

'Grossly incompatible': What warrants impeachment?

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The Constitution gives Congress the power to impeach the president for “high crimes and misdemeanors.” So what exactly is a high crime or high misdemeanor?

“Whatever a majority of the House of Representatives considers it to be at a given moment in history,” Gerald Ford once half-joked.

If you want to be perfectly cynical, Ford was right. Two hundred and eighteen Democrats could impeach President Trump next week simply for being a Republican and nobody could stop them. The first count of impeachment could be raising taxes on San Francisco homeowners and no court could void the vote.

But in a healthy republic, we expect some justification more noble than simple will and power. We don't expect majorities to apply blunt force. A proper statesman will articulate a principle and set standards for what counts as an impeachable offense.

House Speaker Nancy Pelosi has thrown her weight behind the impeachment process following reports of Trump's contacts with Ukraine's president. We still don't know all the facts, which makes it premature to take a position on impeachment. But since we don't know all the facts yet, this is the perfect time to lay out the proper standard for impeachment.

“Impeachment was never something that was supposed to be narrowly aimed at a specific list of crimes or offenses,” Cato Institute Vice President Gene Healy, says. Healy recently wrote a book on impeachment titled *Indispensable Remedy*, invoking the words of James Madison.

Impeachment is proper, Healy argues, for any “conduct incompatible with the public trust.”

The Constitution makes it clear that impeachment should be rooted in an act, or acts. But those acts don't need to be actual crimes. Bill Clinton did commit crimes — blatant, shameless perjury — but his worst offenses may have been abuses of power to cover up his crimes and other misdeeds.

Clinton, the House Judiciary Committee stated (in an impeachment charge that ironically failed in the House), “Has engaged in conduct that resulted in misuse and abuse of his high office, impaired the due and proper administration of justice and the conduct of lawful inquiries, and

contravened the authority of the legislative branch and the truth-seeking purpose of a coordinate investigative proceeding ...”

That is, Clinton didn’t just personally obstruct the investigations into him, but he used the office of the presidency as part of his obstruction. That’s an abuse of power.

Abuse of power is the constellation that lies at the center of the universe of impeachable offenses.

Impeachment, Alexander Hamilton wrote in the Federalist Papers, is specifically for “those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust.”

Presidential powers are supposed to be used to preserve and protect the Constitution and to advance the national interest. Using presidential power to advance private or political interests is thus violating the oath of office, which could be considered the terms on which the president was “hired.”

So one standard for distinguishing an impeachable offense from some other misdeed could be this: Did the president abuse presidential power in a way that harmed the national interest in an effort to serve his own interest?

The problem here is that every president abuses power about once a week. President Barack Obama launched an illegal and disastrous war in Libya and also issued 11th-hour regulations that were nakedly tripwires for his successor. The Bush administration’s steel tariffs, legally justifiable only for national defense, were really just a ploy to win Ohio in 2004. Throw in Iran Contra, and it’s hard to think of a recent president who didn’t abuse power.

Congressional leaders never entertained impeachment charges against Obama or Bush, and 41 of the 44 men to be president before Trump likewise never faced impeachment inquiries. So if we let custom be our guide in defining an impeachable offense, we need a high threshold of abuse-of-power.

Hamilton tried to articulate such a threshold. Impeachable actions, he argued, are those that inflict “injuries done immediately to the society itself.” Again, this can seem too low a bar. After all, many of us considered Obamacare’s implementation injurious to the society. Democrats consider Neil Gorsuch’s appointment the same way.

One 1974 study, by the House Judiciary Committee, combed through history and formulated this standard for impeachment: “behaving in a manner grossly incompatible with the proper function and purpose of the office.”

“Grossly incompatible” is a subjective term. Precedent might help us define it. In other words, if it’s as bad as Bill Clinton (lying under oath and using his powers to cover it all up) or Richard Nixon (covering up unlawful surveillance of his political opponents and blocking any congressional investigation) then precedent suggests that it is impeachable.

As we learn the facts in coming days, any honest statesman or commentator should begin the process with laying out a standard. It's not an easy task, but keeping the republic was never going to be.