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# The Third Impeachment Article: Congressional Bootstrapping

by William Van Alstyne

Just how elastic a congressional bootstrap is the impeachment clause? When Congress failed even to ask the courts to sustain its views of its own powers against those of the presidency, could it nevertheless presume to impeach the president for resisting its claim? The question was raised by the third article of impeachment voted against former President Nixon by the House Judiciary Committee.

**I**N ITS THIRD article of impeachment voted in late July, the House Judiciary Committee recited its several subpoenas that former President Nixon “willfully disobeyed” and concluded that he thereby committed an impeachable “high crime” or “misdemeanor” because he had, under claim of executive privilege, “interposed the powers of the presidency against the lawful subpoenas of the House of Representatives.” In an editorial on July 31 the *New York Times* entered a judgment in agreement with the twenty-one-to-seventeen majority of the Judiciary Committee, concluding that it was “to forestall such a situation that the Founding Fathers wrote impeachment into the Constitution.” I believe that the committee and the *Times* were mistaken and that had the issue gone to trial in the Senate, history would have repeated itself.

In 1868 Pres. Andrew Johnson knowingly violated an act of Congress, the Tenure of Office Act, which Congress also presumed to determine for itself was constitutional, and accordingly the House of Representatives impeached the president for his willful defiance of that law. Yet, as Benjamin Curtis, former associate justice, observed in defense of Andrew Johnson, it was far from clear as to who was right, Congress or president, in respect to the contested constitutionality of that law.

The president, believing that Congress had no authority to restrict his power to remove a cabinet officer, in this instance Secretary of War Stanton, as he, the president, should alone see fit to do, had acted in accordance with his belief. Johnson thereby precipitated a “case or controversy” the courts might have determined against him had Stanton filed suit to regain his office, and Johnson would have been bound to yield to the authority of the courts to decide. Congress, however, believing the

law to be valid but unwilling to have that determined in court, presumed to find the president mistaken in his own opinion and appeared bent on construing the impeachment power as a proper means of granting Congress the right to prefer its own view of the Constitution to any different view the president might maintain.

Curtis argued passionately before the Senate that plainly the impeachment clause did not license Congress to adjudicate its own claims against those of the president, for that would mean that the constitutional powers of the president would always be only what Congress itself would be willing to admit. Rather, referring to Chief Justice Marshall’s opinion in *Marbury v. Madison*, he observed that it was “emphatically the province and duty of the *judiciary* to say what the law is,” once issue was joined in a proper case by the willingness of one party or another to act upon his own belief and thereby to bring himself within judicial jeopardy, should the other party wish to press the matter.

It is not clear, of course, whether it was this argument that resulted in Andrew Johnson’s acquittal in the Senate by a single vote, but this much *is* clear: there is no precedent or authority whatever, and most certainly no hint of suggestion in any of the original debates accompanying the proposal of the impeachment clause in 1787 or its ratification in 1789, that it was meant to repose the power in Congress to determine with finality the extent of its own power when in conflict with a claim of power by the president. The wrongfulness of allowing Congress to bring within the ambit of impeachment—“treason, bribery, or other high crimes and misdemeanors”—a good faith assertion by the president explicitly disputing in a straightforward way the constitutionality of a claimed congressional power should be apparent to anyone.

It is quite true that Mr. Nixon had previously asserted claims of presidential authority that many (myself included) believed to be without constitutional merit. He did so in authorizing wiretaps without benefit of judicial warrant, on grounds of his own prerogative as president, solely in the interest of “domestic security.” He did so in presuming to impound funds that Congress had directed to be spent. He did so in declining to honor the subpoena of the special prosecutor for sixty-four additional tapes the special prosecutor deemed essential evidence in specific criminal trials.

But in none of these instances was Mr. Nixon impeached. In each a party adversely affected by the presi-

dent's action directly challenged his authority through the courts, asking only that the judiciary do its duty "to say what the law is." In each the challenging party succeeded. In each President Nixon yielded to judicial order, as he did after the Supreme Court's decision in *United States v. Nixon*, 94 S.Ct. 3090 (1974).

