waning need for bipartisan support to prosecute that war.

The antipolitics of the Nixon Administration reveals a sad ignorance of how a large, powerful, and democratic country should be run. Without the mediation, the brokerage, of organized political parties, a stable American polity becomes difficult to obtain. Political parties exist to take the heat off elected representatives, to make possible a Burkean relationship between voter and legislator; they exist to negotiate with clamant pressure groups whose power they measure not by decibel output but by vote input. In a heterogeneous society, parties are administered by politicians or, as Mayor Lindsay called them quite accurately, "power brokers." New York City is ungovernable for many reasons, not least of which is the debilitation of political parties, a process which began with Fiorello H. La Guardia (in his three mayoral campaigns, he ran under nine different party labels) and reached its climax with Mayor Lindsay, who couldn't run for reelection in 1973 under any party label.

The weakening or even disintegration of effective (not responsible) political parties leads to instability if not to ungovernability of a democratic polity because it removes from the political process an unideological organized interest group capable of brokering for ideological "single-issue" interest groups. In other words, as politician-brokers, parties are compromisers, trimmers, sell-out artists, amoralists, what you will; they are not however, rule-or-ruin ideologues. In a democratic society, ideological politics are no politics at all. In the 1972 elections the Nixon Administration came closer than any administration in history to producing an end of politics. It was a process furthered considerably by the McGovern campaign, which dismantled the Democratic Party in favor of a personalist machine. Is it not striking that none of the Watergate conspirators could be described as a professional politician? The Haldemans and the Ehrlichmans thought that the United States could be run "scientifically," without politics; they have since learned better.

As he nears the end of his long political career President Nixon finds himself alone with few enthusiastic supporters even in what would be called his own Party. In whose political-party interest is it that President Nixon should succeed? What 1974 GOP candidate for Congress or governor—particularly in a tight race—will seek a Nixon endorsement or a Nixon campaign appearance in a local constituency? A president who tries to take on everybody, including political allies in his own Party, ends up crippled, unless he has the temperament and the *apparat* of a Stalin. Nixon has neither, although he did seek his own version of a "one-party" state.

Watergate is not an historical accident. It is not merely something for senators and newspapers to examine to insure that it does not happen again. Watergate has made it clear to political parties that they should never again be so weakened as to become superfluous to politics. This is not a call for the return of powerful political bosses like Mark Hanna or Boies Penrose, or (shiver, shiver) political machines like Tammany. (Is New York a better place to live in since the fall of Tammany?) It is a call to realize that political parties are not some luxury which we can do without. Parties are also part of the checks-and-balances system. Watergate has shown how ethically corrupt politics without parties can become. □

Abram N. Shulsky

Impeachment: Pushing Against an Open Door

THE AMERICAN Constitution has been widely and rightfully regarded as one of the most impressive documents in the long and predominantly sad history of man's attempts to govern himself with at least some decency and humanity. After the initial period of revolutionary enthusiasm had passed, at a time when one might expect the revolutionary regime either to fall back into its old habits and patterns, or to degenerate into a tyranny, the Founding Fathers were able to deliberate upon, construct, and defend before a skeptical people a sophisticated system of government incorporating the "new discoveries" of a greatly improved "science of politics" as well as a high degree of political prudence.

One of these discoveries, whose perfection was due to the "great improvements" in the science of politics of the seventeenth and eighteenth centuries, was "the regular distribution of power into distinct departments," or the separation of powers (see Publius, *The Federalist*, No. 9 for the importance of these "new discoveries"). Accordingly, the Founders wished to protect the independence of each branch of government while at the same time guaranteeing that no branch of government was in a position to abuse its constitutional powers or extend them beyond their proper limits. In particular, the Founders were concerned to create a strong chief executive who would be able to withstand the usurpations of power that might be expected to proceed from a popularly elected legislature in a country which had recently completed a successful revolution against King George III.

