Comment

Impeachment Revisited

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I. Introduction

The story goes that at the end of the Battle of the Boyne, one of James II's Irish troopers pulled up his horse momentarily before he left the field and shouted to King William III's advancing and victorious soldiers, "Trade kings, and we'll fight you again!" In somewhat like manner, I heard one of President Nixon's counsel say, after the revelation of the fatal Nixon-Haldeman tape of June 23, 1972,[1] "Damn it, we could have won this case."

As a lawyer, and as one of the ten members of the House Committee on the Judiciary who voted "No" to all three Articles of Impeachment,[2] I sympathize with both the unknown Irishman and the frustrated counsel. I understand how they felt, and in the case of the counsel, I shared his feeling. As did the Stuart kings, Mr. Nixon had better men fighting for him than he deserved.

In neither case, however, was the fight really made for an individual. The supporters of the Stuarts fought for royalty, religion, and the structure of British society as they believed it ought to be. Likewise, those of us on the Judiciary Committee who voted "No" to the Articles of Impeachment were not concerned primarily with the defense of Mr. Nixon as an individual; we stood, rather, for due process of law, as we understood it, under the facts and the evidence as they were known to us and existed at the time we were called upon to cast our votes.

II. The Law

Article II, section 4 of the United States Constitution provides:

> The President, Vice President and all civil Officers of

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[1]In this tape, the President implicated himself in interfering with the Watergate investigation for political reasons. See N.Y. Times, Aug. 6, 1974, at 14-15, for the text of the Nixon-Haldeman tape of June 23, 1972, and *id.* at 1, col. 4-7, for the text of the President's statement accompanying the release of this tape.

[2]See pp. 582-84 *infra*.

> the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

It is an old debate, under this provision, whether "other high Crimes and Misdemeanors" must be violations of the criminal law, as, of course, are treason and bribery.

Harvard Professor Raoul Berger argues persuasively in his scholarly work *Impeachment: The Constitutional Problems*[3] that these "other high Crimes and Misdemeanors" need not be violations of the criminal law.[4] "High Crimes and Misdemeanors," he contends, were, and are, words of art, stemming from English parliamentary law and practice, rather than from English common law[5] and encompassed many acts—such as giving the King bad advice or mishandling the tactics of the Royal Fleet—which were in no sense ordinary crimes.[6]

Nevertheless, the fact remains that impeachment, in the English practice, was an essentially political matter—an integral part of the constitutional struggle between the Parliament and the Crown. When the Framers came to write our Constitution, that struggle had been largely concluded. Treason was carefully and most narrowly defined in our written Constitution, and our constitutional provisions regarding impeachment were couched, for the most part, in the language of the criminal law. Thus, the United States Constitution provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be *convicted* without the concurrence of two thirds of the Members present.[7]
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> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party *convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[8]

I do not regard the clause providing that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial,

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[3]R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

[4]*Id.* at 53-102.

[5]*Id.* at 62.

[6]*Id.* at 71.

[7]U.S. CONST. art. I, § 3, cl. 6 (emphasis added).

[8]U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

Judgment and Punishment, according to Law" as necessarily an argument against the criminal nature of impeachment, as Professor Berger urges.[9] It seems at least equally logical to argue that, in the case of this one unique offense, with removal from office as its only constitutionally provided punishment, the Framers simply decided that the defense of a previous conviction should not be available in any future prosecution in the regular criminal courts. This latter interpretation is supported by several provisions of the Constitution.

Under article II, the President has the "Power to grant *Reprieves* and *Pardons* for *Offenses* against the United States, *except in Cases of Impeachment.*"[10] Article III provides that "[t]he Trial of all *Crimes,* except in Cases of *Impeachment,* shall be by Jury . . . ."[11] Finally, of course, the basic impeachment provision speaks of "Treason, Bribery, or **other** *high Crimes* and Misdemeanors."[12]

It is a fact, too, as shown by the debates in the Constitutional Convention, that the phrase "other high Crimes and Misdemeanors" was substituted for George Mason's suggestion of "Maladministration" upon the objection of James Madison that "[s]o vague a term will be equivalent to a tenure during [the] pleasure of the Senate."[13] Colonel Mason, who thus withdrew "Maladministration" and substituted the phrase "other high Crimes and Misdemeanors," had himself stated earlier in the debate that "[w]hen great *crimes* were committed, he was for punishing the principal . . . ."[14]