We have no reason to suppose that he would have done otherwise had the House Judiciary Committee similarly sought to press its own subpoenas successfully in court. The fact that the former president declined to test his own claim by appealing to the judiciary to sustain him cannot excuse the committee's making the same choice. The reluctance of each to initiate a litigative test against the other is certainly no high crime or misdemeanor.

### **A Great Deal Is a Matter of Inference**

Necessarily, for it is scarcely ever otherwise in more ordinary criminal cases, a great deal is ultimately a matter of inference. It was, as one member of the committee observed, the arduous process of working with bits and pieces of a mosaic, arranging them with no bias or favor but as conscientiously as one can in the context of time and place, being willing, however, to face up to whatever image one may be compelled to recognize.

But all this is perfectly obvious, except insofar as it tends to explain and to provide reason for the sheer breadth of the evidence the committee would have been entitled to have considered in support of its charge. Acts in themselves readily explainable by a wide variety of motives may lose their presumption of innocence when juxtaposed with many other acts. And the inexplicable and continued refusal of President Nixon to assist the Judiciary Committee in its authorized inquiry was not equally inexplicable in the totality of circumstances. Among these circumstances was not merely the balance of the evidence which tended in some measure to associate Mr. Nixon in the complicities of concealment but also the remarkable attachment he had to the items subpoenaed by the committee and withheld under claim of executive privilege.

### **Merits of President's Claim Vanished**

It was not only that it "looked bad" to the public, but it looked even worse to the constitutional lawyer. The merits of the president's claim were not only thin in the overwhelming view of those who wrote professionally about the subject, but it was difficult to believe that they were honestly felt by counsel whose advice the president may (or may not) have sought. As poor as they appeared in June, they shrank to the vanishing point following the Supreme Court's decision in *United States v. Nixon*. The Court appropriately disavowed any expression about any case other than the one it had to decide, but it requires no extravagances of analogical reasoning to appreciate the manner in which the Court's decision further diminished the little credibility the merits of the Nixon claim may have had against the impeachment

discovery powers of the House.

With appropriate caution, the committee was entitled to consider the circumstances of the president's claim as they might bear on overcoming the presumption of good faith and innocence. The manner in which this "absolute" claim was asserted against the Judiciary Committee, the circumstances of assertion, and the persistence of assertion in the face of every other development (including the Supreme Court decision) rendered it an additional datum in the over-all assessment of obstruction of the due administration of justice. It was entirely appropriate for Representative Daniels to move to amend the proposed first article of impeachment to include resistance to committee processes as one of the modes according to which it was alleged that the president participated in the obstruction of justice.

This treatment of the claim of absolute executive privilege, however, would have imposed a different burden on the House managers in a Senate trial than the utter nonburden they would have under the third proposed article. Under the first article, the managers would have assumed the burden of satisfying the Senate that the claim of absolute executive privilege was not made or persisted in in good faith. Rather, they would have undertaken to show that, taking everything into account, the making or continuation of the claim itself was but an additional means of coverup.

They may have failed, of course, but that is the risk the impeachment clause requires in order that the president not be removed except for "high crimes" or "misdemeanors." Almost certainly the impeachment trial of Andrew Johnson would have failed by a far wider margin than it did had the House managers been made to show that Johnson's claim of right to remove a cabinet officer without approval by the Senate, contrary to the Tenure of Office Act, was not a good faith assertion of his belief that the Tenure Act was itself unconstitutional, but rather that it was a disguise to conceal or to cover up some reprehensible acts of his own or of others.

### **Third Article Was Constitutionally Unsound**

Because the Nixon third article of impeachment plied a wholly different theory, however—that the claim of executive privilege is per se a "high crime" or "misdemeanor" when opposed by a House committee subpoena issued pursuant to the impeachment power—it was constitutionally unsound.

There is another possible defense to the third article that might have been raised. It would go like this. After we have argued up one side and down the other, isn't it plain enough, even to lawyers (most of all to lawyers?), that the president's claim of privilege against the impeachment subpoena power was so utterly absurd on its face that, even had the president himself "really" believed in it, there could have been no lasting harm in impeaching him anyway. After all, the precedent that might have been set would itself be such a little one, in fact so slight a precedent that we would all be

ready to distinguish it in almost every other situation. All that it would mean is that when virtually everyone is in agreement that a president's claim of constitutional privilege is manifestly in error, even though honestly held, he can be impeached and removed. It would be all right, wouldn't it, if we also all agreed that it was clearly in the national interest to do so?

