WXPost

JAN 27 1974

N.Y. Bar Group Says Crime

By John P. MacKenzie
Washington Post Staff Writer

The Association of the Bar of the City of New York said yesterday that a President may be impeached and removed from office for acts that are not violations of the ordinary criminal law.

While urging a broad definition of an impeachable offense, the lawyers told Congress that the Constitution was not intended to authorize any open-ended, purely political reach for the impeachment power."

According to the association, Congress has the power —subject only to its own restraint"—to impeach and remove the President for a "gross breach of public trust or serious abuse of power," whether or not the conduct is also a crime.

The bar association's report is only the latest in a series of legal opinions on the nature of an "impeachable offense." But because of the professional standing of the New York bar association and its committee on federal legislation which prepared the report, it is expected to be one of the most frequently cited in forthcoming impeachment debates.

The 22-page report, which does not mention President Nixon by name, advises against impeaching a President "except for conduct for which it would be prepared to impeach and remove any President."

Defining an impeachable offense is one of the major tasks now before the House Judiciary Committee, where the bar association filed its report.

Although the Nixon administration has not announced its own definition of an impeachable offense, debate elsewhere has centered on the meaning of the constitutional phrase, "treason, bribery or other high crimes and misdemeanors."

After surveying the history of the clause, the bar association concluded:

• The phrase refers to "acts which, like treason and bribery, undermine the integrity of government."

The concept of "high misdemeanor," borrowed from English impeachment law, was "a catch-all term covering serious political abuses" and was used only in parliamentary impeachment proceedings.

• Senate trials on impeachment charges voted by the House of Representatives are significantly different from conventional criminal trials. Among the differences: Congress can't fine or imprison a President, and conviction by the Senate is no barrier to a criminal prosecution.

• The impeachment and removal process is completely within the control of Congress under the Constitution. Courts have no power to interfere with Senate or House procedures or to set aside the Senate's verdict.

• Although even a "patently frivolous" impeachment and removal is beyond judicial review, Congress should act with "a firm sense of constitutional restraint."

Two Views Rejected

The association committe was unanimous and emphatic in rejecting two definitions that were offered by Gerald R. Ford as a congressman and Richard G. Kleindienst as Attorney General.

Ford said in 1970 that an impeachable offense "is whatever a majority of the House of Representatives considers it to be" and two-thirds of the Senate agree on. Kleindienst told a Senate committe last year that to impeach a President, "You don't need facts, you don't need evidence . . . all you need is votes"

"These statements bear no resemblance to the considered judgments of the Founding Fathers," the association said. "They do not reflect their commitment to a government of constitutional principle."

In support of its definition, narrower than Ford's but broader than ordinary crimes, the bar report cited Benjamin Franklin's view "that impeachment was necessary to prevent the drastic remedy of assassination where a President 'has rendered himself obnoxious.' "

Also cited was James Madison's view that a President was subject to impeachment

Not Required for Impeachment

for failure to prevent the excesses of subordinates as well as for personal misconduct.

Hamilton Quoted

Alexander Hamilton's broad interpretation of the impeachment power was also cited with approval. Hamilton wrote in the Federalist Papers that impeachment dealt with "the misconduct of public men, or, in other words, from the abuse or violation of some public trust." Therefore, said Hamilton, impeachments were "of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."

Distinguishing between "political" and "partisan," the committee said the partisan attack on President Andrew Johnson "demonstrates the perils of treating impeachment as an invitation to purely political retribution."

With the major exception of Andrew Johnson, Congress has shown great reluctance throughout history to use impeachment as a political weapon, the committee said.

"Impeachment was not intended as a method by which a President could be turned out of office because Congress dislikes his policies," said the association. Instead, the report said, it was meant to be used to remove "those whose misconduct in office, whether criminal or not, was serious enough to warrant prompt removal." Otherwise, it added, "purely political" differences are settled by periodic elections.

Impeachment experts have split on the question of court views on impeachable offenses rian Raoul Berger, whose views on impachable offenses were endorsed by the association, has contended that the courts have power to correct a congressional misjudgment.

The association, however, said judicial review was not part of the impeachment scheme.

The association said judicial review was especially inappropriate if impeachable offenses are not limited to crimes, since judges and justices would have more difficulty than legislators in dealing with the broader concept.

In addition, there would be "an awkwardness, to say the least," in court review since the Chief Justice presides in the Senate when the President is tried.

The most important argument against judicial review of a presidential impeachment, the association said, was that it "would cast doubt, with the gravest potential repercussions, on the fundamental question of who is entitled to hold the office of President of the United States in the period following the final vote in the Senate."

Powell Case Cited

Berger has argued that the Supreme Court's 1969 decision in the Adam Clayton Powell case called for another look at the long-view that impeachment was insulated from court action.