The Founders may have been more sensitive to this problem than many of their countrymen—at any rate, the Antifederalists found it convenient to argue against the proposed Constitution on the grounds that it created a monarch in the person of the president; nevertheless, the result of the ratification process seemed to show an agreement with the point that Jefferson had made several years earlier in the *Notes on Virginia*: "The concentrating [all the powers of government, legislative, executive, and judiciary] in the same hands [i.e., those of the legislature] is precisely the definition of despotic government. . . . An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others" (Koch & Peden eds., *The Life and Selected Writings of Thomas Jefferson* [New York: Modern Library, n.d.], p. 237).

But the creation of a strong chief executive required, in keeping with the republican "genius" of the American people, a constitutional provision whereby the community could be protected from the possible misuse of the great powers placed in the hands of one man. Despite some discussion in the Constitutional Convention that the necessity of the president to seek reelection after four years was a sufficient guarantee against his misconduct, there seemed to be general agreement that some impeachment procedure was necessary.

The impeachment inquiry staff of the House Judiciary Committee has a rare opportunity to continue the work of the Founders by delineating an impeachment standard which would preserve the independence of the presidency as well as protect the community against possible misuses of presidential power. Unfortunately, if we may judge by their report (U.S. House of Representatives, 93rd Congress, 2nd Session, Committee on the Judiciary, *Report by the Staff of the Impeachment Inquiry*, "Constitutional Grounds for Presidential Impeachment," hereafter cited as *Staff Report*), they seem to approach their task in a partisan spirit and to regard themselves as in the service of those who wish to impeach the President, for whatever reason, and from whatever motive.

These harsh charges should sound incredible but they emerge from a critical examination of the report. It quotes out of context, uses dubious historical analogies, and at times simply ignores inconvenient facts. It is a brief, and a rather unscholarly one at that, rather than an attempt to reach a full understanding of the impeachment process as intended by the Founders. Its primary conclusion that an impeachable offense need not be an indictable offense is perhaps sound. (Indeed, as the staff notes, before 1863 bribery was not a federal crime for civil officers other than judges. But it must have been an impeachable offense nonetheless, since it is specifically mentioned in the Constitution as a "high crime and misdemeanor.") But the arguments by which it reaches that conclusion are unsound, and raise suspicion as to where the staff is really headed.

Some examples of the staff's procedure

are in order. In explicating the phrase "high crimes and misdemeanors," which the Constitutional Convention added to "treason and bribery" as grounds for impeachment, the report has reference to Blackstone's *Commentaries*, and cites his definition as follows: "maladministration of such high officers, as are in public trust and employment," leaving the impression that such maladministration was not a crime in the ordinary sense of the word. What the report ignores is the context: Blackstone is here recounting the various types of misprisions, a species of crime just below treason in importance. As a type of misprision, a "high misdemeanor" is obviously a crime whose existence was known to the laws of England, and which was to be punished accordingly (Book 4 Blackstone's *Commentaries* p.*121, cf. *Staff Report*, p. 12).

Any doubts on this score could have been cleared up by a further reference in Blackstone's *Commentaries*, this time to the chapter "Of Courts of Criminal Jurisdiction." The first court listed is that of Parliament, when trying impeachments: "[as opposed to acts of Parliament to attaint particular persons of treason or felony], an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the *already known and established law* . . . being a presentment to the most high and supreme *court of criminal jurisdiction* by the most solemn grand inquest of the whole kingdom" (*Commentaries.*, p.*259). If the Founders had Blackstone in mind when they decided that "high crimes and misdemeanors," as well as treason and bribery, were grounds for impeachment, it is hard to see how they could have intended to include a "wide range of criminal and *non-criminal* offenses" (*Staff Report*, p. 23, emphasis supplied) as grounds for impeachment.