History has also recorded the successful assertion of the interpretation of impeachment as having a criminal nature. Luther Martin, a distinguished member of the bar and a delegate to the Constitutional Convention, successfully defended Justice Samuel Chase at his impeachment trial by making the argument that his client had not committed any crime.[15] William M. Evarts, and other distinguished counsel for President Andrew Johnson, made this same argument in the impeachment trial of their presidential client.[16]

The minority report of the House Committee on the Judiciary, in the first and unsuccessful effort to impeach President Andrew

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[9]R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 79 (1973).

[10]U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

[11]U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

[12]U.S. CONST. art. II, § 4 (emphasis added).

[13]2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (1911).

[14]*Id.* at 65 (emphasis added).

[15]*See* 14 ANNALS OF CONG. 357, 432 (1805).

[16]*See* II TRIAL OF ANDREW JOHNSON 285-89 (1868).

Johnson, earlier made the same general point, concluding that while Johnson was certainly to be strongly censured from a political point of view, he had committed no crime and hence was guilty of no impeachable offense.[17] On that occasion the House, by its vote, apparently approved this argument,[18] although President Johnson's subsequent defiance of the Tenure-of-Office Act and his general course of conduct later led to his impeachment by the House,[19] and brought him within one vote of conviction.[20]

It is possible, perhaps, to imagine some serious neglect or dereliction of presidential duty which, while not technically criminal, might nevertheless rise to the level of an impeachable offense; however, it seems probable that such cases would be extremely rare. In practice, almost any conduct which could be considered serious enough to be impeachable would also be found to be criminal. This certainly was true, in my judgment, in the case of President Nixon. Perhaps as good and as sensible a statement on the subject as I have seen is that of Yale Law School Professor Charles L. Black, Jr.

> 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.
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> The phrase "high Crimes and Misdemeanors" carries another connotation—that of *distinctness of offense*. It seems that a charge of high crime or high misdemeanor ought to be a charge of definite act or acts, each of which in itself satisfies the above requirements. General lowness and shabbiness ought not to be enough. The people take some chances when they elect a man to the presidency, and I think this is one of them.[21]

The entire impeachment proceeding, as I see it personally, is, at the least, quasi-criminal in character. It follows that proof—

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[17]*See* H.R. REP. No. 7, 40th Cong., 1st Sess. 105 (1867).

[18]*See* CONG. GLOBE, 40th Cong., 2d Sess. 68 (1867) (rejecting the Judiciary Committee's majority report which recommended impeachment).

[19]*See id.* at 1400.

[20]*See* II TRIAL OF ANDREW JOHNSON 496-97 (1868).

[21]C. BLACK, IMPEACHMENT: A HANDBOOK 39-40 (1974) (emphasis in original).

which leads to the forced removal of an official popularly elected to a fixed term of office—must be, at a minimum, of a clear and convincing character, falling but little short, if short at all, of proof beyond a reasonable doubt.

When we depart from these rigorous standards we run grave danger of purely political impeachment: of tenure, in Madison's words, "during [the] pleasure of the Senate,"[22] or, I might add, during the pleasure of a temporary congressional majority. No member of the House of Representatives can rightly salve his conscience by the constitutional sophistry that he merely brings the charge on a basis of some alleged "probable cause," while it is the Senators alone who must decide the facts. The House, it must be remembered, is not merely the accuser; the House goes to the bar of the Senate, and managers appointed by the House for that purpose prosecute the case.

As Representative James F. Wilson, Chairman of the House Judiciary Committee and later one of the House managers at the time of the Johnson impeachment, said in House debate on the first Johnson impeachment resolution:

> If we cannot arraign the President for a specific crime, for what are we to proceed against him? . . . If we cannot state upon paper a specific crime how are we to carry this case to the Senate for trial?[23]

The House, as Sam Garrison, our minority counsel, said, is therefore in the position of a "prudent prosecutor," and no member of the House should vote to impeach unless he believes the respondent to be guilty as charged, and believes further, that the case can be established and won by the production of competent and convincing evidence in a trial before the Senate, at which the Chief Justice of the United States will preside.[24]

III. The Articles of Impeachment and the Evidence

The Judiciary Committee, after many weeks of hearings, voted three Articles of Impeachment against Richard Nixon.[25]

Article I charged that:

> Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United

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[22]2 M. Farrand, The Records of the Federal Convention of 1787, at 550 (1911).

