# History and interpretations of

# IMPEACHMENT

# impeachment

By Mike Callahan

"Impeachment" is a largely misunderstood word in our society and it is crucial that everyone who supports impeachment proceedings against the President become fully acquainted with the legal and historical background of the process. We must all become experts on impeachment.

Since the Civil War, impeachment has generally been considered a rather repugnant process. In the hundred years since the impeachment of Andrew Johnson, that affair has come to represent an unseemly event in our history. Even through John F. Kennedy's *Profiles in Courage,* the hero of that affair was Senator Ross who cast the deciding vote against conviction. His action has been interpreted as a brave stand against irrationality. However, if we were Blacks in the 1860's we probably would have condemned Senator Ross but Blacks have not been writing our history for the past hundred years.

More recently our attitudes concerning impeachment have been shaped by the fact that the only serious calls for impeachment have been lodged against Chief Justice Earl Warren and Associate Justice William O. Douglas. Obviously, the ACLU has been opposed to such calls for impeachment and libertarian writers have generally disparaged the process. Nevertheless, few people understand the true nature of impeachment as a concept separate from any specific political context.

The Constitutional language on impeachment is found in Article III, Section 4. It reads:

> "The President, Vice President and all civil officers of the United States, shall be removed from office by impeachment for and conviction of treason, bribery or other high crimes and misdemeanors."

Under Article I, Section 2, "The House of Representatives shall . . . have the sole power of impeachment." Article I, Section 3 states "The Senate shall have the sole power to try all impeachments."

## PRESIDENT SHOULD NOT BE A KING

When the Constitutional Framers discussed the impeachment clauses, they were looking at the model of impeachment they knew from England. In that monarchy, the king was above the law since all legislative power emanated from him and therefore, impeachment was effective only against the king's ministers. Impeachments were brought by the House of Commons and tried by the House of Lords. With the ascendance of power of the House of Commons, impeachments had become far more frequent but the Lords resisted a number of convictions.

As a result, the lower house came to rely heavily on Bills of Attainder and *ex post facto* laws to achieve removal of certain of the king's ministers. In other words, the House of Commons got around the impediment of a trial by simply passing legislation which automatically made the actions of any particular minister illegal and therefore punishable. Naturally, great abuses arose to the point that removal from office became purely a political matter.

John Madison's notes from the discussion at the Constitutional Convention indicate that the Framers were aware of the problems presented by impeachment in England and sought to avoid similar pitfalls here. He noted that Bills of Attainder and *ex post facto* laws were abolished because they provided no due process or fairness whatsoever. He also said that it was clear that the Framers specifically rejected the notion that the President be exempt from removal from office since the sentiment was clear that the President should in no way have protection like that of a king.

Impeachment was considered to be the primary check on the President's abuse of power. Also, Madison stressed that the Framers took pains to remove the impeachment process from the criminal justice system and emphasized that the only punishment for impeachment should be removal from office. In England, the punishment was often death.

From the first days of the Republic there have been conflicting interpretations of the scope of the impeachment power. Those who have argued for a broad interpretation of the power contend that the phrase "high crimes and misdemeanors" was not limited to indictable or otherwise punishable offenses. For example Madison felt that a President might be impeached and convicted for incapacity, negligence, misuse of his office or "perfidy". If the President consistently removed meritorious persons from office, that might lead to impeachment and removal, according to Madison.

Hamilton wrote in Federalist Paper No. 65 that the standards for impeachment should "never be tied down by . . . strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges . . ."

Some early political figures stretched this point of view to what they considered its logical conclusion. They contended that the impeachment power could be used to remove a federal officer for whatever reasons were deemed sufficient to the House and the Senate.

This extreme point of view was reiterated by Republican minority leader Gerald C. Ford in his speech of April 15, 1970 when he introduced a resolution to impeach Supreme Court Justice William O. Douglas. Ford said: "What . . . is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."

## 59 IMPEACHMENTS, 4 CONVICTIONS

On the other side of the issue are those who insist that impeachment proceedings require the commission of a criminal act by a public official. This point of view was urged by the defense lawyers for President Andrew Johnson, when he was impeached in 1868. Former Surpeme Court Justice Benjamin Curtis said in defense of Johnson: "my first position is, that when the Constitution speaks of 'treason, bribery or other high crimes and misdemeanors', it refers to and includes only high, criminal acts against the United States, made so by some law of the United States existing when the acts complained of were done, and I say this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment."

The history of the impeachment power has not resolved the issue of whether criminal behavior is required. Since 1789, 59 impeachment resolutions have been introduced into the House of Representative. All but three of the federal officers considered for impeachment were federal judges.

The basis of the charges in 39 of the cases were bribery and financial irregularity. The other 20 charges have been based on: violation of Congressional enactment, treason, drunkenness, arbitrary rulings by a judge, misuse of contempt power, and abusive conduct in court.