The report dodges this difficulty by ignoring Blackstone when his authority is inconvenient and looking instead to English practice dating back to 1386. The lesson they draw from the numerous examples of English impeachments is that the phrase "high crimes and misdemeanors" "had no roots in the ordinary criminal law" and that "the particular allegations of misconduct" under that heading were not necessarily limited to common law or statutory derelictions or crimes (*Staff Report.*, p. 7). The staff moves through 400 years of tangled precedents too quickly to be more than mildly persuasive, but what is compelling is that the staff is unaware or unconcerned with the fact that the bulk of the impeachments to which they make reference were primarily skirmishes in the seventeenth-century fight for parliamentary supremacy under the reigns of James I, Charles I, and Charles II. One cannot simply assume that they are relevant precedents for a government in which the boundary between legislative and executive power is fixed by the Constitution, as interpreted by the Supreme Court. It is a chilling, but hopefully not informative, fact that the staff sees fit to cite precedents from a time of revolutionary upheaval as being in point today.

But the staff's real unconcern with the meaning of what it is saying becomes manifest in its discussion of the impeachment of President Johnson. It goes without saying that nowhere does the report suggest that the behavior of the Congress in that incident has been regarded as anything other than statesmanlike.

However, even the Radical Republican Congress seemed to be guided by the view that the President could only be impeached for violating a law of the United States. A first attempt to impeach President Johnson (before his removal of Secretary of War Stanton put him in violation of the Tenure of Office Act) was voted down by the House on the grounds that some offense known to law was a prerequisite to impeachment (Kelly & Harbison, *The American Constitution: Its Origin and Development*, 3rd edition [New York: Norton, 1963], p. 473). The report notes this earlier attempt (*Staff Report*, p. 19, n. 90) but uses it to suggest that the motives of the House were political. But whatever its motives, the House nevertheless felt it necessary to allege the actual violation of a law.

(It is true that one of the articles did not deal with the alleged violation of a law: Johnson was charged with attempting to "bring into disgrace, ridicule, hatred, contempt, and reproach the Congress," by means of some political speeches he had made attacking the Radical Republicans.

Even the staff does not rely on this ludicrous precedent and contents itself with noting that the Senate adjourned the trial before reaching a vote on this article.)

The report is certainly correct in stating that the motivations of the Johnson impeachment were distinctly political, and only marginally connected with the violation of the (probably unconstitutional) Tenure of Office Act. What it does not do is evaluate this fact, or even allude to the criticism of many historians and constitutional scholars who have felt that the behavior of Congress was dangerous to the fundamental separation of powers principle of the Constitution, and that the results of a successful impeachment could have been a far-reaching change in our system of government. In any case, where the Radical Republicans feared to tread, into an impeachment not grounded on a presidential violation of the law, the staff walks in, not only unafraid, but, to all appearances, unaware as well.

Despite these shortcomings, the report does have a point: many remarks of the Founders discuss the grounds of impeachment in rather broad terms. James Madison himself, in defending the necessity of impeachment contended that: "some provision should be made for defending the community against the incapacity, negligence or perfidy of the chief magistrate. The limitation of his service was not a sufficient security" (*The Records of the Federal Convention*, Ferrand ed., vol. 2, p. 65. Hereafter cited as *Ferrand*). Yet it is the same James Madison who objects to the ground of "maladministration" as being so vague as to be "equivalent to a tenure at the pleasure of the Senate" (*Ferrand*, vol. 2, p. 550) and then acquiesces in the substitution of "other high crimes and misdemeanors," (which, in Blackstone, encompasses "maladministration"). Madison further objected to the trial of impeachments by the Senate, preferring the Supreme Court for this function. Although, for extraneous reasons, he was unable to carry the convention on this point, his preference again suggests that he thought of impeachment as a judicial procedure.

The report ignores these ambiguities, but if we wish to understand the purpose of the impeachment process, we must try to unravel them. The key appears to be that the Founders assumed that "high misdemeanors," as a species of misprisions, would be crimes under U.S. law, as they had been under English common law. As suggested in a recent law review article, "the inconsistency (between the Founders' explanations of impeachment and the language in the Constitution) may arise from the Framers' assumption that crimes could be defined and punished by common law, as they had been in England" (Note: "Vagueness in the Constitution: The Impeachment Power," 25 *Stanford Law Review* 908, 918 [1973]).