[23]Cong. Globe, 40th Cong., 2d Sess., app. 65 (1867).

[24]U.S. Const. art. 1, § 3, cl. 6.

[25]The Committee labored pursuant to H.R. Res. 803, 93d Cong., 2d Sess. (1974), which authorized the Judiciary Committee to investigate whether sufficient grounds existed for the House to impeach President Nixon.

> States . . . and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:
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> On June 17, 1972, and prior thereto, agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities . . . .[26]

The Article then proceeded to specify the various means allegedly used "to implement this course of conduct or plan."[27]

Article II was a catch-all article, which we usually referred to as the "abuse of power" article. It set forth five separate and completely unrelated specifications of alleged official misconduct: political abuse of the Internal Revenue Service; allegedly illegal electronic surveillance; establishment of the so-called "plumbers" unit; failure to act to prevent various alleged illegal activities of his subordinates; and, once again, interference with the Federal Bureau of Investigation, the Special Prosecutor, and the Central Intelligence Agency.[28]

Article III charged that the President "failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary . . . and willfully disobeyed such subpoenas."[29] I spoke to this Article in debate in the Judiciary Committee as follows in part:

> [T]he President simply asserted what he stoutly claimed to be a constitutional right, and which he is, in fact, still legally free to assert to be a constitutional right so far as this committee is concerned, and we, on the contrary asserted a constitutional right in opposition to the Presidential claim. Such a conflict is properly one for resolution by the courts, and absent a binding and definitive decision between the parties by the judicial branch, it

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[26]H.R. REP. No. 1305, 93 Cong., 2d Sess. 1-2 (1974).

[27]*Id.*

[28]*Id.* at 3-4.

[29]*Id.* at 4.

> escapes me on what grounds it can properly be asserted that a claim of constitutional right is in any sense an abuse of power.[30]

I see no reason whatever to change that stated position. During the debate, I pointed out that the Special Prosecutor, unlike the Judiciary Committee, had gone to court and had in fact obtained an order for additional tapes and documents.[31] I suggested that these would no doubt become available to our Committee and might well result "in the furnishing to the committee of additional . . . highly material evidence which we do not have."[32] I proposed, without success, that we defer our vote pending production of this evidence.[33] Ten days later, the tape of June 23, 1972, evidence which made all the difference, was indeed produced.[34]

Article II was an example of absolutely horrible pleading in which five separate, distinct, and wholly unrelated acts of alleged misconduct were lumped together, instead of being charged as five separate articles, as they clearly should have been. This pleading monstrosity was fair neither to the President nor to the members of the Congress who would have been called upon to vote upon it. Individual members might well have taken different views of the separate acts alleged within the Article. Moreover, as I pointed out in the Committee debate, the proof in support of the matters charged in this Article was legally and factually weak and insufficient.

> [F]irst illegal surveillance. . . . [T]he 17 wiretaps which are chiefly complained of under this heading were all instituted before the *Keith* decision,[35] and were not only presumptively legal at that time, but are probably legal in large part today, since many if not all of them had international aspects, a situation in which the need for a court order was specifically not passed upon in the *Keith* decision.
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> Second, use of the executive power to *unlawfully* establish a special investigating unit to engage in unlawful covert activities. But, it was *not* unlawful so far as I am advised to establish the plumbers unit, and I suggest

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[30]*Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 41 (1974).

[31]*Id.* at 40.

[32]*Id.* at 41.

[33]*Id.*

[34]See note 1 *supra*.

[35]United States v. United States Dist. Court, 407 U.S. 297 (1972) (author's footnote).

