Impeachable Offenses: Few

By Richard L. Lyons
Washington Post Staff Writer

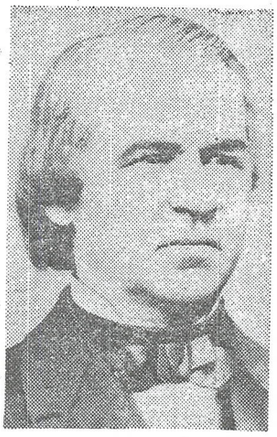
Before Congress votes on whether President Nixon should be removed from office for Watergate or other reasons, members must ask themselves what courts call the threshold question: What is an impeachable offense?

This may not be of too much concern to those congressmen who so dislike the President that they are ready to vote him out of office now, nor to those so strongly supporting him or so fearful of the national trauma of impeachment that they would never vote for it. But for the large group in the middle who will decide the issue, this is an imperative first question.

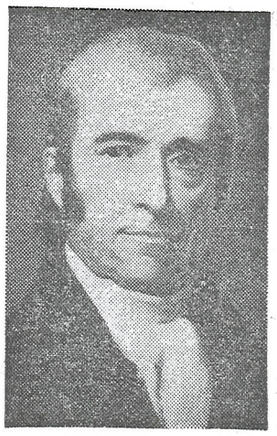
The Constitution states that "the President, Vice President and the civil officers of the United States" may be impeached (indicted) by a majority vote of the House and removed from office upon conviction by a two-thirds vote of the Senate for "treason, bribery or other high crimes and misdemeanors."

Treason and bribery are well-defined crimes. But what are "high crimes and misdemeanors"? Must they be indictable criminal offenses, or may they be acts which though not legal crimes are harmful to the public interest?

The answer that each congressman gives to this question may be crucial to the outcome. Those choosing the latter definition could find that Mr. Nixon's actions were not indictable offenses but still so offended their concept of the public interest that he should be removed from office. But should Congress be empowered to oust a President because it doesn't like him? If the standard for impeachment is not an indictable offense, what is it?



ANDREW JOHNSON



JOHN MARSHALL

. . . Targets in Congress for unpopular political views.

This question has been debated by legal scholars throughout the nation's history and is still not definitively answered as Congress begins the first impeachment inquiry of a President in more than 100 years.

The Constitution is full of imprecise phrases, such as regulation of commerce and due process of law. Their very imprecision has given the Constitution its ability to adapt to changing times, and their meaning has been defined from time to time by the Supreme Court.

But the impeachment provisions are tucked away in a corner of the Constitution, little used and never reviewed by the courts because the Constitution vests the impeachment power in Congress. Whether there is a constitutional right to judicial appeal from a Senate impeachment conviction is another question lawyers argue.

Nearly four years ago when Vice President Gerald R. Ford, then the House minority leader, was leading an attempt to impeach Supreme Court Justice William O. Douglas, Ford said in a much-quoted definition (one he probably would like to forget) that an impeachable offense "is whatever a majority of the House of Representatives considers it to be at a given moment in history."

The present minority leader, Rep. John J. Rhodes (R-Ariz.), who like Ford is a lawyer, recently expressed the belief that an impeachable offense must be an indictable offense. This invariably has been the position taken by defenders of the targets of impeachment.

The term "high crimes and misdemeanors" was lifted out of English law. Raoul Berger, a leading authority on impeachment, tells us that when the phrase was first used in a 14th century impeachment, there was no crime of misdemeanor in English law. It meant a political offense against the state. Today a misdemeanor is a minor criminal offense, not one that would seem likely to be grouped with treason as an indictable offense.

At the Constitutional convention in 1787, the word "maladministration" was suggested as a ground for impeachment to go with treason and bribery. This was rejected as too vague and "high crimes and misdemeanors" was substituted.

Although this may suggest the founding fathers intended to cover non-indictable offenses, it would not necessarily lower the standards for impeachment. A non-indictable act such as presidential misuse of a government agency could be considered a more serious offense against the public interest than some indictable action such as an arguable case of tax evasion.

Those who contend that an impeachable offense must be an indictable offense point out that the constitutional language on impeachment is replete with words connoting criminal acts and trials.

The Constitution says that the Senate shall "try" impeachments. A person may be "convicted" only by a two-thirds vote. The President may grant pardons "for offenses against the United States except in cases of impeachment." Trials for all "crimes except in cases of impeachment shall be by jury." "Treason" and "bribery," the other impeachable offenses, are indictable offenses.

