Everything You Wanted to Know About Impeachment

It was last spring when Congressman Peter Rodino Jr. sensed initial stirrings of interest among House colleagues in impeachment. As chairman of the Committee on the Judiciary, he set some of his staff to work on the subject. Slowly they gathered a stack of relevant materials that has become a 718-page volume, *Impeachment—Selected Materials.* The book has just been put on sale by the Government Printing Office ($4.40 a copy). Demand for the first press run of 3,430 copies was so heavy that a second printing will start this week.

The collection of documents, articles and official records ranges over a broad, historical terrain covering the impeachment of "all civil officers of the United States." But it comes at a time when readers in and out of Congress will doubtlessly concentrate on its import for President Nixon.

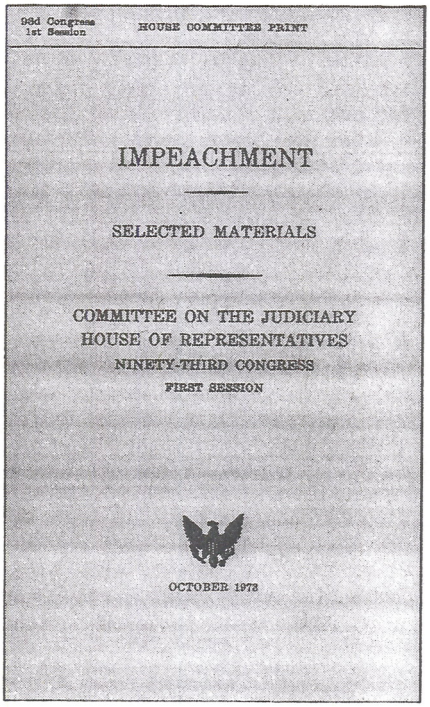
Having just revolted from an unimpeachable King, early Americans had passionate feelings about the subject of impeachment. They feared that an untouchable President would turn into a tyrant, yet worried that making him subject to impeachment would destroy his ability to govern. Said Virginia's Colonel George Mason at the Federal Convention: "No point is of more importance than that the right of impeachment should be continued. Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?" South Carolina's Charles Pinckney countered that impeachment would enable the legislature to hold "a rod over the Executive and by that means effectually destroy his independence."

There were other concerns as well. Massachusetts' Rufus King thought that impeachment would compromise the separation and independence of "the three great departments of Government." But "if he be not impeachable whilst in office," worried North Carolina's William Richardson Davie, "he will spare no efforts or means whatever to get himself re-elected."

Finally, by a vote of 8-2, the states concluded that the President would be impeachable. The ultimate constitutional provision: "The President, Vice President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors." Impeachment was limited to removal from office and disqualification from holding future office; any other punishment would require criminal proceedings in the courts. The Vice President and civil officers had been added as an afterthought. Throughout the impeachment debate, the founders' wary eyes were almost exclusively on the President. But only once has the full machinery they designed been put into action—against President Andrew Johnson, who had come to office upon the assassination of Abraham Lincoln.

Contrary to the temper of the times, wrote Federal Judge Leon Yankwich in a 1938 law-review article, Johnson refused to "sanction extreme measures against the defeated South." A flood of congressional resentment finally broke over him in 1868 after he tried to fire Edwin Stanton, Secretary of War and hard-line Reconstructionist, who had become an angry Johnson foe.

Compounding the President's troubles, Congress had passed a law forbidding such a removal without the consent of the Senate. Because the Senate had not consented, Stanton refused to give up his office. But the President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IMPEACHMENT

SELECTED MATERIALS

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would not back off, confident that the Supreme Court would find Congress' firing restriction unconstitutional. Before any high-court determination, however, the House voted eleven articles of impeachment. With the Senate sitting as a trial court and presided over by the Chief Justice, the charges were prosecuted by the "managers" from the House, one of whom elegantly defined an impeachable act as being "subversive of some fundamental or essential principle of government or highly prejudicial to the public interest." The Senators failed by one vote to muster the necessary two-thirds majority, and the President was acquitted.

The Johnson impeachment serves stark warning of the danger to a President who mixes unpopularity with a combative affront to Congress. By the same token, however, the Johnson trial is also a reminder that an emotional political railroading is likely to offend enough Senators to prevent conviction. Unfortunately, the Johnson case's historical interest is not matched by much useful guidance on legal issues. So politically charged were the proceedings that authorities generally regard it as an abuse of the impeachment power.

DENNIS BRACK—BLACK STAR

PETITION IN FRONT OF WHITE HOUSE

A Crime? In fact, out of the twelve persons—nine judges, one Senator, one Cabinet member, and of course President Johnson—who have been impeached, only four men, all judges, have been convicted by the Senate. It is arguable that a President's impeachment bears little relation to that of a judge, since the Chief Executive is unique in his office and does not enjoy a judge's constitutionally guaranteed life tenure "during good behavior." But the general procedures and principles of impeachment are the same for all, and it is unlikely that precedents set in a judge's impeachment and trial can be entirely ignored in any subsequent impeachment. Two of the four convicted jurists were in somewhat unique difficulties, and their cases provide little guidance for other impeachments. One of the convicted men was an alcoholic and allegedly insane, and the other was tried during the Civil War in connection with his activities on behalf of the South.