> that proof is lacking that the President intended for it to engage in *unlawful,* covert activities.
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> . . . .
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> Third, alleged abuse of the IRS. Without going into detail, I suggest that the evidence here so far as the President is concerned is one of talk only and not of action, . . . and that the only direct evidence of an alleged Presidential order in the *Wallace* case[36] is a hearsay statement by Clark Mollenhoff that Mr. Haldeman *said* to him that the President requested him to obtain a report which, of course, is not competent proof of anything.[37]

All of these variegated matters were debatable, both on the law and on the facts. Regarding the alleged illegal surveillance, for example, a foreign connnection sufficient to permit wiretaps may not have been adequately established; yet, it is at least true that the law regarding the requirement of a court order, even for purely domestic national security wiretaps, was unsettled at the time of the acts complained of. Moreover, President Nixon followed the practice of several of his predecessors in this field. Some of my colleagues felt that presidential participation in attempted political abuse of the IRS was more clearly made out than did I. And so it went—there was something for everyone somewhere in the catch-all charges of Article II. All in all, however, I can only conclude that those responsible for this conglomerate article had hoped that the whole would impress its readers as being greater than the sum of its parts.

Article I, of course, alleged an impeachable offense, and did so in reasonably clear and intelligible language. The problem here was the problem of proof. At the time our Committee voted on this Article, I was of the opinion that the requisite degree of proof was lacking, under the standards previously discussed, and that the case against the President had not been made out. It remains my judgment, based on the state of the proof at that time, that this opinion was correct.

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[36][Author's footnote]. *See Statement of Information, Hearings on H.R. Res. 830 Before the House Comm. on the Judiciary,* 93d Cong., 2d Sess., bk. VIII, at 38-39 (Clark Mollenhoff affidavit, June 4, 1974, regarding IRS investigation of political contributions of Gerald Wallace, brother of Governor George Wallace).

[37]*Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary,* 93d Cong., 2d Sess. 41 (1974) (emphasis added).

I was aware that many suspicious circumstances had been established.[38] I realized that it was possible that the President might be guilty of obstructing justice. Thus, I would have been willing, at that point, to vote for a resolution of censure on the basis of the record in general and on the fact that the tapes which had been made available, even standing by themselves, demonstrated a personal and political amorality on the part of a President of the United States which was truly shocking.

I did *not* believe, however, that personal knowledge of, or participation in, any impeachable offense had been brought home to the President by competent proof at that time, and I was determined to give him the benefit of the reasonable doubt—as I would have done in the case of any President, or of any other American.

Impeachment, of course, is in part a political process. President Ford, as a member of the House supporting an impeachment resolution against Justice William O. Douglas, said that an impeachable offense was, in effect, anything that a majority of the Congress might decide it to be.[39] This, in my judgment, can be true only in fact, and not in morals or at law.

I have spent a rather substantial portion of my life in courts of law defending the presumption of innocence on behalf of a number of rather obscure American citizens. To my mind, President Nixon was entitled to no more—but certainly to nothing less—than was extended to these less well-known Americans, and this view was, if anything, strengthened by the fact that his immediate jury, the Judiciary Committee, included several members who had themselves introduced impeachment resolutions—an act of personal involvement which would have disqualified them from sitting in judgment in any normal legal proceeding.

At the time of the Judiciary Committee vote, the most damaging evidence directly touching President Nixon was that concerning the payment of $75,000 of alleged "hush money" to E. Howard Hunt on the night of March 21, 1973. I discussed that incident in the Committee debate, and then said:

> [T]he March 21 payment to Hunt was the last in a long series of such payments engineered by Mitchell, Haldeman, Dean and Kalmbach, and later on LaRue, and all so far as appears without the President's knowledge

[38]The circumstance which had the greatest impact on my opinion at that time was the $75,000 payment to E. Howard Hunt on March 21, 1973. *See Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 42 (1974).

[39]*See* 116 CONG. REC. 11,913 (1970) (remarks of Representative Ford).

> or complicity. And as to the payment of March 21, the evidence appears to establish that it was set up and arranged for by conversations between Dean and LaRue, and LaRue and Mitchell *before* Dean talked to the President on the morning of March 21, so that even if the President was willing, and he had ordered it, as to which the proof falls short, it would appear that this payment was *in train* and would have gone forward, had Dean never talked to the President on March 21 at all.[40]

The record before us, I think, supported my statement.