Those who contend that impeachment need not be limited to indictable offenses make this point: The Constitution goes to great lengths to insulate the courts, which try crimes, from political pressures by giving federal judges permanent tenure during "good behavior." But the Constitu-

Definitions, Precedents

tion throws impeachment right into the middle of the political process by making it subject to a vote by Congress, the part of government most sensitive to political pressures.

Would the founding fathers have provided for a trial by politicans rather than judges if they had intended to limit the impeachment grounds to legal crimes?

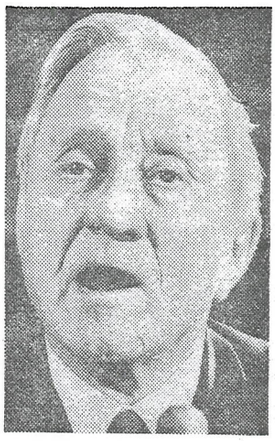
There is little historical background to use as precedent for impeachment. Only 12 times has the House voted impeachment, and only four times has the Senate convicted. Nine of the 12 impeached and all four officials convicted and removed from office were federal judges, who can be removed no other way.

In the most recent case, in 1936, the Senate decided an impeachable offense need not be an indictable offense when it acquitted a Florida federal district judge, Halsted L. Rittter, of several criminal charges, but then convicted him of the non-indictable offense of bringing his court into "scandal and disrepute," and removed him from office.

The major impeachment trials were those involving Supreme Court Justice Samuel Chase in 1805 and President Andrew Johnson in 1868. Both were acquitted, Johnson by a margin of one vote.

Chase was an outspoken Federalist, and the Jeffersonian Republicans were after him as "arbitrary, oppressive and unjust," apparently as a first step toward clearing the high court of their Federalist opponents. Had Chase been convicted, Chief Justice John Marshall probably would have been the next target, and a precedent for impeaching judges for their views would have been established. Chase argued that he had committed no indictable offense and was acquitted.

GERALD R. FORD



WILLIAM O. DOUGLAS

. . . foes in 1970 House hearings on impeaching Douglas

Johnson was impeached by the House in 1868 for firing Secretary of War Edwin M. Stanton, in violation of the Tenure of Office Act which provided that Stanton could be discharged, only with the Senate's approval. This narrow charge was just an excuse invoked by the Radical Republican majority in Congress to oust Johnson, whose lenient policies toward the South they viewed as an attempt to repeal the Civil War. Johnson was a Tennessee Democrat, picked by Lincoln as his Vice President in 1864.

The House impeachment vote was 128 to 47. The Senate trial, presided over by Chief Justice Salmon P. Chase, lasted six weeks, and the vote of 35 to 19 for conviction fell one short of the needed two-thirds. More than half a century later the Supreme Court held that the Tenure of Office Act was an unconsitutional intrusion by Congress upon the power of the President to fire anyone he appoints.

Had Johnson been removed from office, it could have set a precedent for easy presidential removal. Sen. Lyman Trumbull (R-Ill.) declared: "Once set the example of impeaching a President . . . and no future President will be safe who happens too differ with majority of the House and two-thirds of the Senate on any measure."

Judges have been removed for drunkenness on the bench (another Federalist in 1804), for accepting a Confederate judgeship without first resigning from the United States bench, for accepting favors from litigants and, in the 1936 case of Ritter, for bringing his court into scandal and disrepute.

The first impeachment trial in American history involved a U.S. senator, William Blount of Tennessee, who was accused in 1797 of plotting to organize an Indian uprising to help wrest American territory from Spain and give it to England. The Senate expelled Blount before his impeachment trial—and then dropped the charges, because it felt either that it lacked jurisdiction over him as a private citizen or that as a senator he was not impeachable.

No attempt has been made since to impeach a member of Congress. There is no point to it, since under the Constitution either house can expel one of its own members.

Had Congress set a precedent in the Blount case of impeaching a private citizen, the history of this nation could have been very different. Since a person impeached and convicted may never again hold federal office, a Congress dominated by one party could have killed off dangerous potential opponents by impeachment.

The Senate, unlike the Court, does not write opinions to explain its decisions. So while we have the votes on the charges, there is still no written definition of an impeachable offense.

One definition offered during Andrew Johnson's trial was: "one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest".

More recently, Paul S. Fenton, a former Republican counsel of the House Judiciary Committee which is now considering whether President Nixon should be impeached, examined the scope of the impeachment power in a law review journal.

While concluding that "impeachment is not a political tool for arbitrary removal of officials," he also said that impeachment "is not limited to crimes whether indictable or otherwise . . . The only generalization which can safely be made is that an impeachable offense must be serious in nature."