

Justice Sees Battle Over Impeachment

By Susanna McBee
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The Justice Department said yesterday that if a President insists on withholding evidence in an impeachment trial, "a constitutional confrontation of the highest magnitude would ensue."

The statement was contained in a segment of a four-month study on the law of impeachment that the department's Office of Legal Counsel has conducted.

Assistant Attorney General Robert G. Dixon, who heads the office, said the study is an academic analysis and does not reach conclusions.

In its section on "executive privilege and impeachment," the report speaks in general terms, but it refers specifically to President Nixon's State of the Union message last month in which he said he would cooperate with the House Judiciary Committee in its impeachment investigation.

Mr. Nixon qualified the promise by adding that he would not do anything to weaken the presidency or impair a future President's ability to make decisions.

The Justice study says that "conceivably" in House and Senate deliberations on impeachment, "the President may feel that it is his constitutional duty not to disclose certain information which may endanger national security or the conduct of foreign affairs."

If he invokes executive privilege, the study continues, "it is unclear how the propriety of the President's refusal to make such information available may be tested."

Perhaps the chief justice, who would preside at a Senate trial, could determine the propriety of the claim, as U.S. District Court Chief Judge John J. Sirica has done in the Watergate tape case, the report suggested.

But it acknowledged that the chief justice might rule for the President and then "be overridden by the Senate," following the custom that the Senate has the final word on the admissibility of evidence.

"If the President persisted in his refusal to comply, a constitutional confrontation of the highest magnitude would ensue," the report concludes.

The section on executive privilege was one of two remaining segments of its impeachment study which the department made public yesterday along with a 52-page overview. Last Friday it released two sections dealing with the question of what is an impeachable offense.

The overview took issue with remarks about impeachment made by former Attorney General Richard G. Kleindienst and Vice President Gerald R. Ford. It said the statements "are not supported by pertinent historical sources."

Kleindienst, testifying last April before three Senate subcommittees, said, "you do not need facts to impeach the President... you do not need evidence." All that is required, he said, is votes.

Ford, as House minority Leader during a 1970 effort to impeach Supreme Court Justice William O. Douglas, said, "An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."

In the same speech Ford

said impeachment of a President or Vice President would "require crimes of the magnitude of treason and bribery," and since then he has said his first comment referred only to impeachment of judges.

But the first comment has been widely quoted and is used by those who argue that a President may be impeached for political actions as well as criminal offenses.

The "pertinent historical sources" mentioned in the department's study are the Constitution, constitutional convention debates and records of state conventions called to ratify the Constitution.

The framers of the Constitution intended the term "high crimes and misdemeanors" to have a "rather limited technical meaning," the study's overview stated.

They showed "no clear intent to adopt wholesale English practice and precedent on impeachment," it said, referring to a broader definition that the British gave to the "high crimes" concept — one that included undermining the integrity of office.

But the study also cited the Federalist papers, which explain the meaning of the Constitution, and the record of the state ratification conventions, and says they "lend support to the view that impeachment may be based upon certain types of non-criminal conduct."

It noted that President Andrew Johnson's impeachment in 1868 "has been viewed by some" as an example of an exercise of "political power" of the House over the President.

The report also agreed with what it called the majority view of legal scholars holding that once a President is impeached by the House and convicted by the Senate, the courts cannot review the decision.

The unavailability of judicial review presents another argument for the position that impeachment may be based on political acts instead of criminal acts, the report suggested.

But it also stated that the broader approach to the question of what is an impeachable offense "rests upon the view that the underlying purpose of the impeachment process is not to punish the individual, but to protect the public against gross abuse of power."

That view squares with the overall suggestion of the study that a President may be impeached for a non-criminal offense, but that such an offense must be a "gross abuse of office," not simply "maladministration."

Assistant Attorney General Dixon said the overview made public yesterday is 30 pages shorter than one that went earlier this month to the White House and Watergate Special Prosecutor Leon Jaworski.

The deletions included repetitive material and a discussion of the investigative powers of Congress in impeachment proceedings and the responses or defenses available to the President, he said.

"It might have been thought that we were trying to prejudge the present situation, which we weren't, so we took the section out," he said.