

Before the Trial, Ask the Pivotal Question

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STANFORD, Calif. - A critical question has gone strangely neglected amid our preoccupation with the procedures for conducting an impeachment trial and repeated allusions to the "somber" and "solemn" character of it all. When and how will the Senate consider whether the offenses alleged against President Clinton amount to "high crimes and misdemeanors" -- a question that the President's lawyers yesterday rightly reminded the Senate it should ponder?

Will that body ever examine this question in its own right, something it cannot easily do once the trial formally begins, since the rules silence senators until the final deliberation? Will the issue be left to the President's lawyers pursue, though some senators have already discouraged them from doing so? Or will senators act silently on this question, when they vote either on an anticipated motion to dismiss after the initial round of presentations or, much later if witnesses are called, to convict or acquit?

The troubling ambiguities that have dogged this impeachment cannot be resolved if the Senate considers only the veracity of the charges made about the President's misdeeds and misbehavior. That risks legitimizing the shaky theory of impeachment under which the House majority acted: that misrepresentations tied to a civil suit (itself of doubtful legal merit) involving an incident of private behavior occurring well before Mr. Clinton took office amount to high crimes and misdemeanors.

The argument could be made, of course, that the Senate should proceed directly to trial because doing otherwise would impugn the motives of the lower House, which the Republican majority is clearly loath to do. Moreover, justice, from the President's viewpoint, might simply mean allowing him to be defended on the facts, which he has repeatedly indicated will vindicate his claims of innocence. No less an authority than Benjamin Franklin viewed a Senate trial in just this way: as a means of giving the President "an honorable acquittal when he should be unjustly accused."

All of this seems consistent with the idea that "duty to the Constitution" and "the rule of law" require that the Senate proceed to trial, with or without witnesses. Yet a higher notion of constitutional duty should urge the Senate to consider the standard of impeachment separately, before it proceeds to the delicate matter of witnesses.

With all due respect to Representative Henry Hyde, the true issue has never been whether the President is above the rule of law, for Kenneth Starr can always indict Mr. Clinton when he leaves office. It is, rather, whether impeachment is appropriate for the offenses alleged. The Senate is perfectly entitled to consider this question from the outset, and not simply as a matter of conscience when each member votes to convict or acquit.

Senators do not sit simply as jurors; they are, in reality, the judges, over whom Chief Justice William Rehnquist will only nominally preside. This was what Alexander

Hamilton meant when he observed (in Federalist 66) that it was in "the nature of the proceeding" that impeachment "can never be tied down by such strict rules" as operate in ordinary cases -- "either in the delineation of the offense by the prosecutors [the House], or in the construction of it by the judges [the Senate]."

"Construction" is synonymous with interpretation; it means that the Senate is responsible not only for gauging the facts, but also for assessing the very legitimacy of the charges.

In judging whether the theory sustaining this impeachment is adequate, senators need to reflect on their duty both to the Constitution we have inherited and to the one we want to have once this episode is over. They could well begin by asking why they have been so perplexed over how to proceed.

The answer does not lie solely in the political calculations that inevitably affect their judgments. It lies as well in an uncomfortable fact that all our evocations of duty, solemnity and bipartisan bonhomie cannot completely mask: Presidential impeachment is a vestigial, largely moribund element of the Constitution that has proved nearly useless in two centuries of the Republic.

When the Framers adopted it, they were reviving an English practice that had never worked very well, had always been highly politicized and had essentially become obsolete after 1715 (though one celebrated impeachment, of Warren Hastings, Governor-General of the East India Company, was just beginning). That they adopted it at all owes less to confidence that it would work than to their persisting uncertainty about the novel system of Presidential elections they cobbled together.

Few of the Framers thought the Electoral College would actually make a conclusive decision; many worried that the eventual election by the House would be subject to partisan manipulation. With these nagging doubts, retaining impeachment made sense as a last resort to guard against the possibility that the electoral mechanism would simply not work well.

Two of our three past impeachment proceedings (the abortive resolution against John Tyler and the actual trial of Andrew Johnson) arose when the electoral system exposed another flaw in the constitutional design by bringing to the White House Vice Presidents who did not truly owe their political loyalty to the parties (Whigs and Republicans) that elected them. Only the near impeachment of Richard Nixon threatened a genuine reversal of an electoral verdict, and that occurred only because the nature of the offense and the cumulative evidence of Presidential complicity brought even his own party to favor resignation.

Those conditions are highly unlikely to obtain in the current proceedings, and that is why the Senate should not proceed to a full trial without first seriously judging the adequacy of the theory sustaining this impeachment. For even with an acquittal, we risk transforming an unwieldy and vestigial element of the Constitution into a potential loose cannon -- or canon -- of constitutional manipulation.