#### Question of Justiciability Has Not Been Tested

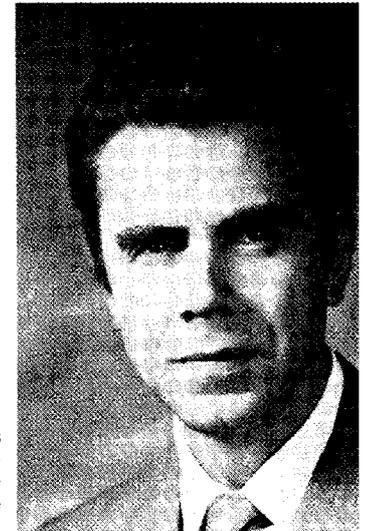
Several persons who supported the third article of impeachment, trusting to the very eminent authority of constitutional scholars, attempted to distinguish the issue in Andrew Johnson's case. In their opinion, had either President Nixon or the committee gone to court, even to the Supreme Court, the court would have declined outright "to say what the law is," that is, to determine whether the House subpoena power pursuant to the impeachment clause is superior to any claim, much less a blanket claim, of executive privilege. They say the court instead would have characterized the dispute as "nonjusticiable," a purely political controversy that the federal courts either are not empowered to decide at all or, if technically within the judicial power as a "case or controversy" arising under the "laws" or the "Constitution" as described in Article III, at least one highly inappropriate for decision.

This opinion has a great deal to be said for itself. It is true and importantly so, however, that the Supreme Court has in fact never passed on the justiciability of the impeachment subpoena power. Thus, it is nothing more than an informed opinion that we deal with here, as the question of justiciability has itself not been tested.

#### Judicial Determination of Distinction Is Missing

What, then, does the proposition amount to? Essentially, simply this: that whenever Congress persuades *itself* that the courts would decline to pass on a constitutional question in issue between itself and the president of the United States, Congress may then presume to resolve the issue in its own favor and to impeach the president for the "high crime or misdemeanor" of holding a different view. I do not see how this really distinguishes Andrew Johnson's case or Benjamin Curtis's concern at all.

What is obviously missing is precisely the judicial determination of the distinction being relied on. If the House Judiciary Committee had sought to enforce its subpoenas through the courts, and if the courts had then declared that it was a matter for the House itself to decide (as it might, by a holding that the language in Article I, that the House "shall have the sole Power of Impeachment," somehow means that the House shall also be the sole judge of its subpoena power when used in an impeachment inquiry), that would have settled the matter. The judiciary having done its duty "to say what the law is"—that according to the law of the Constitution the House is made the final judge of its own impeachment subpoena powers—the House would not be



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wrong to act, and to impeach the president if he still continued to defy its process.

But assume that the courts did even less than this. Assume, rather, that the Supreme Court held only the question was "nonjusticiable" in the true sense of meaning only that the courts would not themselves presume to say anything at all about it, rather than holding as a matter of law that it was a question which the Constitution had committed to the sole determination of the House. That too would make a difference, because it would make clear that the House would have no choice except to make up its own mind because the judiciary, for whatever reason, declined "to say what the law is."

But neither of these happened. The Judiciary Committee, rather than seeking to determine whether the courts would decide the issue, presumed to decide for itself the "nonjusticiability" of the constitutional question. This device readily leads itself to an infinite regress. What other questions of constitutional conflict might Congress simply declare to be "nonjusticiable" and by so declaring use its impeachment power to have its way, deciding every question in its own favor and threatening impeachment of those who "defy" what Congress alone has declared to be the "the law"? We come back to the same point. Neither the constitutionality of the House impeachment subpoena power nor even the justiciability of the question was adjudicated when opposed by a claim of executive privilege. Assuming only that the claim of privilege were asserted in good but mistaken faith, how can the mere obstinacy of assertion safely or fairly be described as a "high crime" or "misdemeanor"?

There is but one way in which this could have been done—indeed, it was done in the first article of impeachment voted against former President Nixon. In fact, it was precisely because the first article treated this issue in an entirely proper way that the third article was so clearly improper.