It was also possible at that time to believe on the evidence that the President had not become fully aware of Watergate until March 21, 1973, and that he was genuinely concerned with possible CIA involvement and consequent national security problems in the days immediately following the Watergate break-in on June 17, 1972. Of course, the Nixon-Haldeman tape of June 23, 1972, which the Special Prosecutor obtained from the Court and which our Committee notably did *not* obtain, made the latter arguments no longer tenable.[41] The President's obstruction of justice as charged was then established beyond a reasonable doubt.

One matter of political judgment remains to be considered here, however. Should a capable and successful President, who has dealt and is dealing masterfully with some of the highest affairs of state, be summarily removed from office because, in a moment of weakness, he agrees to help political lieutenants and friends conceal what can arguably be regarded as a minor political crime, committeed not for financial gain, but in his political behalf during an election campaign? If we dealt with such a mere moment of weakness; if the moment had been regretted and rejected upon second thought; if the guilty had been discharged and the act disavowed; and if a frank and full statement of the case had been promptly made, I believe the answer to this question, in the exercise of a sound political judgment under certain circumstances, might conceivably be "No."

However this may be, nothing of the kind occurred. The cover-up continued and no genuine national security basis for it—the only even possibly viable excuse—was ever established. No President of the United States, in such a situation, can be permitted to deceive and to redeceive the people of America. Such falsification, moreover, renders its author suspect in other par-

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[40] *Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 42 (1974) (emphasis added).

[41] See note 1 *supra*.

ticulars and denies him the benefit of the doubt once properly extended on other disputed matters in the record.

It is for all these reasons that, after the production of the tape of June 23, 1972, I would have voted, had there been a vote in the House, to convict President Nixon upon Article I. These same reasons, no doubt, led the President to realize that "his deserts [were] small" and that he dared not "put it to the touch, to gain or lose it all."[42] In other words, these considerations led to his speedy resignation.

These same reasons again no doubt impelled Mr. Nixon to accept President Ford's pardon. The pardon was entirely legal under *Ex parte Garland*[43] and was an act of compassion on the part of Mr. Ford. President Nixon's acceptance of the pardon, however, like his statement in August 1974, immediately following disclosure of the fatal tape,[44] was a confession of guilt on his part.

IV. The Judiciary Committee

The House Committee on the Judiciary, its Chairman, and its individual members, have received many compliments on the manner in which they conducted the Nixon impeachment proceedings. It has been said that we enhanced the public perception and appreciation of the Congress; that we functioned in a workmanlike, professional, dignified and judicious manner; and that we restored faith in our constitutional system and demonstrated that it would work as it was designed to do in a constitutional emergency. Speaking generally, I believe that these compliments paid to our Committee are in truth justified.

The staff and Committee members worked hard and, for the most part, conscientiously. Chairman Rodino was astute, diplomatic, dignified and, over all, as fair and judicious as anyone in his exceedingly difficult and highly sensitive political position could reasonably be expected to have been. It is only realistic to recognize, however, that our Committee, as do all human institutions, had its faults. These faults ought to be recognized on a fair appraisal in hope that they might, insofar as possible, be avoided upon any possible similar occasion in the future.

I have said that Chairman Rodino was astute. One of his more astute actions was to persuade the Republican minority that

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[42]James Graham, First Marquess of Montrose, *My Dear and Only Love*, stanza 2.

[43]71 U.S. (4 Wall.) 333 (1866).

[44]For the text of this statement, see N.Y. Times, Aug. 6, 1974, at 1, cols. 4-7.

this historical impeachment inquiry should be handled on an allegedly "nonpartisan" basis, rather than on the bipartisan basis normal to congressional committee procedure. The chief result of this approach was the assembly of a supposedly "nonpartisan" staff which, in practice, however, turned out to be, from the beginning, generally oriented against the position of the former President. This orientation was in large measure due also to the fact that Mr. Albert Jenner—a distinguished Chicago lawyer who was chosen by the minority as the chief minority counsel—from the very beginning agreed on almost every point of law and fact with Mr. John Doar, the Special Majority Counsel of the Committee, and was never at any pains to keep these opinions to himself.

