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Joseph A. Woods Jr.

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by
JOSEPH A. WOODS, JR.*

Before 1974, the concept and history of impeachment were subjects well below the horizon, for me and for virtually everyone else. I don't remember the words even being mentioned in law school. But then the phone rang early that New Year's Day, and by mid-January I was in Washington as a Senior Associate Special Counsel to the House Committee on the Judiciary, responsible for a staff task force examining constitutional and legal questions related to the Committee's pending Impeachment Inquiry respecting President Nixon.

Impeachment being a constitutional remedy, it seemed to me that understanding it had best begin with the Constitution itself. My children had given me a small, blue, paperbound booklet containing the Constitution and the *Declaration of Independence*. That booklet was in my pocket as I enplaned for Washington, and much of the flight time was spent reading, rereading, and thinking about those documents—time later proved to have been well spent.

Normally a congressional committee staff is highly partisan. To ensure a fair and principled inquiry, Chairman Peter Rodino, Ranking Minority Member Ed Hutchinson, Special Counsel John Doar, and Minority Counsel Bert Jenner established an integrated Inquiry Staff, separate from that handling regular Committee business. Though individuals were selected by the respective parties, each working group within the Inquiry Staff comprised both majority and minority staff. We worked together on our assigned subject matter—cooperatively, diligently, for the most part amicably, and, I think, effectively.

The Committee and the Inquiry Staff realized that, if there were to be impeachment and removal, the necessity and propriety of removal had to be recognized clearly by the American people. That

* Of counsel, Donahue, Gallagher, Woods & Wood, LLP, Oakland, California. Former Senior Associate Special Counsel to the House of Representatives' Committee on the Judiciary in its inquiry respecting the possible impeachment of Richard Nixon. Former head of the Constitutional and Legal Section of the Inquiry Staff.

did not mean that unpopularity should be grounds for impeachment, but it did mean that an election should not be upended on doubtful evidence, or for reasons that the people could not readily accept as serious and fundamental to the well-being of the nation.

The Committee recognized that discretion meant not only judiciousness and fairness; it also meant confidentiality. The Members did a most unusual thing; they resolved that the work of the Inquiry Staff should be known only to Chairman Rodino, Mr. Hutchinson, and the Inquiry Staff, and that even other Members themselves were to learn of it only at Executive Session hearings to be held when the investigation was concluded. Staff contact with the media was prohibited. To my knowledge, there were no leaks.

When we were attempting to define the proper grounds for impeachment in early 1974, we were careful not to imply applicability to the facts at hand. For one thing, our understanding of the evidence was evolving, and judgment should not be premature. For another, one readily gains a sense of place when working in the staff for the House of Representatives. One could have his hair cut in the House barbershop, but if a Member came in, one got out of the chair. One did not reach conclusions, or even state facts. One could provide information, or make suggestions, or in an extreme case offer a recommendation, but certainly one could not decide.

Our effort was to be most circumspect in our choice of words. The events following the Watergate break-in were not "a cover-up." Instead, we had evidence-gathering teams addressing "Watergate and its aftermath." (Incidentally, that fundamental research tool, L. M. Boyd's *Grab Bag* column, told us recently that "aftermath" originally meant "the second mowing of the hay." What would have been the likely result of the Watergate burglary had there been a prompt and open facing of the situation, and thus no occasion for a second mowing of the hay?)

The observation is made, sometimes in a tone of surprise or bemusement, and sometimes pejoratively, that impeachment is a political process. This should not be news. Hamilton told us so in *The Federalist Number 65*—and he told us in capital letters.[1] The impeachment process originated and developed in the House of Commons, not in the courts. It was most used in the Commons' contest with Charles I over royal power. The Long Parliament (1640-48) voted 98 impeachments. One could hardly get more political than that.