The first article alleged, as a "high crime" or "misdemeanor," a course of conduct by the president to impede, delay, interfere with, and obstruct the due administration of justice. There is no serious question whatever that this charge was well within the core of the impeachment clause. Insofar as the committee was not obstructed by Mr. Nixon's extraordinary claims of absolute executive privilege, the committee had developed a substantial case. Most of that case involved cumulative evidence reviewed by the committee over a period of several months, briefly profiled in the week of televised hearings, and ultimately drawn from the thirty-eight volumes of material the Judiciary Committee had already published.

Some of the material was soft and circumstantial; some direct and damning. All of it warranted the committee's fair consideration, however, precisely because much of the basic charge went not only to what President Nixon knew or should have known by even the most minimal reasonable superintendence of his most intimate subordinates, but why he did or failed to do a great number of things.

Just how far are we willing to carry this fetish that Congress ought not to presume to be the sole judge of just what is an impeachable offense? What if, to use an example found in the original Watergate hearings, President Nixon personally ordered the ransacking of Dr. Fielding's office or even the murder of Dr. Fielding, but did so claiming that he thought "national security" required it? Should one contend that unless Congress were to find that the president was not acting in good faith, that is, in the good faith belief that he did have the constitutional authority even to direct homicide for reasons of national security, it could not impeach and remove him—or at least not do so unless some court first declared that the question of privilege was "non-justiciable"?

#### **Dubious Premises Furnished False Support**

But this last example mistakes the whole purpose of this essay. I have not attempted to argue that only the courts can presume to say what is a "high crime" or "misdemeanor." Rather, I assume that of course Congress may determine this to its own satisfaction, and in most instances no one would even consider asking the courts to review the sufficiency of the grounds, even assuming that any court would agree to do so. Indeed, I raise no criticism of the other articles of impeachment precisely because I do not think anyone could seriously doubt that they alleged "high crimes" or "misdemeanors" or that conviction and removal on the grounds stated in those articles would set a bad precedent.

But the third article was objectionable precisely because it was not like the other two. May one not finally test the proposition this way? Suppose that the third article were made to stand by itself by removing the support it derived from the other articles. This is not an unfair way of examining it, as we understand that

conviction in the Senate on any article would have resulted in the president's removal and that proof of this "offense" was already clear—the president *did* fail to comply with the subpoenas—where sufficient proof on the other two articles was more doubtful.

How, then, shall we rationalize the outcome? That "just like" executively directed homicide under a good faith claim of constitutional privilege, it was so abundantly clear that default on the committee's subpoenas even under a good faith claim of constitutional privilege was so obviously culpable, so plainly corrupt, so unarguably a "high crime" or "misdemeanor" that we would see no harm done by this construction of the Constitution?

May someone not inquire, at least at some future date, that if Congress were so confident of its premises why, at least, did it not first attempt to remove the doubt by a willingness to test the strength or even the justiciability of its subpoena power against that claim of privilege through the judicial process? Would it, truly, have diminished Congress in the public's view, or might not that willingness on Congress's part have been exactly what was demanded in the era that was Watergate?

The first two articles of impeachment were powerful and correct. They needed no false support from the highly dubious premises of the third. ▲

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### **Cost Accounting Standards Workshop**

THE Section of Public Contract Law and the National Contract Management Association are cosponsoring a two-day workshop on cost accounting standards which will be held at the Shoreham Hotel in Washington, D.C., on Thursday and Friday, October 31 and November 1, 1974.

The first morning will feature a number of prominent speakers. After lunch, the registrants will be divided into groups of twenty to twenty-five participants. Each group will have a moderator and a panel consisting of a member of the cost accounting standards board staff, a government contract auditor, and a government contracts representative. An attempt will be made to organize the groups to accommodate different degrees of involvement with the cost accounting standards. Discussion will focus on practical solutions to everyday problems.

The second morning will continue the group discussions. After lunch selected panelists will summarize the main issues discussed in the groups, and a question-answer session will follow.

Further information may be obtained from the Division of Legal Practice and Education, American Bar Association, 1155 East Sixtieth Street, Chicago, Illinois 60637, or the National Contract Management Association, 2001 Jefferson Davis Highway, Arlington, Virginia 22202.