borrowed." He described the parameters of impeachment as "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to society itself." THE FEDERALIST, No. 65 at 423-424 (Modern Library ed. 1941) (A. Hamilton).

9. *See generally* J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1881), [hereinafter cited as ELLIOT].

10. THE FEDERALIST No. 65 at 423 (Modern Library ed. 1941) (A. Hamilton).

11. 2 Farrand, *supra* note 1, at 550.

12. STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REPORT ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26-27 (Comm. Print 1974) [hereinafter cited as HOUSE REPORT].

shelter him"[13]—that action would constitute an impeachable offense. But if the persons the president chose to advise him subverted our constitutional system without his knowledge or against his will, he is, like Shakespeare's Lear, "a man more sinn'd against than sinning."[14]

This is not to say that the president can escape his duty to see to it that the laws are faithfully executed.[15] Gross neglect of such duty may properly be deemed an impeachable betrayal of the public trust. The president must mind the store and this necessarily encompasses appropirate supervision of the activities of his high-ranking subordinates to whom he delegates important responsibilities.

A threshold question in the Watergate and related scandals is: Can a president be indicted while in office? History offers no clear answer. The Constitution merely provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . but the Party convicted shall nevertheless be liable and subject to Indictment, Trial Judgment, and Punishment, according to Law."[16] Judges have been indicted while in office.[17] No specific constitutional provision indicates that the president, unlike any other citizen, is immune from criminal sanctions.

But, as always, the Constitution must be interpreted in light of the general structure of government it contemplates. Such an interpretation compels the conclusion that the president is the exception who cannot be indicted while in office. Our federal system can function with a judge serving a prison term. Other federal judges can replace them. But the president is uniquely powerful and essential: he is the official who under the Constitution commands the armed forces,[18] formulates foreign policy,[19] appoints judges,[20] and presides

13. 3 ELLIOT, *supra* note 9, at 498.

14. King Lear, Act III, Scene II, Line 59.

15. The duty he assumes when he takes his oath of office set forth in U.S. CONST. art III, § 1.

16. U.S. CONST. art I, § 3.

17. The most recent example is Otto Kerner, who was appointed as a judge of the U.S. Court of Appeals in 1968. Judge Kerner was indicted in December of 1971 for bribery, perjury, conspiracy, mail fraud and income tax evasion in connection with a secret purchase and sale of race track stock while he was Governor of Illinois. Judge Kerner was convicted on Feb. 19, 1973, and sentenced to three years in federal prison and a $50,000 fine on Apr. 19, 1973. N.Y. Times, Apr. 20, 1973, at 11, col. 5. Judge Kerner took a leave of absence from the bench after his conviction, and requested that his salary be held in escrow pending appeal of his conviction. N.Y. Times, May 10, 1973, at 27, col. 8.

18. U.S. CONST. art. II, § 2.

19. U.S. CONST. art. II, § 2.

20. U.S. CONST. art. II, § 2.

over the executive branch of government.[21]

The president can only be impeached by one institution—the Congress[22]—which is directly accountable to the people. Prosecutorial harassment and physical detainment, before conviction by the Senate after impeachment is voted by the House, are incompatible with the unique functions of the chief executive. Apparently, Special Prosecutor Jaworski is of the same mind and so advised the Watergate Special Grand Jury.

The president's immunity from indictment before conviction by the Senate and removal from office increases the burden on the Judiciary Committee. For this reason, it is imperative that the House Judiciary Committee be supplied with all relevant information and evidence bearing on the president's case, including the grand jury report.[23] Precautions can and should be taken under the Federal Rules of Criminal Procedure to prevent prejudicial pre-trial publicity which could jeopardize the indictments of secondary figures. Even if some indictments are in fact jeopardized, there is an overriding need to fully air and judge the president's case in the present circumstances.

The president, too, must take part in this full disclosure—that is his constitutional duty. Article I, section two of the Constitution provides that the House of Representatives "shall have the sole Power of Impeachment." The House is thus authorized to investigate the conduct of the president. Considering the gravity of its task, the House's powers to obtain information are even greater than a grand jury's. The House in an impeachment proceeding is indeed the great inquest of the nation. For the president to assert executive privilege in refusing to turn over material relevant to the impeachment investigation would be tantamount to defying the constitutional scheme of impeachment. The president has no executive privilege in matters pertaining to impeachment, and continued resistance to the House's relevant inquiries would in itself constitute an impeachable offense. But, of course, the House's inquiries must be relevant to the question of the commission of an impeachable offense.

The president is not left defenseless through the course of impeachment. The Judiciary Committee can only recommend; the

21. U.S. CONST. art. II, § 1.

22. U.S. CONST. art. II, § 2 provides that the House of Representatives "shall have the sole Power of Impeachment," and U.S. CONST. art. I, § 3 states that "[t]he Senate shall have the sole Power to try all Impeachments."

23. On March 18, 1974, Judge Sirica ruled that the grand jury report should be turned over to the House Judiciary Comm. N.Y. Times, Mar. 19, 1974, at 1, col. 8.