That is not to suggest, however, that the exercise of such political

1. "They [impeachable offenses] are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

power should be unprincipled. Standards have evolved over hundreds of years of English, British, and American history, and since 1386 those standards have been embodied in the phrase "high Crimes and Misdemeanors."[2]

Precedent means something in impeachment that is markedly different from what it means in our judicial system. There is no stare decisis in impeachment. In that sense Gerald Ford was correct when he said in the aborted 1970 investigation of Justice William O. Douglas that the grounds for impeachment are determined by Congress at any given time.[3] And, I might add, in response to any given situation. The real question must always be whether, then and there, the conduct complained of involves serious abuse of the powers of the office or a serious threat to our system of government. Precedent in impeachment is by way of example—how others handled their particular situation in their particular time. It may or may not be persuasive. It is *not* binding.

An early Inquiry Staff objective had to be informed analysis of the grounds for impeachment. To be useful, this analysis had to be grounded in sound scholarship. Even more important, it had to be even-handed, a presentation of guiding principles that could be applied by all Members to such facts as they might come to find months later, after they had heard the direct testimony and cross-examination of the witnesses and reviewed the documentary evidence. Our group relied on direct reference to the records of the many English and British and few American impeachment cases; the Constitution itself; the debates in the Constitutional Convention, the ratifying conventions in the several colonies, and the First Congress where many of the Framers served and sought to apply the requirements of the Constitution they had just created; *The Federalist Papers* and other contemporary writings; and the *Declaration of Independence*, which we came to understand as the functional equivalent of articles of impeachment against George the Third.

The result was published in February 1974 as *Constitutional Grounds for Presidential Impeachment*,[4] proposing that not all "high

2. Though parliamentary practice had a longer history, the phrase "high crimes and misdemeanors" first appeared in the impeachment of Michael de la Pole, Earl of Suffolk. Suffolk was the King's Chancellor and was charged with many offenses against the state, including failure to execute a parliamentary direction to ransom the town of Ghent, resulting in the loss of that town. *See* ADAMS AND STEVENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 148 (London 1927).

3. *See* 116 CONG. REC. 11,913 (daily ed. Apr. 15, 1973) (statement of Rep. Ford).

4. *See* CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 93D CONGRESS, 2D SESSION, (U.S.G.P.O. No. 28-959, February 1974) [hereinafter GROUNDS].

Crimes and Misdemeanors" are crimes within the meaning of the criminal law and that not all crimes are "high Crimes and Misdemeanors."[5] To be grounds for impeachment, the questioned conduct, when considered as a whole in the context of the office held, must be "seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office."[6] The Committee found that grave impact in recommending three articles of impeachment.

The Constitution provides that the sole power to impeach is in the House of Representatives.[7] The sole power to try impeachments is in the Senate, and "when sitting for that Purpose, they shall be on Oath or Affirmation."[8] Upon conviction by the vote of two-thirds of the Senators present, the charged officer is removed from office.[9] By a separate vote the Senate may, but need not, disqualify the removed officer from holding office thereafter.[10] There can be no penalty in impeachment beyond removal and disqualification, but the charged officer is "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[11] The presidential pardon power does not extend to cases of impeachment.[12] There is no judicial review of impeachment proceedings.[13]

The Constitution clearly states the grounds for impeachment: "Treason, Bribery, or other high Crimes and Misdemeanors."[14] "Other" means that treason and bribery are examples of "high Crimes and Misdemeanors," not some discrete offenses. "High" means significant, and comes to us from history. One does not find the phrase in ordinary cases. It is peculiar to cases of impeachment. When the phrase was suggested in our Constitutional Convention for use in the Extradition Clause, it was rejected as "having a meaning too limited," and the words "other crimes" were wisely substituted.[15] The Framers knew what the phrase had meant in development of the Constitution in Britain, and it was that meaning they adopted, just as they were rejecting Parliament's other major tool, the bill of

5. *See id.* at 26-27.
6. *Id.* at 27.
7. *See* U.S. CONST. art. I, § 2, cl. 5.
8. U.S. CONST. art. I, § 3, cl. 6.
9. *See id.*
10. See article I, section 3, clause 7, which provides for disqualification. The Senate Rules provide for the voting procedure.
11. U.S. CONST. art. I, § 3, cl. 7.
12. *See* U.S. CONST. art. II, § 2, cl. 1.
13. *See* U.S. v. Walter L. Nixon, 506 U.S. 224 (1997).
14. U.S. CONST. art. II, § 4.
15. 2 THE RECORDS OF THE FEDERAL CONVENTION 443 (M. Ferrand ed. 1911).

attainder.