There is no reason to suppose that Mr. Jenner's views were not entirely honest and the result of conviction on his part. Indeed, it can be argued, with some truth, that he was justified by the event. The results of this situation for the course of the inquiry were, nevertheless, unfortunate.

No one, including Mr. Jenner, could have foreseen the ultimate truth leading inexorably to the final result. Many, if not most, of the facts of the inquiry were in dispute or were legitimately subject to different interpretation. Mr. Jenner's views made it impossible for him to provide the minority with an effective presentation of the case for the President, something which badly needed to be done in order to arrive at a true and balanced assessment of the problem. As a result of this situation, it became necessary for the minority members of the Committee—concerned with due process of law, and with justice for the President—to spend more time than should have been necessary to make certain that the case for the President was presented. In the end, the problem became so generally recognized that Sam Garrison, the assistant minority counsel, was requested by minority members of the Committee to present the minority memorandum on the facts and the law. Mr. Garrison and his young assistants did this, and did it well, on far shorter notice than the importance and the complexity of the case warranted.[45]

The lesson to be learned from this episode is that the adversary system is still the best one for getting at the truth. Congressional committees, which are by nature, and properly so, political, function most effectively in their traditional manner, in a fair and honorable but frankly bipartisan fashion.

The Chairman was also diplomatic and astute in successfully riding herd upon, and holding to at least a semblance of judicial

[45] *See Minority Memorandum on Facts and Law, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

conduct, the anti-Nixon enthusiasts among his own majority—some of whom were ready to vote conviction from the beginning—while at the same time maintaining generally civil relations of mutual respect with the members of the minority. While Chairman Rodino was always able to round up a party-line vote when he felt that one was needed, these results were not necessarily always unjust, nor is this ability generally considered a serious reflection upon a chairman of a congressional committee.

There were other matters, both good and bad, in the work of our Committee. An amazingly complete and truly monumental job was done by our staff under the leadership of John Doar in organizing and presenting written material. On the other hand, we called fewer live witnesses than we should have—E. Howard Hunt being one of the glaring and largely unexplained omissions. We also gave practically no consideration to whether limited or use immunity should be granted in order to avail ourselves of the testimony of such vital witnesses as Haldeman and Ehrlichman, whom our Committee likewise never heard. It was necessary for the minority to fight hard to secure even the relatively complete list of witnesses which were in fact called. This apparent reluctance to call testimony on the part of the majority, and on the part of the majority staff, was surprising and puzzling to me at that time, and still remains so.

Further, no effort was made to take advantage of Mr. Nixon's offer to answer interrogatories. Even though he might not have told the truth, good lawyers could still have posed difficult and pertinent questions. To my mind, it was our obvious and positive duty to obtain in every lawful way every bit of information possible.

One very serious mistake was made by a bipartisan vote of our Committee, which, fortunately, was corrected by vote of the House following debate in which, it is fair to say, I led the opposition to the Committee position. The Committee, under the Chairman's leadership, but, I regret to say, with strong bipartisan support, voted to confine the questioning of witnesses before the Committee to counsel only, with any questions by the members confined to inquiries submitted in writing through counsel.[46] To me, this was an entirely unjustified derogation of the duties and responsibilities of the elected members of the Congress. Final adoption of this procedure, however, required a two-thirds vote of the entire House in order to suspend the rules, and, following the debate on the floor, the motion to suspend the rules was re-

[46] *See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

jected.[47] Consequently, members did question witnesses before the Committee in the usual manner, and we saved ourselves the embarrassment and humiliation which, I am satsified, any other course would necessarily have entailed. I feel that we were able through this vote to vindicate the appropriate and historic rights and privileges of the House of Representatives and also to maintain and strengthen the worth, value, and legitimacy of our entire impeachment inquiry.

A definite plus in our procedure, which followed the better rule of the more recent past and which set a useful precedent for the future, was our extension of liberal privileges to the President's counsel to attend the hearings, to call witnesses, to examine committee witnesses, and to make oral argument. Foolishly we voted that the presidential counsel could only "question" and could not "cross-examine" witnesses called by the Committee,[48] but in practice we largely, and wisely, ignored this patently unfair and impractical distinction.