The two other convictions were of

. . . But Were Afraid to Ask

Halsted L. Ritter and Robert W. Archbald. Both set important precedents, but it was the 1912 impeachment of California Federal Judge Archbald that established a significant principle in the question of whether an impeachable offense must involve a criminal act. Archbald faced charges of accepting money and favors—but his misbehavior was considered unethical rather than criminal. His lawyer, Alexander Simpson, argued that criminality must be involved. Treason, bribery and high crimes are by definition criminal, he observed. "Everybody knows that a misdemeanor taken technically is a crime pure and simple," he said. "If it is taken in the popular sense, you will not find one in a thousand but will say that every one of those words [describing impeachable offenses] imports a crime."

jaywalking to the Executive Office Building, if they chose. Thus the House and Senate have what Hamilton termed "the awful discretion"—but it is not a discretion devoid of common sense or heedless of the past. Today there is broad agreement that impeachable misconduct must be "serious" or "grave."

Yet a critical uncertainty remains: Can the founding fathers' concern about "maladministration in office" properly lead to impeachment? "High crimes and misdemeanors" was put in the impeachment clause when the framers agreed to replace the proposed "maladministration." James Madison shot down the latter with his much-quoted observation that "so vague a term will be equivalent to a [presidential] tenure during the pleasure of the Senate." That seemed to be the end of maladministration, but,

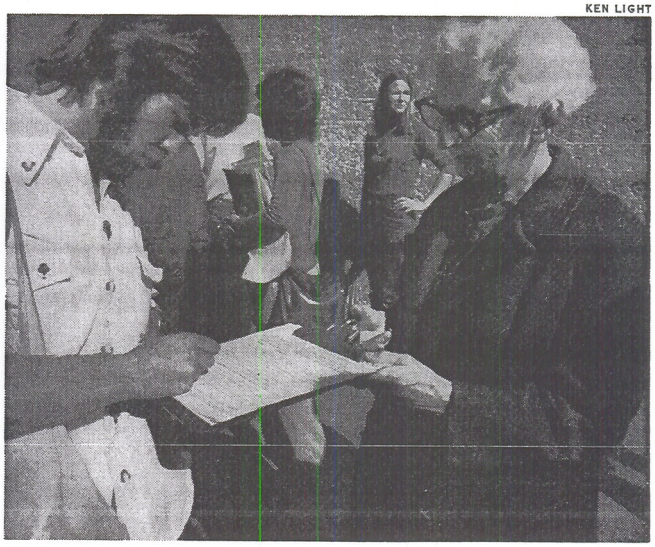
staff. He could also be cited for the firing of Archibald Cox. In addition to these, a number of other Nixon actions could conceivably provide the basis for articles of impeachment: 1) the allegedly unconstitutional 1969-70 secret bombing of Cambodia, 2) the impoundment of congressionally authorized funds despite a growing array of lower court decisions against Nixon and 3) the meeting with Judge Matthew Byrne during the Ellsberg-Russo trial to discuss the FBI directorship.

Vague Charges. Perhaps even more threatening to Nixon is the precedent set by the case of Florida Federal Judge Halsted Ritter. He was accused in six articles of impeachment of a variety of relatively serious financial offenses. But the Senate convicted him on only the seventh article, which charged that "the reasonable and probable consequence of [his] actions and conduct . . . is to bring his court into scandal and disrepute . . . to the prejudice of public respect for and confidence in the fed-

LARRY KRAMER

PROTEST SIGN OF THE WEEK AT AMHERST RALLY

KEN LIGHT



"PRESIDENTIAL CRISIS CONVOCATION" IN BERKELEY

Madison also thought that "the wanton removal of meritorious officers would subject him to impeachment and removal."

Despite this sturdy defense, Archbald was convicted. Almost all modern scholars agree with the decision. Few jurists today believe that charges must be criminal to be impeachable. Harvard's authoritative Raoul Berger notes that the phrase "high crimes and misdemeanors" was taken by the founders from English law, where it meant "a category of *political* crimes against the state" and "had no relation to whether an indictment [could be issued] in the particular circumstances."

But another ambiguity immediately arises. If the charges need not be criminal, is it true that an impeachable offense is "whatever a majority of the House of Representatives consider it to be at a given moment in history"? So said Gerald Ford during his 1970 effort to oust Justice William O. Douglas. In a cold, technical sense, Ford was right. A majority of Representatives and two-thirds of the Senate could vote to impeach and convict an official for merely

as *Selected Materials* shows, Madison for one did not mean to eliminate the offense totally from consideration as impeachable conduct. "If the President be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter him," or if he "neglects to superintend [subordinates'] conduct, so as to check their excesses," said Madison, the President can be impeached. He also noted: "If an unworthy man be continued in office by an unworthy President, the House can at any time impeach the President." And "I contend that the wanton removal of meritorious officers would subject him to impeachment and removal." The latter two offenses hold a particular relevance and peril for Richard Nixon.

Nixon could possibly be held responsible for such "unworthy" aides' activity as the break-in at the office of Daniel Ellsberg's psychiatrist, especially since he has already accepted responsibility for the "improper actions" of his

eral Judiciary, and to render him unfit to continue to serve as such judge."

House leaders in recent days have been looking over Ritter's impeachment, and they are most interested in that seventh article. Says one Judiciary Committee insider: "Strike Ritter's name and substitute Nixon's and you're in business."

Despite the uncertainties of impeaching a President on such vague charges, it could happen to Nixon. The reason is that, after all the legalities, technicalities and constitutionalities are settled, an impeachment is invariably a political action. It cannot be anything else. "The critical focus," says Harvard's Berger, "should be therefore not on political animus, for that is the nature of the beast, but on whether Congress is proceeding" within proper limits. As the U.S. considers again using its most awesome political power, the Rodino committee's *Materials* provides a settling perspective on those proper limits.