The prohibition of bills of attainder[16] bears significantly on the political nature of impeachment. An impeachment is a factually based accusation of impropriety; a bill of attainder is a legislated conviction, without an evidentiary predicate. If impeachment and conviction proceed without a clear record of convincing evidence of conduct amounting to high crimes and misdemeanors, there is a critical blurring of the distinction between impeachment and the bill of attainder expressly prohibited by our Constitution.

Thomas Wentworth, Earl of Strafford, was chief among the advisors of Charles I. He was impeached in 1640 on charges of subversion of "the Fundamental Laws and Government of the Realms" and endeavoring "to introduce Arbitrary and Tyrannical Government against Law."[17] Even in the heat of the struggle over the divine right of kings, the Commons, faced with a determined defense, declined to bring the trial to a vote in the House of Lords. Instead, the Commons adopted a bill of attainder against Strafford, thereby avoiding the tiresome necessity of making their case. The difference between impeachment and attainder could hardly be made more clearly.

It is perhaps instructive that, when sitting as a court of impeachment, Senators "shall be on Oath or Affirmation." So did the Framers recognize the peculiar nature of a Senator's role in the impeachment process. A clear distinction was thus made between the normal legislative function and the essentially judicial function of a trier of the law and the facts. The oath or affirmation requirement in the trial of an impeachment is the constitutional counterpart of the prohibition of attainder. It says to the senator that his or her vote is to be determined by the facts and by the meaning of the applicable standard—high crimes and misdemeanors—and not by partisan or policy considerations. Whatever may occur in fact in a given instance, what should happen is implicit in the oath or affirmation.

When our Constitution was being written and adopted, obviously there were as yet no federal statutes, and thus no federal crimes. There must have been some intended meaning of the Impeachment Clause, and it seems to follow that the meaning was not limited to crimes.

In Britain the potential consequences of conviction after impeachment were varied and severe, including fines, imprisonment, confiscation of property, and even death. In adopting the concept of impeachment as a control over the conduct of public office, the

16. *See* U.S. CONST. art. I, § 9, cl. 3.

17. J. RUSHWORTH, *The Tryal of Thomas Earl of Strafford, in* 8 HISTORICAL COLLECTIONS 8 (1686); GROUNDS, *supra* note 4, at 4-5.

Framers chose a more limited effect—removal from office, and possible disqualification from the holding of future office. And they expressly provided that the subject conduct should remain amenable to the ordinary processes of law, quite apart from impeachment, and unaffected by it. This precise and targeted penalty helps to define the type of conduct for which it is imposed: a political sanction, to be imposed by a political process, for political offenses.

Thus, in 1974, the Judiciary Committee considered a proposed Article based primarily on President Nixon's having filed false income tax returns—affording an instructive parallel to charges of falsity of President Clinton respecting his relationship with Monica Lewinsky. The Committee rejected that charge by a substantial bipartisan majority, with several Members stating clearly that the Nixon taxes and related perjury were matters between a taxpayer and his government, not the abuse of presidential power with which the impeachment process should be concerned.[18]

In summary, not all crime is impeachable conduct and not all impeachable conduct is crime. Impeachment and conviction of a President reverse the will of the people, as expressed in a presidential election, and thus should result only from grave abuse of the power of office. The core question is whether the conduct in question perverts our government or threatens our constitutional system. If it does not, let the general criminal and civil law and the electoral process take their course.

18. *See* IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, REPORT ON THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 93D CONGRESS, 2D SESSION, H.R. REP. NO. 93-1305 (1974).