House of Representatives must by a majority vote impeach, which, in constitutional terms, is akin to a finding, not of guilty, but of probable cause. The Senate only can convict, and a two-thirds vote is required.[24] And conviction can only take place after a senatorial trial with the Chief Justice of the United States presiding.[25] The Constitution provides in Article I, section three that the Senate has "the sole Power to *try* all Impeachments." In *The Federalist*, Hamilton refers to the Senate in their judicial character as a court "for the *trial* of impeachments."[26] "Trial" has real meaning for both lawyer and layman. During an impeachment proceeding, when his great office is at stake, the president is entitled to the right to counsel, the opportunity to be heard and to face opposing witnesses, and the other fundamental elements of a fair trial.

The Andrew Johnson impeachment has been repudiated by history largely because the Senate persisted in ignoring the president's procedural rights. After the Senate convened, for example, defense counsel requested thirty days to prepare for trial; the Senate allowed only six.[27] When the Senate proceeds in such a manner, it exceeds its constitutional authority to try the president.

Although the Constitution authorizes the Senate to try all impeachments, it does not provide a blank check for the Senate to exceed constitutional boundaries by denying procedural due process.

It is almost inconceivable that after a senatorial conviction, a president would contest it in the courts. Such a course might well result in irreparable damage to the body politic. There is a debate, however, among constitutional experts as to whether the president could challenge an impeachment conviction in the Supreme Court. In my opinion, he could but only on the ground that he was denied procedural due process or convicted of a non-impeachable offense. I regard the 1969 case of *Powell v. McCormack*[28] as a relevant Supreme Court precedent. Adam Clayton Powell was a New York Congressman excluded from the House for "serious misconduct."[29] The Constitution provides that the House shall be the sole judge of its members' qualifications and further enumerates the qualifications each rep-

24. U.S. CONST. art. I, § 3.
25. U.S. CONST. art. I, § 3.
26. THE FEDERALIST No. 65 at 423 (Modern Library ed. 1941) (A. Hamilton).
27. TRIAL OF ANDREW JOHNSON 23 (3 Vols., U.S. Gov't Printing Office, 1868).
28. 395 U.S. 486 (1969).
29. H.R. Res. 278 as amended, 90th Cong., 1st Sess., 113 CONG. REC. 5039 (1967).

resentative must meet.[30] None of those qualifications pertained to the charges against Powell.[31] The fact that the House is designated sole judge of its members' qualifications did not prevent the Court from setting aside Powell's exclusion, for the House had abused its power in barring Powell for a shortcoming not specified in the Constitution.[32]

Congress is empowered to impeach and remove a president who has committed treason, bribery or other high crimes and misdemeanors. Yet one of the articles of impeachment against Andrew Johnson —Article X—charged, essentially, that in various speeches he had attempted to bring Congress into disgrace.[33] Article X was not only, as Professor Berger observes, "a brazen assault on the right freely to criticize the government;"[34] it involved neither treason nor bribery nor a high crime or misdemeanor. Had Johnson been convicted of the charges made in Article X, it would have been proper, in my opinion, for the Supreme Court to have set aside that conviction on appeal. Otherwise, Congress' violation of the Constitution would have survived unchecked.

The impeachment process was abused at the Johnson trial. It is imperative, as we face the possibility of impeaching a president for only the second time in our history,[35] that Congress proceed constitutionally. Impeachment cannot solve all of our Watergate woes; but if impeachment proceedings are properly and fairly conducted, the

30. U.S. CONST. art. I, §§ 5, 2.

31. 395 U.S. at 492.

32. 395 U.S. at 512-549.

33. Article X alleged that Johnson, "unmindful of the high duties of his office and the dignities and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, [and] to impair and destroy the regard and respect of all good people . . . for the Congress and legislative power thereof . . . [by making] certain intemperate, inflammatory, and scandalous harangues." For the full text of the articles, see CONG. GLOBE, 40th Cong., 2d Sess., 1603-18 (1868).

34. BERGER, *supra* note 6, at 274.

35. President Johnson was acquitted by vote of 35 guilty, 19 not guilty, one vote short of the two-thirds required to convict. CONG. GLOBE SUPP., 40th Cong., 2d Sess. 415 (1868). Since 1787, Thirteen U.S. officials have been impeached by the House of Representatives: Senator William Blount (1797), District Judge John Pickering (1803) Justice Samuel Chase (1804), District Judge James Peck (1830), District Judge West Humphreys (1862), President Andrew Johnson (1867), District Judge Mark Delahay (1873), Secretary of War William Belknap (1876), District Judge Charles Swayne (1903), Circuit Judge Robert Archibald (1912), District Judge George English (1925), District Judge Harold Louderback (1932), and District Judge Halstead Ritter (1933).

result, whatever it may be, will stand as legitimate in this nation and through the world.

The Constitution provides the tools; our reluctance to use tools so finely honed is understandable. But they are in use. The impeachment process is underway. It is the duty of Congress to proceed to a conclusion; it is the duty of the president to cooperate with the Congress. It is the duty of the people to abide by the result. This is our constitutional way. We must uphold and defend it.