If so, the Founders assumed incorrectly, as indicated by the Supreme Court's decision in *U.S. v. Hudson and Goodwin* in 1812 (Pritchett, *The American Constitution* [New York: McGraw-Hill, 1959], p. 119). In general, American legal experience represents a development of the English tradition in the direction of a greater emphasis on the written law (as in the case of the Constitution itself), a greater tendency to restrict the judicial power to the judiciary (as witness the prohibition of bills of attainder) and, conversely, to make the judiciary more independent of the other branches of government. The absence, therefore, of a common law criminal jurisdiction in the federal courts is hardly surprising—but it does leave the impeachment clause high and dry.

The report sets up a false dichotomy: either an impeachable offense must be an indictable offense, *or* criminality is not required for impeachment. Since the ordinary statute law is not aimed at offenses only high officials can commit, and since one could not foresee all possible serious misuses of power in order to incorporate them into a criminal code of impeachable offenses the staff argues that only the second alternative is valid. In so doing, it ignores the fact that the common law was always regarded as being able to accommodate new and unforeseen cases within its basic principles, by means of extension and gradual modification.

The denial of "criminality" in any shape, manner or form as a necessary ingredient of an impeachable offense, opens the way for the staff's conclusion that "where the issue is presidential compliance with the constitutional requirements and limitations on the presidency, *the crucial factor is not the intrinsic quality of behavior* but

the significance of its effect upon our constitutional system or the functioning of our government (*Staff Report*, p. 27, emphasis supplied). But in a government with a complicated constitutional structure, there are bound to be disagreements among the branches of government concerning their respective powers. Until now, it was generally understood that these disputes were to be settled ultimately by the Supreme Court, the electorate, and/or the amending process. Under the doctrine proposed by the staff, it would seem that Congress could determine, on the basis of its own interpretation of the boundary between legislative and judicial functions, that the President had failed to comply with the constitutional limitations of his office, and impeach him.

Ultimately, it is probably true that, as then-Representative Gerald Ford put it, an impeachable offense is whatever the House says it is. (While Ford was referring specifically to judges, whose tenure "during good behavior" might require impeachment as a more important safeguard than does the limited term of an elected official, it would seem that procedurally, at least, his dictum applies to other impeachments as well.) Nevertheless, it matters greatly in what spirit the House goes about its task of defining what constitutes an impeachable offense. If it believes that criminality is an important component of impeachability, then it will want to examine the "intrinsic quality" of the behavior in question, even if it does not feel bound to a strict standard of indictability. Otherwise, it will feel free to consider impeachable any behavior which it regards as infringing on its, or anyone else's, constitutional rights or privileges; specifically, it will be tempted to compensate for its own growing powerlessness, brought on by circumstances and its own inability to assert its will, by an increased willingness to take pot shots at the holders of the real power. Rather than take up the difficult task of reasserting its proper role in the constitutional system, will Congress indemnify itself for the emergence of an "imperial presidency" by dreaming of the Long Parliament, which, as the staff notes in wonderment and admiration, "alone impeached 98 persons"? □

The Public Policy

by Peter J. Rusthoven

On Subsidizing Hot Air

THIS SPRING, as Richard Nixon continues his struggle to stay in the White House, Congress is busily engaged in producing a bill designed to radically alter the process which elevated that worthy to the nation's highest office. In one sense, of course, this effort represents merely the latest of a seemingly endless series of repercussions from *l'affaire Watergate*—an event which, according to network historians and other dealers in instant perspective, has already passed Crédit Mobilier and Teapot Dome on the domestic scandal charts, and will soon inch ahead of Profumo-Keeler and the Dreyfus Case on the international listings. Nevertheless, this particular spinoff from the 1972 campaign break-in may well prove the most significant in terms of its lasting impact on the American political system. For Congress, spurred on by the media and by the always seductive and currently irresistible cry of "reform," is about to put the government in the business of financing federal election campaigns.