To my mind, one of the most serious failures of our Committee was its absolute refusal to legally test our subpoena powers vis-a-vis the presidential claim of executive privilege.[49] While it may be admitted that the ordinary procedures for a finding of contempt of the House are clumsy and ill-suited for application to the President of the United States, we could readily have recommended legislation—as proposed by Mr. Railsback of Illinois —which would have given us the authority to sue in court.[50] Alternatively, we could, at least, have adopted the resolution which I offered,[51] under which we would have been instructed by the House to attempt to intervene as amicus curiae in the litigation which was taken to the Supreme Court by the Special Prosecutor, Mr. Jaworski.[52] Had we taken either of these steps, perhaps our Committee, rather than the Special Prosecutor, might have had the honor of securing the vital evidence. We might also have provided ourselves with a valid and defensible third Article of Im-

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[47] *See* 120 CONG. REC. H6022-23 (daily ed. July 1, 1974).

[48] *See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

[49] The Committee rejected any effort to seek the aid of the federal courts in enforcing its subpoenas. *See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 917-32 (1974). Our subpoenas and accompanying materials are set out in H.R. REP. No. 1305, 93d Cong., 2d Sess. 233-78 (1974).

[50] Mr. Railsback's proposal is set out in *Hearings*, note 49 *supra*, at 917-18.

[51] My proposed resolution, the ensuing debate, and its rejection are set out in *id.* at 932-39.

[52] The Special Prosecutor's litigation culminated in United States v. Nixon, 418 U.S. 683 (1974).

peachment. The Constitution, after all, provides that the "House of Representatives . . . shall have the sole Power of Impeachment."[53] I am confident that the Court would have been at least as receptive to our claims, based on an exercise of that constitutional power against an assertion of executive privilege, as it proved to be in the case of the Special Prosecutor.

By far the worst failure of our Judiciary Committee, and its only disgraceful one, was the constant "leaking" of information to the news media by some members of the Committee and of the Committee staff, in direct violation of our own duly adopted rules of confidentiality.[54] These individuals, I think, honestly believed that the President was guilty and that they should further a guilty finding by consistently and repeatedly leaking, as they did, supposedly confidential evidence which was thought to be detrimental to his interests. Because the Committee minority, for the most part, observed our self-adopted rules and did not reply in kind, the result was a steady, one-sided leaking process directed against the interest of Mr. Nixon. This conduct was no less dishonorable because Mr. Nixon was ultimately shown to be guilty in fact; and the most charitable thing than can be said in this connection is that these individuals believed that the end justified the means—the very doctrine they so vigorously condemned when it was followed by the former President.

I acquit the Chairman of any part or participation in the violation of our rules; however, this proved to be one area in which he was unable to control his troops—and indeed it is very difficult to force an elected member of the Congress to do anything he does not want to do, or to make him behave as a gentleman if he prefers to behave otherwise.

V. Conclusion

There are some sad legacies of Watergate.

The conservative cause in this country—a cause which I believe is important to the well-being and the future of our country—has been set back by the Haldemans, Mitchells, and Ehrlichmans, who were not true conservatives at all, and who apparently believed in nothing but present power and immediate political success. The cause also has been set back, unfortunately, by the ex-President, who performed some great national and international services; and who, I believe, originally had sound beliefs and

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[53]U.S. Const. art. I, § 2, cl. 5.

[54]*See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

principles, but misplaced them somewhere along the road in the vicious struggle for political power.

The conservative cause aside, the entire electorate has, to a substantial degree, been "turned off" in respect to our whole political process. Our nation must recover from this disillusionment, or it will be in serious and lasting trouble.

I like to think, and I believe, that the conduct of the Committee on the Judiciary, on balance, helped to commence this recovery. We faced up to, and, in the end, we dealt successfully with one of the most serious challenges to the rule of law under the Constitution which has occurred in modern American history. The Chairman of the Committee, and each member, is entitled to take pride in his own part in this historical proceeding.

Not least so entitled, I would assert, are those of us who voted in the minority. It is my respectful and considered judgment that it was our unflagging insistance on fair procedure and adequate proof which, as much as any other factor, contributed to a final result which has proved to be acceptable to the great majority of our countrymen.