In 23 of the cases where charges were filed, the judge or officer resigned before the charges were heard. In 25 of the cases, the House did not pass Articles of Impeachment. That leaves 11 people who have been impeached by the House. One of these resigned before being tried in the Senate and 6 were found not guilty in the Senate. That leaves four judges who have been convicted by the Senate: two for financial irregularities, one for treason and one for drunkenness.

The only public officers held for impeachment trial by the Senate other than judges were Senator William Blount in 1796, President Andrew Johnson in 1868, and Secretary of War William W. Belknap in 1876. Blount was impeached for plotting with England to invade Spanish Florida. However the Senate concluded that Senators could not be impeached, although they could be expelled for improper actions. Belknap, who was involved in the Whiskey Ring scandals of the Grant Administration, was impeached for bribery but he resigned before the charges could be heard by the Senate. And President Johnson was impeached for violating the Tenure of Office Act by trying to discharge his Secretary of War, Edwin Stanton.

## IMPEACHMENT POWER STILL IN CONFUSION

Three of the judges impeached and removed did not commit indictable offenses. One was removed for drunkenness on the bench and two others engaged in such questionable financial transactions that they were removed from office. Judge Robert W. Archibald was impeached and removed in 1913 because he "accepted loans" from lawyers and clients and secured valuable favors from railroad companies while their cases were before him. Federal Judge Halsted L. Ritter was impeached and removed from office in 1936 for continuing to collect fees from his old law firm which represented a client in a case pending before him. Edward Corwin commented about these cases:

> "It is probable that in both these instances the final result was influenced by the consideration that judges of the United States hold office during 'good behavior' and that the impeachment process is the only method indicated by the Constitution for determining whether a judge's behavior has been 'good'. In other words, as to judges of the United States at least, lack of 'good behavior' and 'high crimes and misdemeanors' are overlapping if not precisely coincidental concepts."

If neither the words of the Constitution nor the history of the impeachment power resolve the problem of the standards to be imposed, what considerations should apply in deciding whether to impeach the President?

Two recent books on impeachment (Raoul Berger — *Impeachment: The Constitutional Problem;* Irving Brant — *Impeachment: Trial and Errors)* attempt to decipher the dilemma. Although these two studies offer some valuable insights, they both again suffer from the political context in which they were written and that context was not the Watergate scandal. Berger's concern arises out of the continuation of the war in Vietnam and asks the question whether the Congress may properly impeach a President for abuse of war powers. Brant's book is largely a defense of Justice Douglas against impeachment.

Nevertheless, the two authors offer some helpful insights which can be applied to the present situation. They both agree that impeachment should be a limited process. They believe that the impeachment power was not intended as a political weapon. As Berger states, "The Records of the Constitutional Convention make quite plain that the Framers, far from proposing to confer illimitable power to impeach and convict, intend to confer a limited power."

Secondly, the two agree that impeachment should not be considered unless the President committed either an indictable crime or a "great offense." It must involve actions which are totally inconsistent with the responsibilities and duties of the office held. Finally, they argue that impeachment is a last resort which should not be used as a substitute for other methods of investigating and exposing charges of Presidential misconduct.

## PRESIDENT CLAIMS IMPEACHMENT IS ONLY REMEDY

The President's lawyers have taken a somewhat contrary view. They argued in the U.S. Court of Appeals for the District of Columbia Circuit that impeachment is the sole remedy against a President for any breach of his Constitutional responsibilities. In their efforts to deny investigative authority to Special Prosecutor Archibald Cox and the Senate Select Committee, the President's lawyers argued that "there was no sentiment whatever in the Constitutional Convention for providing restraints *other* than impeachment against a President . . . the Framers deliberately chose one particular means of guarding against abuse of the powers they entrusted to him.

"He is immune — unless and until he has been impeached — from the sanctions of the criminal law, impeachment is the device that ensures that he is not above justice, and trial of impeachments is left to the Senate and not to the courts."

Of course, it is not known whether the President had already contemplated the abolishment of the Special Prosecutor's Office when his lawyers were arguing that impeachment is the sole method of investigating his misconduct. Nevertheless, the President's subsequent actions have certainly pushed the nation into this either/or proposition.

Today, despite all the study and the historical precedents, no one is really sure what constitutes an impeachable offense but it is the view of the National ACLU Board of Directors and the ACLU-NC Board that the public record shows that Nixon has committed acts which push the question to the extreme. One is left with the query — "If these acts don't constitute impeachable offenses, what actions do?" The president himself has done what he can to push Americans to this dilemma. Only by concluding that the impeachment process has absolutely no place in the American system of government can we avoid the position that the impeachment process must now be invoked.

ACLU is sponsoring an "Impeachment Poster Contest" for any artists who wish to participate. Style and form are unlimited and the entries will be judged by Bay Area art professionals. The posters will be printed and distributed by the ACLU-Impeachment Campaign and the winner will recieve a one-year free membership to ACLU.