The proponents of this idea are already well on the way towards achieving their objective. The John Chancellors and Walter Cronkites have set the mood, speaking in sonorous tones of how Watergate indicates the "corrosive influence of private money on public elections." Edward Kennedy, who (rather ironically) is in the forefront of this particular battle, attaches even more cosmic significance to the results of the crusade. Indeed, in his view "most, and probably all, of the serious problems facing this country today have their roots in the way we finance political campaigns." Since Congress is seldom shy to deal with such problems, it is quite likely that by the time you read this article, public campaign financing will be the law of the land. As of this writing, the Senate has already choked off opposition debate by invoking cloture, and is now concerned mainly with deciding how big a subsidy the taxpayers should be required to furnish the candidates for the presidency. A substantial majority in the House, one suspects, will find it wise, on this one, to line up on the side of the angels. I leave it to your own political judgment to determine the number of viable options available to Richard Nixon when a bill entitled The Campaign Reform Act, or some such thing, is presented to him for signature.

In fairness, it is hardly surprising that this legislation is being pushed in the wake of what even Republican apologists concede to be a serious election scandal. Indeed, the President himself has on occasion made appropriate noises about the evils of campaign financing (perhaps figuring that any explanation of Watergate which places responsibility beyond the confines of the Oval Office can't do him any harm). And Spiro Agnew, in his farewell to the nation, laid part of the blame for his troubles on the cruel necessities of political fund raising. And the image of "fat cats" bidding for political favors at the expense of the "public interest" is hardly a popular one, even in less hysterical times.

It is unfortunate, however, that Congress seems bent on public campaign financing as this session's solution to political corruption. Like most salvationist measures, this one is being advanced with cries of "urgency" that greatly overestimate the problem it purports to "solve," but with little serious reflection on its probable impact in practice. And like most such proposals, this one will not only fail to yield the wonderful results its sponsors so confidently predict, but will have a fair number of pernicious side effects as well.

In the first place, it is hardly true, as so many seem to assume, that private contributions to political campaigns have resulted in wholesale prostitution of the democratic process. Professor Ralph K. Winter, Jr., of Yale Law School, who made a study of campaign financing for (of all people) the Senate Select Committee on Presidential Campaign Activities, argues convincingly that this perception of American politics is largely a misconception. "Horror stories," as he puts it, "are effective because they horrify, not because they illuminate. Moreover, the abuses [that do exist] may (in fact, do) yield to remedies considerably narrower than the proposals now being made." Winter backs this view with the research conclusions of some highly prominent political scientists. For example, Alexander Heard, in *The Costs of Democracy*, points out that literally millions, and not just a wealthy few, pour money into campaign coffers—and more importantly, that among the wealthy there is no uniform "fat cat" interest group gouging the public. Rather, he says, "Big givers show up importantly in both parties and on behalf of many opposing candidates"—as anyone who is familiar with the activities of Stewart Mott, Howard Stein, or Martin Peretz can attest. Similarly, Nelson Polsby and Aaron Wildavsky reject, in *Presidential Elections*, the idea that those who do contribute, to whichever side, thereby gain significant undue influence. While conceding that money has an impact, their research led them to conclude that "in matters of great moment, when the varied interests in our society are in contention, it is doubtful whether control over money goes very far with a President."

But, one may ask, what about heavy contributors becoming ambassadors? or the ITT antitrust settlement? or the supposed milk-pricing scandal? or (shudder) Watergate itself? Several responses are in order. First, even assuming that making, say, Walter Annenberg ambassador to the Court of St. James involves a serious distortion of whatever the public interest is supposed to be in such matters, the Senate can change such results without imposing